

ISSUES

The issues are: (1) whether appellant has received an overpayment of compensation in the amount of \$15,521.26 as he concurrently received Office of Personnel Management (OPM) retirement benefits while receiving FECA benefits for the period February 28, 2017 to March 3, 2018; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 13, 2009 appellant, then a 52-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 8, 2009 he fell over a large box in the area behind the cash register while in the performance of duty. He alleged that he injured his neck, hands, back, and right thigh. Appellant stopped work on January 8, 2009.

OWCP initially accepted appellant's claim for myalgia, myositis, not otherwise specified, and arthropathy, multiple sites. On September 30, 2016 it expanded acceptance of the claim to include spinal stenosis, lumbar region, sciatica, and acquired spondylolisthesis. OWCP paid appellant wage-loss compensation on the supplemental rolls as of February 23, 2009, and then on the periodic compensation rolls commencing November 22, 2009.

In a letter dated November 25, 2009, OWCP advised appellant that he was being placed on the periodic compensation rolls and that he would receive a regular net payment of \$1,044.64 for the period November 22 to December 19, 2009 and every 28 days thereafter. It explained that he must report any retirement income, disability income, or compensation benefits from any federal agency. OWCP advised that a recipient of compensation benefits under FECA was not permitted to receive benefits under certain other federal programs, including the Civil Service Retirement System.

On May 28, 2017 appellant elected to receive retirement benefits from OPM.

In a letter dated June 23, 2017, OWCP advised appellant that his monthly FECA benefits were \$1,328.00 and that it had been informed that he might be receiving benefits from OPM, which was a prohibited dual benefit. It advised him of the actions he could take regarding his benefits.

In a July 5, 2017 letter, OWCP contacted OPM providing notification that appellant had elected to receive OPM benefit commencing May 28, 2017 and provided a copy of the election form.

In a signed letter dated July 24, 2017, appellant advised his election to receive FECA benefits effective that date.

In a letter dated September 1, 2017, OWCP advised OPM that appellant elected to receive OPM retirement benefits effective May 28, 2017, however, after learning that he would not receive his OPM benefits for nine months, he elected to continue receiving FECA benefits until "around February 28, 2017."⁴ It further advised OPM that it retroactively reinstated his FECA benefits

⁴ OWCP indicated February 28, 2017, but this was an error as appellant had elected to receive benefits from OPM effective February 28, 2018, as noted later in his letter.

from May 28, 2017 and that he elected to receive benefits from OPM effective February 28, 2018, in lieu of benefits under FECA.

In a letter to OPM dated January 26, 2018, appellant indicated that he was electing to receive disability retirement benefits, effective February 28, 2018, and that he signed a release of “OWCP workers’ compensation benefits” effective January 26, 2018, in order to receive his OPM benefits beginning on February 28, 2018.

In a letter dated March 7, 2018, OWCP issued a preliminary determination that an overpayment had been created in the amount of \$15,521.26 for the period February 28, 2017 through March 3, 2018. It explained that appellant submitted an application to receive benefits from OPM effective February 28, 2017 and continued to receive benefits from OWCP concurrently until March 3, 2018. OWCP noted that he could not receive payments from both programs concurrently. In an attached worksheet it calculated the overpayment based on the amounts received from OWCP which included \$46.50 for the day of February 28, 2017, \$17,311.428 for the period March 1, 2017 to February 28, 2018, and \$145.39 for the period March 1 to 3, 2018. OWCP calculated the gross benefits from OWCP as \$17,503.31, subtracted deductions of \$1,982.05, and concluded that an overpayment in the amount of \$15,521.26 had been created. It advised appellant that he was without fault in the creation of the overpayment because he was not aware, nor could he reasonably be aware, that OWCP had paid compensation incorrectly. OWCP also provided him with an Overpayment Recovery Questionnaire (Form OWCP-20) and informed appellant of his appeal rights.

On March 15, 2018 appellant completed the Form OWCP-20. He contested the overpayment and provided a breakdown of his monthly income and expenses. Appellant reported a total monthly income of \$82.00 from social security benefits and total monthly expenses of \$1,540.56. Regarding assets, he indicated that he had \$3.00 cash on hand, \$82.19 in a checking account, savings of \$2.25, no stocks or bonds, and \$800.00 of personal property. Appellant reported his bills and monthly expenses amounts including rent of \$761.56, food of \$160.00, clothing \$00.00, utilities of \$344.00, miscellaneous expenses of \$225.00, VACU credit card of \$25.00, and a Walmart credit card of \$25.00. He noted that his rent and utilities were split with his roommate. In a letter dated April 18, 2018, OWCP instructed OPM that appellant had elected to receive benefits from OPM effective February 28, 2017. It instructed OPM to commence monthly annuity payments effective that date and to thereafter reimburse OWCP in the amount of \$15,521.26 for FECA benefits paid for the period February 28, 2017 to March 3, 2018.

By decision dated April 19, 2018, OWCP finalized the preliminary determination regarding the fact and amount of overpayment and found that appellant was without fault in the creation of the overpayment in the amount of \$15,521.26. It noted that he responded to the preliminary determination by completing the OWCP-20 form. OWCP found, however, that the information provided was insufficient to justify waiver of recovery of the overpayment. It further found that appellant had received benefits from OPM, but the amount he had received was not reported on the OWCP-20 form. OWCP advised that the overpayment would be recovered through payments in the amount of \$50.00 dollars per month.

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 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

Under section 8116 of FECA, an injured employee must make an election between compensation for disability and retirement pay.¹⁰ OWCP procedures provide that, when an election is required in a disability case, OWCP must provide an OWCP Form CA-1102 to the employee. This form provides information about the rate of compensation payable and the employee's right to elect the more advantageous benefit.¹¹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$15,521.26 overpayment of compensation for the period February 28, 2017 to March 3, 2018.¹²

While appellant elected to receive OPM benefits, rather than FECA benefits on May 28, 2017, the Board notes that, in a letter dated September 1, 2017, OWCP notified OPM that he was changing his OPM election dated May 28, 2017 to FECA benefits. OWCP explained that he changed his election because he had been advised that he would not receive his check from OPM for nine months and he therefore rescinded his OPM election until February 28, 2018.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 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. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹⁰ *Id.* at 2.1000.5 (b) (February 1995).

¹¹ *Id.*

¹² *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

An overpayment of FECA benefits occurs due to receipt of prohibited dual benefits if the claimant elects OPM benefits, but continues to receive FECA benefits during the same time period.¹³

The Board finds that OWCP has not established that appellant received an overpayment of compensation during the period February 28, 2017 through March 3, 2018, as he had elected to receive FECA benefits until his OPM benefits became effective on February 28, 2018. OWCP advised OPM that he had changed his election to FECA benefits because he was ineligible to receive OPM benefits for another nine months, which would be February 2018. Its preliminary determination did not include the amount of payments he had received from OPM prior to February 28, 2018, if any. Without a record establishing the exact dollar amount of OPM benefits actually paid during the time of the alleged dual benefit period with FECA benefits, the Board is unable to adequately review this aspect of the case. This documentation from OPM is especially important in this case where OWCP simultaneously sought reimbursement of an overpayment from appellant, yet also sought reimbursement from OPM by letter dated April 18, 2018. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹⁴ The Board finds that the overpayment decision in this case does not provide such an explanation. Therefore, the fact and amount of overpayment has not been established.

On remand OWCP shall determine when appellant's OPM benefits commenced and the amount that he received, including deductions, to determine if he received a prohibited dual benefit without appropriate offset.¹⁵ If he received a prohibited dual benefit, then OWCP should issue a new preliminary overpayment determination, with an appropriate overpayment action request form, an overpayment recovery questionnaire, and instructions for him to provide supporting financial information. After OWCP has further developed the case record, a *de novo* decision may be issued.¹⁶

¹³ *C.H.*, Docket No. 18-0772 (issued November 14, 2018).

¹⁴ *See J.W.*, Docket No. 15-1163 (issued January 13, 2016); *see also O.R.*, 59 ECAB 432 (2008) with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); *see Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

¹⁵ *See supra* note 9, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.2 (September 2018).

¹⁶ As the case is not in posture for decision regarding the fact and amount of overpayment, the waiver issue is moot. *See S.F.*, Docket No. 18-0003 (issued April 19, 2018); *see also R.L.*, Docket No. 11-1251 (issued January 27, 2012).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: April 1, 2019
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