

**United States Department of Labor
Employees' Compensation Appeals Board**

S.U., Appellant

and

**U.S. POSTAL SERVICE, LINDA MAR
STATION, Pacifica, CA, Employer**

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**Docket No. 17-1281
Issued: April 2, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2017 appellant, filed a timely appeal from March 17 and April 27, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,300.57 for the period January 1, 2011 to April 2, 2016; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,519.79 for the period June 30 to August 20, 2016; and (3) whether OWCP properly determined that appellant was at fault in the creation of the overpayments of compensation in the amount of \$48,300.57 and \$1,519.79, thereby precluding waiver of recovery of the overpayments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she is not at fault in the creation of the overpayments as she was misled by OWCP, the Social Security Administration (SSA), and the Office of Personnel Management (OPM).

FACTUAL HISTORY

OWCP accepted that on October 26, 1991 appellant, then a 42-year-old mail carrier, sustained a back strain as a result of tripping on a sidewalk while walking with her mailbag. It paid wage-loss compensation and medical benefits. On November 27, 2006 OWCP accepted a recurrence of disability from April 27 to July 22, 2006 and paid additional wage-loss compensation benefits. On September 15, 2010 it expanded acceptance of appellant's claim to include displacement of the lumbar intervertebral disc without myelopathy and paid compensation benefits. By decision dated March 14, 2011, OWCP reduced her compensation, effective that date, based on her capacity to earn wages in a constructed position of floral designer (retail trade). It paid appellant compensation for partial disability on the supplemental rolls beginning March 14, 2011, and placed her on the periodic rolls beginning March 31, 2011.

In EN1032 forms signed by appellant on December 27, 2011, December 28, 2012, January 3, 2014, January 1, 2015, and January 5, 2016² she responded "NO" to the question of whether she received benefits from SSA as part of an annuity for federal service. By signing the forms, appellant certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief. In December 10, 2012, December 18, 2013, and December 16, 2014 letters accompanying the EN1032 forms, she was advised that she "must report to OWCP ... any income or change in income from Federally[-]assisted disability or benefit programs" as this information would be used to decide whether she was entitled to continue receiving these benefits or whether her benefits should be adjusted.

In a facsimile transmittal dated January 21, 2016, OWCP requested SSA to provide information regarding any dual benefits appellant may have received.

On March 29, 2016 SSA submitted a form which showed SSA benefit rates with a Federal Employees Retirement System (FERS) offset and without a FERS offset from January 2011 through December 2015. OWCP then calculated wage-loss compensation benefits that appellant should have received with appropriate offset.

In a notice dated April 29, 2016, OWCP advised appellant of its preliminary determination that she received a \$48,300.57 overpayment of compensation for the period January 1, 2011 to April 2, 2016 due to the failure to offset her FECA benefits for SSA benefits she received. It found appellant at fault in the creation of the overpayment because she had made statements on the Form EN1032 which she knew or should have known were incorrect, failed to provide information which she knew or should have known was material, and accepted payments which she knew or should reasonably have known were incorrect. OWCP advised her that she could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment.

² Appellant actually listed the date that she signed the form, sent to her on December 12, 2015, as "January 5, 2015." From the context of the evidence, the date should have been January 5, 2016.

Additionally, it informed appellant that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On May 6, 2016 appellant requested a telephone conference with OWCP. She requested waiver of recovery as she was not at fault in the creation of the overpayment. In a May 17, 2016 letter, appellant noted that, upon her completion of an employee rehabilitation program, the director of the program specifically told her that the amount of money she would receive from the Department of Labor (DOL) was set even if she started a different higher paying job. She further noted that an SSA official told her that the amount of money she received from SSA had nothing to do with DOL. Appellant thought that she was properly informed based on the information she received from two official departments. She contended that she was not hiding anything on the forms.

Appellant submitted a completed Form OWCP-20, on which she reported total monthly income of \$1,054.00 in SSA benefits. Her reported monthly expenses totaled \$1,820.00. Appellant also reported \$6,000.00 in assets, including checking and savings accounts and other personal property and other funds.

On July 15, 2016 appellant retroactively elected to receive OPM retirement benefits in lieu of FECA benefits, effective June 30, 2016. She continued to receive compensation benefits on the periodic rolls in the amount of \$1,519.79 through August 20, 2016.

In an August 19, 2016 letter, appellant contended that she was underpaid as she received approximately \$1,500.00 a month in compensation benefits from DOL for one year and only received \$1,000.00 a month in benefits from SSA beginning January 1, 2011.

In a March 15, 2017 notice, OWCP advised appellant of its preliminary determination that she received a \$1,519.79 overpayment of compensation for the period June 30 to August 20, 2016, because she had received both FECA and OPM benefits for the same period. Appellant was found at fault in creating the overpayment because she was aware or should have reasonably been aware that compensation and retirement benefits were not payable concurrently. She was advised of rights she could exercise in an attempt to overturn the preliminary finding, including the right to request a telephone conference. OWCP requested that appellant complete the enclosed Form OWCP-20 and submit supporting financial documents.

On March 17, 2017 appellant participated in a telephone conference with an OWCP claims examiner regarding the \$48,300.57 overpayment preliminary determination. She acknowledged that she understood the principles of a FERS offset.

By decision dated March 17, 2017, OWCP finalized its preliminary determination that appellant received a \$48,300.57 overpayment of compensation for the period January 1, 2011 through April 2, 2016. It found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP requested that appellant submit the full amount of the overpayment or contact it within 30 days to make appropriate arrangements for recovery.

By letter dated March 21, 2017, the employing establishment submitted a notification of personnel action (Form SF-50) dated August 2, 2016 which indicated that appellant had retired effective June 30, 2016 and that she was covered under FERS retirement plan.

On March 28, 2017 appellant requested a telephone conference with OWCP regarding the \$1,519.79 overpayment preliminary determination. She challenged OWCP's finding that she was at fault in creation of the overpayment. In an undated letter, appellant referenced enclosed statements revealing her loss of income in the amount of \$20,000.00 during the first and second years after her accepted employment injury while working as a floral designer. She noted that her DOL caseworker told her to take the larger amount of money when she asked her about retirement. Appellant maintained that she would not have taken SSA benefits before her full benefit date had she known that she could not do it. She thought that she had an option of taking a DOL check or the employing establishment retirement check.

In an accompanying Form OWCP-20, appellant reported no monthly income. She reported monthly expenses that totaled approximately \$2,035.00.³ Appellant advised that she had \$101,500.00 in assets, including cash on hand, checking and savings accounts, and \$100,000.00 in a Thrift Savings Plan account.

On April 27, 2017 OWCP issued a decision finalizing the preliminary determination that appellant received a \$1,519.79 overpayment of compensation for the period June 30 through August 20, 2016.⁴ It found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that during a telephone conference, appellant had indicated that she was unsure as to when she began receiving OPM retirement benefits and the dates covered by the compensation received. OWCP requested repayment be made in full or that she contact it about repayment arrangements within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits.⁶

³ The Board notes that it appears that appellant inadvertently calculated \$2,050.00 rather than \$2,035.00 in monthly expenses.

⁴ The Board notes that a memorandum regarding the April 27, 2017 telephone conference is not contained in the case record.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(d); *see G.B.*, Docket No. 11-1568 (issued February 15, 2012); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It will also provide a hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefits to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,300.57 for the period January 1, 2011 to April 2, 2016.

OWCP accepted that appellant sustained back strain and sprain and displacement of the lumbar intervertebral disc without myelopathy on October 26, 1991 while in the performance of duty. Appellant's August 2, 2016 Form SF-50 documented her enrollment in the FERS retirement plan.

Appellant received FECA partial disability compensation and SSA age-related retirement benefits concurrently from January 1, 2011 to April 2, 2016. OWCP requested, and SSA provided, information regarding her applicable SSA rates and their effective dates. Based on these rates, it determined that appellant received a prohibited dual benefit from January 1, 2011 to April 2, 2016 in the amount of \$48,300.57, because she received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to SSA benefits that are attributable to federal service. Appellant received SSA benefits under the FERS system. As noted, the receipt of concurrent FECA and FERS benefits attributable to federal employment is a prohibited dual benefit.⁹ As appellant received SSA benefits based on her federal service concurrently with partial disability compensation from OWCP without an appropriate offset, she received an overpayment of compensation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that it properly determined that she received dual benefits totaling \$48,300.57, creating an overpayment of compensation in that amount. The Board notes that, on appeal, appellant does not contest the fact or amount of the overpayment.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); see *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁸ See *P.G.*, Docket No. 13-0589 (issued July 9, 2013).

⁹ *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

LEGAL PRECEDENT -- ISSUE 2

Section 8116(a) of FECA provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.¹⁰

Under section 10.421(a) of OWCP's implementing federal regulations, a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ The beneficiary must elect the benefit that he or she wishes to receive.¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,519.79 for the period June 30 to August 20, 2016.

On July 15, 2016 appellant retroactively elected OPM retirement benefits beginning effective June 30, 2016. She also received wage-loss compensation from OWCP for the period June 30 to August 20, 2016. As noted, an employee cannot receive compensation under FECA and retirement pay from OPM for the same period.¹³

As appellant elected retirement benefits from OPM for a period already covered by FECA compensation payments, the Board finds that she did in fact receive an overpayment of compensation for the entire amount. Her election of retirement annuity benefits from OPM, beginning June 30, 2016 and continuing through August 20, 2016, created a prohibited dual benefit under section 8116 of FECA. The record supports that appellant received partial disability compensation in the amount of \$1,519.79 for the period June 30 to August 20, 2016. The Board finds, therefore, that an overpayment of compensation in the amount of \$1,519.79 was created from June 30 to August 20, 2016.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁵ The fact that the overpayment was the result of error by OWCP or another

¹⁰ 5 U.S.C. § 8116(a).

¹¹ 20 C.F.R. § 10.421(a).

¹² *Id.*

¹³ *Id.*

¹⁴ 5 U.S.C. § 8116; *see N.P.*, Docket No. 15-1799 (issued January 11, 2016).

¹⁵ 20 C.F.R. § 10.433(a).

government employing establishment does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹⁶ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁷

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that appellant was at fault in the creation of the \$48,300.57 overpayment of compensation for the period January 1, 2011 through April 2, 2016.

The record reflects that appellant accepted payments covering the period January 1, 2011 to April 2, 2016 which she knew or should have known to be incorrect. She was advised on several occasions that receipt of SSA benefits would affect her entitlement to FECA compensation, but she continued to accept full FECA benefits during the period January 1, 2011 to April 2, 2016 in addition to her SSA benefits. In December 10, 2012, December 18, 2013, and December 16, 2014 letters accompanying EN1032 forms, appellant was repeatedly advised that she must inform OWCP immediately if she received benefits from federally-assisted disability or benefit programs as this would affect her benefits from OWCP.

Despite being given notice that receipt of SSA benefits would reduce her entitlement to FECA compensation, appellant continued to accept full FECA benefits during the period January 1, 2011 to April 2, 2016. In addition, she also failed to provide information which she knew or should have known to be material for a portion of the period January 1, 2011 to April 2, 2016. In EN1032 forms signed on December 27, 2011, December 28, 2012, January 3, 2014, and January 1, 2015, appellant responded "NO" to the question of whether she received benefits from the SSA as part of an annuity for federal service, despite the fact that she had received such benefits in the 15-month period preceding her signing of the form. By signing the form,

¹⁶ *Id.* at § 10.435(a).

¹⁷ *Id.* at § 10.433(a); see *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹⁸ *Id.* at § 10.433(b).

appellant certified that all of the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief.

The Board thus finds appellant at fault under the third standard, as she accepted compensation which she knew or should have known she was not entitled to receive¹⁹ and, as such, recovery of the overpayment of compensation in the amount of \$48,300.57 may not be waived.

The Board further finds that appellant was at fault in the creation of the \$1,519.79 overpayment of compensation for the period June 30 through August 20, 2016 on the same basis.

As set forth above, appellant had been advised that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits concurrently with FECA payments. Notwithstanding this notice, she made an election to receive retirement benefits retroactively to June 30, 2016. Appellant received FECA benefits in the amount of \$1,519.79 for the period June 30 to August 20, 2016. She was clearly aware that she could not receive compensation for wage-loss and OPM benefits for the same period.

The employing establishment informed OWCP that appellant was retiring, effective June 30, 2016 and appellant informed OWCP that she had elected OPM benefits. Appellant made an election, when she elected to receive retirement benefits, to receive a prohibited dual benefit under 5 U.S.C. § 8116. Her election created an overpayment of compensation in the amount of \$1,519.79, and as of the effective date of the commencement of her retirement benefits, she knew or should have known that she was not permitted to receive both FECA disability benefits and OPM annuity benefits for the same period.²⁰

The Board, therefore, finds appellant at fault under the third standard, as she accepted compensation which she knew or should have known she was not entitled to receive²¹ and, as such, she is not eligible for waiver of recovery of the \$1,519.79 overpayment.

While appellant contends on appeal that she was told by department officials, including an OWCP caseworker, that she could receive OWCP compensation benefits and SSA retirement benefits at the same time, there is no documentation in the record which supports this argument.²² She also generally contends on appeal that she should have received compensation for periods in which she received no compensation. As explained, the Board only has jurisdiction over the

¹⁹ 5 U.S.C. § 8129(b); *id.* at § 10.433(a).

²⁰ See *A.P.*, Docket No. 15-0586 (issued June 6, 2016); *N.P.*, *supra* note 14; *B.G.*, Docket No. 14-2002 (issued August 13, 2015).

²¹ *Supra* note 19.

²² In such cases, there must be documentation to show that misinformation was communicated by either OWCP or the employing establishment. Furthermore, there cannot be any evidence that the individual knew or should have known the proper course of action to be followed. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5b(2) (June 2009).

March 17 and April 27, 2017 OWCP decisions finding that overpayments occurred during specific periods. The Board does not have jurisdiction to review any other periods of compensation.²³

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²⁴ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,300.57 for the period January 1, 2011 to April 2, 2016. The Board further finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$1,519.79 for the period June 30 to August 20, 2016. Lastly, the Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayments of compensation in the amount of \$48,300.57 and \$1,519.79, thereby precluding waiver of recovery of the overpayments.

²³ See 20 C.F.R. § 501.2(c).

²⁴ *Cheryl Thomas*, 55 ECAB 610 (2004).

²⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT that the April 27 and March 17, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board