

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

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E.R., Appellant)	
)	
and)	Docket No. 18-0084
)	Issued: July 27, 2018
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FEDERAL CORRECTION)	
INSTITUTE, Dublin, CA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 12, 2017 appellant filed a timely appeal from a September 12, 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 to consider the merits of the case.

¹ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,607.37; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation thereby precluding waiver of recovery of the overpayment.²

FACTUAL HISTORY

On April 25, 2013 appellant, then a 41-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 2013 an inmate passed out and fell on her, causing injuries to her neck, back, and shoulder. On May 14, 2013 OWCP accepted her claim for right shoulder strain, right femoral hernia, cervical sprain, and thoracic sprain. It paid compensation benefits commencing June 8, 2013, and placed appellant on the periodic rolls effective September 22, 2013.

On December 12, 2016 appellant completed a form indicating that she elected to receive benefits from the Civil Service Retirement System (CSRS) instead of benefits under FECA effective December 31, 2016.

On January 20, 2017 OWCP sent appellant a letter advising that it had been informed that appellant received compensation under the Civil Service Retirement Act. It advised her that annuity benefits by the Office of Personnel Management (OPM) and wage-loss compensation paid by OWCP are not payable for the same period of time. OWCP sent appellant a form to complete (Form CA-1105) to advise OWCP which benefits she elected. Appellant completed the form on January 26, 2017 and elected to receive benefits under CSRS. She noted that the effective date of her election was December 31, 2016.

In a June 23, 2017 letter to OPM, OWCP indicated that appellant elected to receive benefits from OPM effective December 31, 2016 in lieu of compensation benefits under FECA. It asked OPM to reimburse it in the amount of \$3,607.37 for FECA benefits paid from December 31, 2016 through February 4, 2017.

On July 21, 2017 OWCP made a preliminary determination that appellant was overpaid in the amount of \$3,607.37 for the period December 31, 2016 to February 4, 2017 because she concurrently received benefits from OWCP and OPM for the same period, which constituted a prohibited dual benefit. It advised appellant that she was at fault in the creation of this overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. OWCP sent to appellant an Overpayment Action Request that provided the options she had for challenging the finding along with a financial form, Overpayment Recovery Questionnaire (OWCP-20), and instructed appellant to complete the form and provide the information within 30 days. It advised appellant that under 20 C.F.R. § 10.438, failure to submit

² The Board notes that appellant submitted additional evidence after OWCP rendered its September 12, 2017 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

the requested information within 30 days would result in the denial of waiver of recovery of the overpayment, and no further request for waiver shall be considered until the requested information is provided.

On August 10, 2017 OWCP received appellant's response wherein she requested a decision based on written evidence. Appellant stated that she believed that the overpayment occurred through no fault of her own and requested a waiver of recovery. She contended that she did not receive retirement pay during the time stated, so there was no overpayment.

An OWCP memorandum of record indicates that, on September 12, 2013, the claims examiner called appellant. The memorandum reflects that appellant told the claims examiner that she did not receive money from OPM for the period December 31, 2016 through February 4, 2017. The note further indicates that the claims examiner told appellant that she would have to submit something from OPM to confirm this, but that in the meantime, OWCP must issue a final determination because appellant had not submitted any evidence to support her contention and did not submit a completed financial form.

By decision dated September 12, 2017, OWCP finalized the determination that appellant received an overpayment of compensation in the amount of \$3,607.37 for the period December 31, 2016 through February 4, 2017, and also determined that the preliminary finding that appellant was at fault in the creation of the overpayment was correct. It requested payment of the full amount within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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.³ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁴ Section 8116(a) 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.⁵ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for a decision. OWCP based its overpayment finding on its determination that appellant had received prohibited dual OPM and FECA benefits for the period December 31, 2016 through February 4, 2017. While the record reflects that appellant received FECA benefits for this period, OWCP has not established that she also received OPM benefits for this period.⁸

Appellant elected OPM retirement benefits effective December 31, 2016. On June 23, 2017 OWCP requested that OPM commence retirement benefit payments and that OPM reimburse any FECA benefits paid to appellant after December 31, 2016. However, there is no evidence of record which establishes, as a matter of fact, that appellant actually received OPM benefits, the periods during which she received such benefits, or the amount of benefits she received.⁹ The record is also silent as to whether OPM reimbursed OWCP for FECA benefits paid to appellant during the period in question.

Given that the case is not in posture regarding whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,607.37, it is premature for the Board to consider whether OWCP properly determined that she was at fault in the creation of any overpayment.

CONCLUSION

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

⁸ *R.R.*, Docket No. 18-0032 (issued May 3, 2018); *see also B.G.*, Docket No. 14-2002 (issued August 13, 2015).

⁹ *R.R.*, *id.* The election form signed by appellant on December 12, 2016 is insufficient to show that she actually began receiving OPM benefits at any time.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 27, 2018
Washington, DC

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

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

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