

appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 9, 1989 appellant, then a 45-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her right arm while lifting a bag from a rack to the workroom floor in the performance of duty. She stopped work on March 25, 1990 and did not return. On March 28, 1990 OWCP accepted appellant's claim for cervical radiculopathy. It initially paid wage-loss compensation on the supplemental rolls. Beginning November 17, 1991, appellant was paid compensation benefits on the periodic rolls. On January 27, 1993 she retired from the employing establishment.

On May 5, 2016 appellant wrote to OWCP, inquiring about her "retirement pension."

In a June 21, 2017 letter, OWCP provided a Form CA-1102, which explained the process of electing benefits to which she was entitled to under FECA and the benefits to which she was entitled to under the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS) under the Office of Personnel Management (OPM). It advised appellant that when selecting an election date, she could not receive compensation for disability under FECA while also receiving benefits under the CSRS or FERS. Therefore, if she made an election of benefits under CSRS or FERS for a date in the past, this may result in an overpayment under FECA for which she would be responsible to pay. It indicated that she may wish to consider choosing a date that corresponded with the cessation of her FECA/OPM benefits or a date in the future to avoid the creation of an overpayment. An election form, Form CA-1105, was provided.

In a separate June 21, 2017 letter, OWCP advised appellant that her entitlement to FECA benefits for the period July 23 to August 19, 2017 was \$2,966.00 monthly, or \$741.50 weekly. It indicated that employees entitled to both FECA and OPM benefits could elect which benefit to receive, and that the election could be changed to whichever plan the employee deemed more advantageous. Appellant was advised that she was still entitled to medical benefits for the effects of her December 9, 1989 employment injury at OWCP expense.³

On June 27, 2017 appellant completed a Form CA-1105, electing OPM retirement benefits, effective that date.

In a letter dated July 28, 2017, OWCP advised OPM that appellant had elected OPM benefits in lieu of compensation benefits under FECA. It requested that OPM commence monthly annual benefits, effective June 27, 2017 and that it reimburse OWCP \$2,860.07 for FECA benefits it had paid appellant during the period June 27 to July 22, 2017.

By letter dated August 1, 2017, OWCP informed appellant of its preliminary determination that she was overpaid compensation in the amount of \$2,655.66 because she elected to receive retirement benefits from OPM, effective June 27, 2017, but continued to receive FECA benefits

³ A copy of appellant's gross calculation detail report from December 9, 1989 to March 1, 2017 was also provided.

from OWCP through July 22, 2017. A copy of the overpayment calculation was provided.⁴ OWCP found appellant at fault in the creation of the overpayment because she was aware or should have been aware that she was not entitled to FECA compensation on the date of her election of OPM retirement benefits. OWCP provided an overpayment action request and overpayment recovery questionnaire (Form OWCP-20) for her completion. Appellant was afforded 30 days to respond.

On September 11, 2017 appellant contested the finding of fault. She indicated that she had not received a retirement check and had to use the monies received to pay her August bills. On the Form OWCP-20, appellant listed monthly income of \$2,754.02 and monthly expenses of \$2,432.50.⁵ She reported \$1,322.00 in cash and in her checking account. No supporting financial documentation was provided.

By decision dated September 14, 2017, OWCP finalized its preliminary overpayment determination. It found that appellant received an overpayment of compensation in the amount of \$2,655.66 for the period June 27 through July 22, 2017, for which she was at fault. While appellant provided no supporting evidence to substantiate her expenses or income, OWCP accepted the figures as reported and directed recovery in the amount of \$100.00 in monthly installments.

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.⁶ 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 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.⁷

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.⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹ OWCP procedures also

⁴ The gross amount of \$2,966.00 was divided by 28 days of compensation to find the daily rate of \$105.93 which was multiplied by 27 days of the overpayment period to find the new gross amount of \$2,860.07. An overpayment amount of \$2,655.66 resulted after health benefits of \$204.41 was subtracted from the new gross amount.

⁵ The monthly expenses were comprised of rent/mortgage \$920.00, food \$175.00, clothing \$100.00, utilities \$160.00, other expenses \$600.00, and monthly installment debts \$477.50.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

⁹ *Id.*

explain that the employee has the right to elect the monetary benefit which is the more advantageous.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation. OWCP based its overpayment finding on its determination that appellant had received prohibited dual OPM and FECA benefits for the period June 27 through July 22, 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.¹¹

Appellant elected OPM retirement benefits, effective June 27, 2017. On July 28, 2017 OWCP requested that OPM commence retirement benefit payments and that OPM reimburse any FECA benefits paid to appellant after June 27, 2017. However, there is no evidence of record which establishes, as a matter of fact, that appellant actually received OPM benefits, the periods for which she received such benefits, or the amount of benefits she received.¹² The record is also silent as to whether OPM reimbursed OWCP for FECA benefits paid to appellant during the period in question.

The Board thus finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,655.66 for the period June 27 through July 22, 2017.¹³

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,655.66 because she was in receipt of dual benefits for the period June 27 through July 22, 2017.¹⁴

¹⁰ 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).

¹¹ *See B.G.*, Docket No. 14-2002 (issued August 13, 2015).

¹² The election form signed by appellant on June 27, 2017 is insufficient to show that she actually began receiving OPM benefits that day or any other time.

¹³ *G.M.*, Docket No. 17-0784 (issued August 23, 2017); *D.O.*, Docket No. 15-1004 (issued July 28, 2015).

¹⁴ In light of the Board's finding in Issue 1, Issue 2 is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 3, 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