

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

S.F., Appellant)	
)	
and)	Docket No. 17-1935
)	Issued: August 13, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Knoxville, TN, Employer)	
)	

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 13, 2017 appellant filed a timely appeal from an August 22, 2017 merit decision 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 the case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$9,384.35 for the period November 30, 2016 through March 4, 2017 because he concurrently received Office of Personnel Management (OPM) retirement benefits and FECA

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP issued its August 22, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

benefits; and (2) whether OWCP properly found appellant at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 20, 2013 appellant, then a 58-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that his bilateral knee osteoarthritis was caused or aggravated during the 18 years of his federal employment as a result of multiple slips, trips, and falls he sustained while delivering mail. OWCP accepted the claim for bilateral knee osteoarthritis.³ Appellant stopped work on September 2, 2014 and has not returned.⁴

On November 4, 2014 OWCP placed appellant on the periodic compensation rolls for temporary total disability commencing September 2, 2014. Appellant was advised that he must report any retirement income received from any federal agency, as federal employees who receive compensation benefits under FECA are not permitted to concurrently receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS).

In an October 3, 2016 letter, OWCP informed appellant that section 8116(d)(2) of FECA required that a claimant's continuing compensation benefits be reduced if he or she begins receiving Social Security Administration (SSA) retirement benefits based upon his or her age and federal service. It notified appellant of this requirement as he was approaching his 62nd birthday, the minimum age at which an individual was eligible to receive SSA retirement benefits. OWCP informed appellant that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery.

In both December 29, 2016 and January 3, 2017 letters, appellant advised OWCP of his intention to retire from the employing establishment. He requested that OWCP forward any necessary forms to be removed from OWCP compensation rolls.⁵

In a February 27, 2017 letter, OWCP informed appellant that his period of entitlement for the period September 2, 2014 to February 27, 2017 had changed due to the Social Security offset of benefits. It advised him that employees entitled to both OWCP and OPM benefits must elect which benefit to receive as they are not payable for the same period of time. An election form, CA-1105, was enclosed. It advised that any benefits paid by OPM would be reimbursed to OPM from the compensation due and no benefits would be paid until OPM had been fully reimbursed.

In a memorandum of record dated March 1, 2017, OWCP indicated that OPM had advised that appellant had begun receiving OPM benefits without specifying a date. However, the

³ The present claim was assigned OWCP File No. xxxxxx208. Appellant also has an accepted occupational disease claim for aggravation of left knee arthritis under OWCP File No. xxxxxx005.

⁴ Appellant had right knee surgeries on March 6, 2000 and November 20, 2006. He underwent left total knee replacement surgeries on April 21 and October 2, 2014.

⁵ On February 9, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$2,379.31 occurred for which appellant was with fault as he received prohibited dual benefits from receipt of Social Security Act retirement benefits and FECA compensation.

memorandum further noted that as appellant was not receiving FECA benefits no dual benefits issue existed, which required an election of benefits.

On March 6, 2017 OWCP received an election of benefits form signed by appellant on March 3, 2017 in which he elected to receive OPM retirement benefits, effective November 30, 2016.

By form dated March 17, 2017, OWCP advised OPM that appellant's entitlement to OWCP benefits ended on November 29, 2016, but that OWCP benefits had been paid through March 4, 2017. A reimbursement in the amount of \$10,078.69 was therefore due from OPM.

On March 28, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$9,384.35 had been created for the period November 30, 2016 through March 4, 2017 as appellant received both FECA wage-loss compensation benefits and OPM retirement benefits during this period.⁶ It explained that, for the period November 13 to December 10, 2016, appellant was overpaid for 11 days from November 30 to December 10, 2016 or \$1,170.18. Its calculation was provided. For the period December 11, 2016 to January 7, 2017, appellant received \$2,978.64; for the period January 8 to February 4, 2017, appellant received \$2,960.22, and for the period February 5 to March 4, 2017, appellant received \$2,275.31. He was found at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he was not entitled to FECA compensation on the date of his election of OPM retirement benefits. OWCP provided an overpayment action request and overpayment recovery questionnaire. Appellant was given 30 days to respond. Overpayment computer worksheets showing appellant's wage-loss compensation for this period were also provided. No additional evidence pertaining to the overpayment was received.

By decision dated August 22, 2017, OWCP finalized the preliminary overpayment determination finding that appellant received of an overpayment of compensation in the amount of \$9,384.35 and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The entire amount was to be withheld from appellant's initial schedule award payment covering the period March 5 through August 19, 2017.⁷

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁸ Section 8116(a) states 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

⁶ A worksheet indicated that, for the period March 1 through 4, 2017, an overpayment of \$333.13 was created.

⁷ See *supra* note 5.

⁸ 5 U.S.C. § 8102.

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.⁹

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹⁰ The beneficiary must elect the benefit that he or she wishes to receive.¹¹ OWCP procedures also explain that the employee must make an election between FECA benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.¹²

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

OWCP based its overpayment determination on its finding that appellant had received prohibited dual OPM and FECA benefits for the period November 30, 2016 through March 4, 2017. While the record reflects that appellant received FECA benefits for this period, it has not established that he also received OPM benefits during this entire period.¹³ The record only contains a March 1, 2017 OWCP memorandum indicating that OPM annuity payments had begun on an unspecified date. The memorandum also lacks evidence as to the amount of OPM benefits appellant may have received. The Board thus finds that this memorandum is insufficient to establish that appellant received prohibited dual OPM and FECA benefits.

Appellant elected OPM retirement benefits, effective November 30, 2016. However, it is unknown whether OPM paid appellant retirement benefits. OWCP requested that OPM commence retirement benefit payments and that OPM reimburse any FECA benefits paid to appellant on and after November 30, 2016.

The Board thus finds that OWCP improperly determined that appellant received an overpayment of compensation during the period November 30, 2016 through March 4, 2017.¹⁴

⁹ *Id.* at § 8116(a).

¹⁰ 20 C.F.R. § 10.421(a).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹³ *See B.G.*, Docket No. 14-2002 (issued August 13, 2015).

¹⁴ *R.R.*, Docket No. 18-0032 (issued May 3, 2018); *G.M.*, Docket No. 17-0784 (issued August 23, 2017); *D.O.*, Docket No. 15-1004 (issued July 28, 2015).

CONCLUSION

The Board thus finds that OWCP improperly determined that appellant received an overpayment of compensation during the period November 30, 2016 through March 4, 2017.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 13, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ Given the disposition of issue 1, the second issue is moot.