

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

C.H., Appellant)	
)	
and)	Docket No. 18-0772
)	Issued: November 14, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Baton Rouge, LA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 February 28, 2018 appellant, through counsel, filed a timely appeal from a December 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$222,371.35 as she concurrently received Office of Personnel Management (OPM)

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

retirement benefits while receiving FECA compensation benefits for the period April 26, 2007 through October 19, 2013; and (2) whether OWCP properly found appellant at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 11, 2007 appellant, then a 48-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 25, 2007 she injured her right wrist and forearm while in the performance of her federal employment duties. She stopped work on February 9, 2007 and did not return. OWCP accepted the claim for brachial neuritis or radiculitis and cervical radiculopathy.

By letter dated May 2, 2007, OWCP informed appellant that she was being placed on the periodic compensation rolls. It explained that she would receive a regular payment of \$2,504.98 (net) for the period April 15 to May 12, 2007 and every 28 days thereafter. OWCP's May 2, 2007 letter also included a Form EN1049, which informed appellant of her rights and responsibilities as a FECA benefits recipient. On the subject of retirement benefits, the EN1049 advised appellant as follows:

“You must report to the OWCP any retirement income you receive from any [f]ederal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).”

On an EN1032 form, signed by appellant on July 24, 2013, she indicated that she was receiving retirement benefits from the Office of Personnel Management (OPM).³ OWCP then forwarded a form to OPM, which it completed on October 29, 2013. OPM's response indicated that appellant had received OPM retirement benefits of \$2,386.00 per month commencing April 26, 2007.

OWCP suspended appellant's FECA compensation effective October 20, 2013. On November 30, 2013 appellant elected to receive OPM retirement benefits, effective December 1, 2013.

By letter dated February 4, 2014, OWCP informed appellant that annuity benefits paid by OPM, including any lump-sum, and wage-loss compensation benefits paid by OWCP were not payable for the same period of time, and that employees entitled to both must elect which benefit to receive. It informed her that if she elected OPM benefits, she would still be entitled to FECA medical benefits. OWCP also informed appellant of the compensation she had received from April 15, 2007 to October 19, 2013 and attached an election form.

Appellant elected to receive FECA benefits effective April 1, 2014.

³ Appellant had submitted EN1032 forms beginning July 16, 2007.

By letter dated March 28, 2014, OWCP informed OPM that appellant had elected FECA benefits, effective April 1, 2014. On April 7, 2014 it asked OPM to provide written confirmation of the beginning and ending dates, with dollar amounts, of OPM benefits appellant had received.

On April 24, 2014 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$222,667.91 had been created for the period April 26, 2007 through October 29, 2013. It explained that the overpayment occurred because appellant received both FECA benefits and OPM retirement benefits during this period. OWCP found appellant at fault because she accepted a payment she knew or should have reasonably known was incorrect. It provided an overpayment action request and overpayment recovery questionnaire (OWCP-20) and afforded appellant 30 days to respond. An attached memorandum shows appellant's wage-loss compensation for this period.

On May 6, 2014 appellant requested a prerecoument hearing with OWCP's Branch of Hearings and Review on the issues of fact and amount of the overpayment and fault in the creation of the overpayment. She sent in a second hearing request on May 13, 2014, alleging that there were errors because she filed for retirement in 2011 and received her first payment from OPM in 2012. Appellant forwarded an overpayment recovery questionnaire listing monthly income of \$1,921.44 and monthly expenses of \$2,060.00. She again indicated that she did not receive OPM retirement benefits until 2012 and noted that with the OPM benefits she received, she put a down payment on a house and had dental work done. Appellant related that she thought she had received a schedule award. She submitted a third hearing request on May 23, 2014, indicating that her only income from April 2007 to April 2012 was from OWCP.

On May 25, 2014 appellant elected retirement benefits from OPM, effective June 1, 2014.

At the hearing, held on December 15, 2014, counsel objected to the overpayment, indicating that, if there were dual payments, appellant had the right to choose which agency she would repay. Appellant testified that beginning in November 2011 she began receiving both OPM retirement benefits and FECA compensation, but thought she was receiving schedule award compensation. She acknowledged that she had not received documentation indicating that she had ever been granted a schedule award.

Following the hearing, appellant forwarded a copy of correspondence dated October 27, 2011 in which OPM indicated that her application for disability retirement had been approved. OPM informed appellant that, in general, she could not receive annuity payments from both OPM and OWCP for the same period, but could receive monetary benefits from both if OWCP had granted a schedule award, if she was receiving OWCP payments due to the death of another person and she was receiving retirement benefits for her own federal service, or if she was receiving a third-party settlement in lieu of "OWCP benefits." Appellant forwarded information from OPM regarding her retirement benefit calculation. This indicated that her first payment, for the period April 26, 2007 through April 30, 2012 was a net amount of \$79,658.38, and that her first regular net payment would be \$1,909.93.

Appellant forwarded an updated overpayment questionnaire, which she signed on January 1, 2015. She listed monthly income of \$1,960.00, monthly expenses of \$2,600.00, and

\$808.00 in total additional funds. Appellant attached financial information and indicated that she thought the lump sum she received when granted disability retirement was retroactive pay.

By decision dated March 4, 2015, an OWCP hearing representative remanded the case to OWCP for further development. She indicated that OWCP should clarify with OPM the period of receipt of OPM benefits, the effective eligibility date, and the first payment date and period of the payment. It was to confirm appellant's date of election of benefits between OWCP and OPM and ensure that appellant indicated the period for which she was making the election. Following clarification as noted, OWCP was to provide a new preliminary overpayment determination.

On September 22, 2015 and January 13, 2016 OWCP requested additional information from OPM. In a response received on April 1, 2016, OPM informed OWCP that appellant's OPM benefits commenced on April 26, 2007 and continued to the present (March 31, 2016), that her effective eligibility date was April 26, 2007, and that on May 14, 2012 she was paid a lump sum for the period April 26, 2007 to April 30, 2012.

On July 7, 2016 OWCP again issued a preliminary determination that an overpayment of compensation in the amount of \$222,667.91 had been created for the same period April 26, 2007 through October 29, 2013. It explained that the overpayment occurred because appellant concurrently received both FECA benefits and OPM retirement benefits during this period. Appellant was found at fault because she accepted a payment she knew or should have reasonably known was incorrect. OWCP provided an overpayment action request and overpayment recovery questionnaire. It afforded appellant 30 days to respond.

On July 27, 2016 counsel requested a prerecoupment hearing. Appellant requested a hearing on August 2, 2016. She submitted an overpayment questionnaire listing monthly income of \$2,054.00 and monthly expenses of \$2,375.00 and indicated that she had \$3,683.00 in additional funds. Appellant forwarded an agency checklist for retirement dated May 3, 2011, completed by an employing establishment human resources associate. She also forwarded financial information.

By decision dated February 2, 2017, an OWCP hearing representative set aside the July 7, 2016 preliminary overpayment determination. She found that OWCP had failed to follow the instructions outlined in the March 4, 2015 hearing representative's decision. The hearing representative noted that OWCP did not ensure that appellant specified her election and the period for which she was making the election. She further found that, while OWCP indicated that appellant was overpaid from April 26, 2007 to October 29, 2013, the record indicated that she last received FECA benefits on October 19, 2013, and that, even though OWCP noted that a worksheet was attached to its July 7, 2016 preliminary determination, nothing was attached to indicate on what specific period the overpayment was based. On remand, the hearing representative instructed OWCP to send appellant a new election of benefits form, asking her to confirm whether she wished to elect OWCP or OPM benefits and confirm the date of the election. Following clarification, OWCP should issue a new preliminary overpayment determination, if applicable, which was to include the period and amount of the overpayment with a detailed explanation to support how the figure was calculated.

By letter dated February 6, 2017, OWCP asked appellant to select a date for election between FECA and OPM benefits. It attached a CA-1102 form which explained the process of electing benefits and a CA-1105 election of benefits form for her completion.

OWCP mailed appellant second and third requests for her to complete attached election of benefits forms on March 31 and May 12, 2017.⁴

By letter dated May 22, 2017, OWCP notified counsel that it had sent election forms to appellant on three occasions, per the February 2, 2017 OWCP hearing representative decision, and that she had not responded. It requested counsel to contact appellant and ask that she determine whether she wished to receive benefits from OPM or OWCP, and to elect an effective date. OWCP informed counsel that, if no response was received within 30 days of the date of the letter, an overpayment would be declared from her effective the date of OPM retirement through October 19, 2013.

In correspondence dated August 3, 2017, counsel informed appellant that the law did not accept the type of explanation she gave as a basis for waiving a right, noting that she received two benefits when she should not have. He indicated that OWCP had the right to declare an overpayment. Counsel encouraged appellant to submit an election form. By letter of even date, he also contacted OWCP, indicating that appellant wished to pay back OPM rather than OWCP, and asked that it send her a schedule award so she could begin to start the election process.

By letter dated October 11, 2017, OWCP informed appellant of the procedural history of the overpayment and noted that election of benefits forms had been mailed to her on February 6, March 31, and May 22, 2017, to which she had not responded. It notified her that, in order for the overpayment to be further reviewed, it was imperative that she return the election of benefits form within the next 30 days. Appellant did not respond.

By decision dated December 7, 2017, OWCP finalized the overpayment, finding that an overpayment of compensation in the amount of \$222,371.35 had been created for the period April 26, 2007 through October 19, 2013. It noted that she did not respond to its letters dated February 6, March 31, and May 12, 2017 and found her at fault because she knowingly accepted compensation to which she knew or should have known she was not entitled to receive. Thus, OWCP denied waiver of recovery and requested repayment in full. It attached computer printouts documenting the FECA compensation appellant had received for the period April 26, 2007 through October 19, 2013 and an overpayment worksheet describing its calculation of the overpayment.

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.⁵ 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

⁴ The correspondence was properly sent to appellant's address of record.

⁵ 5 U.S.C. § 8102(a).

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.⁶ 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.⁷ The beneficiary must elect the benefit that he or she wishes to receive.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation in the amount of \$222,371.35 was created for the period April 26, 2007 through October 19, 2013 because appellant concurrently received FECA wage-loss compensation and OPM retirement benefits for this period.¹⁰

The Board initially notes that OWCP's decision dated December 7, 2017 contains a typographic error. On that decision OWCP indicated an overpayment of compensation in the amount of \$222,371.35. As properly calculated on the overpayment worksheet attached to the decision, the correct amount of the overpayment is \$222,371.45.¹¹ The Board deems this error harmless and will modify the amount of the overpayment to \$222,371.45.¹²

The record indicates that appellant began receiving FECA benefits on the periodic rolls commencing April 15, 2007, and that she also began receiving OPM retirement benefits commencing April 26, 2007. Further information received from OPM indicated that appellant's first OPM payment, made on May 14, 2012, was a lump sum for the period April 26, 2007 to

⁶ 5 U.S.C. § 8116(a).

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994)

¹⁰ The Board notes that OWCP gave appellant ample opportunity to comply with the hearing representative's instructions in the February 2, 2017 decision. On February 6, March 31, and May 12, 2017 OWCP asked appellant to complete an attached election form. On August 3, 2017 counsel also encouraged appellant to submit an election form. Appellant did not submit an election form at any time subsequent to the February 2, 2017 decision. OWCP, therefore, properly issued a final overpayment decision on December 2, 2017.

¹¹ In calculating the first period of overpayment, OWCP noted that an automatic roll payment was made for the period April 15 to May 12, 2007 in the net amount of \$2,504.98. It divided that amount by 28 days and multiplied it by 11 days (for the period April 15 to 26, 2007), to yield \$984.10, which it subtracted from \$2,504.98, to yield \$1,520.88, the amount of this periodic FECA compensation to which appellant was not entitled. OWCP worksheets established that appellant received total net FECA compensation of \$223,892.23 for the period April 15, 2007 to October 19, 2013. OWCP then subtracted \$1,520.88 from \$223,892.23, finding an overpayment of compensation of \$222,371.45.

¹² *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

April 30, 2012. In documentation submitted by appellant, OPM informed her that a direct deposit had been made to her financial institution for \$79,658.38, net benefits due from April 26, 2007 through April 30, 2012. OWCP calculations show that in total appellant received \$222,371.45 in FECA compensation for the period April 26, 2007 to October 19, 2013 when it was suspended.

As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,¹³ an overpayment in compensation was created.¹⁴ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP procedures prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹⁵

OWCP afforded appellant multiple opportunities to elect FECA benefits, rather than OPM retirement benefits. Appellant did not respond with an election of FECA benefits during the period April 26, 2007 through October 19, 2013, therefore the FECA benefits she received during this time period constitute an overpayment of compensation.¹⁶

As appellant received \$222,371.45 in FECA benefits while concurrently receiving OPM retirement benefits, an overpayment of compensation in that amount was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."¹⁷

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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 in 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; or (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

¹³ *Id.*

¹⁴ See *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁵ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a), Federal (FECA) Procedure Manual, *supra* note 9.

¹⁶ *Martin L. Stringer*, Docket No. 01-0820 (issued June 24, 2002).

¹⁷ *Id.* at § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁸

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$222,371.45 overpayment of compensation for the period April 26, 2007 to October 19, 2013.

OWCP found appellant at fault because she knowingly accepted compensation to which she reasonably should have known she was not entitled.

In its May 2, 2007 letter notifying appellant that she would receive periodic compensation, OWCP included an EN1049 form. This clearly advised that a person who received compensation benefits under FECA was not permitted to receive retirement benefits concurrently with FECA payments. Moreover, in its letter dated October 27, 2011, OPM notified appellant that she was not entitled to receive OPM retirement benefits if she was in receipt of “OWCP benefits” for the same period with the exception of payments for a schedule award, payments for the death of another person, and a third-party settlement. The record does not support that any of these exceptions applied to appellant.

Appellant was therefore on notice that dual benefits from OPM and FECA were a prohibited benefit. She received her first OPM annuity payment in a lump sum on May 12, 2012. Although appellant maintained that she thought this was either payment of a schedule award or for back pay, these are not credible assumptions. She testified at the December 15, 2014 hearing that she had not received communication that she was granted a schedule award, and there is nothing in the record on which she could base an assumption that her OPM annuity was for back pay.

The Board finds appellant at fault under the third standard, as she accepted compensation which she knew or should have known she was not entitled to receive.²⁰ As such, appellant is not entitled to waiver of recovery the \$222,371.45 overpayment of compensation.²¹

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

¹⁸ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁹ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

²⁰ *See S.U.*, Docket No. 17-1281 (issued April 2, 2018).

²¹ *See E.M.*, Docket No. 17-1987 (issued July 25, 2018).

FECA.²² 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.²³

As to counsel's assertion on appeal, there is no evidence to support that the December 2, 2017 decision was contrary to fact and law.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$222,371.45 for which she was at fault, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 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

²² *Cheryl Thomas*, 55 ECAB 610 (2004).

²³ *Id.*

²⁴ The Board notes that appellant filed a schedule award claim on August 25, 2015, and that counsel requested that OWCP process the claim and submitted an impairment evaluation on March 9, 2017. OWCP had not issued a schedule award decision at the time appellant filed her appeal with the Board on February 28, 2018. The Board's jurisdiction is limited to reviewing final decisions of OWCP. 20 C.F.R. § 501.2(c); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).