

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

C.P., Appellant)

and)

U.S. POSTAL SERVICE, NETWORK)
DISTRIBUTION CENTER, Dallas, TX,)
Employer)

Docket No. 19-0732
Issued: September 5, 2019

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 13, 2019 appellant filed a timely appeal from a December 17, 2018 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 this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,737.04 for the period September 1 through October 13, 2018; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 17, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On January 3, 2011 appellant, then a 50-year-old dock clerk, filed an occupational disease claim (Form CA-2) for a right shoulder condition, which she attributed to repetitive work duties, including keying, pushing/pulling bundles of mail, throwing parcels into containers, and sacking mail. She identified July 30, 2010 as the date she first became aware of her condition, and January 3, 2011 as the date she first realized it was caused or aggravated by her federal employment.³ After initially denying the claim, OWCP accepted it for right shoulder rotator cuff sprain. It also authorized April 23, 2012 right shoulder surgery. Appellant received wage-loss compensation on the periodic rolls until resuming work on July 8, 2013. Subsequently, in May 2015, OWCP expanded the acceptance of appellant's claim to include left upper arm/shoulder infraspinatus, supraspinatus, and subscapularis sprains. Appellant underwent a July 7, 2015 OWCP-approved left shoulder surgical procedure to repair a full-thickness rotator cuff tear. OWCP paid wage-loss compensation for temporary total disability beginning July 7, 2015.

In an August 4, 2015 letter, OWCP informed appellant that she was being placed on the periodic compensation rolls effective July 26, 2015. It explained that she would receive regular payments beginning July 26, 2015 and every 28 days thereafter. OWCP's August 4, 2015 letter also included a Form EN1049 which informed appellant of her rights and responsibilities as a FECA benefits recipient. On the subject of retirement, the EN1049 advised her as follows:

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

In July 2016, OWCP further expanded the acceptance of appellant's claim to include left shoulder effusion, left shoulder bursitis, left shoulder impingement syndrome, and left shoulder incomplete rotator cuff tear/rupture. It continued to pay appellant wage-loss compensation on the periodic rolls.

On July 26, 2018 appellant completed a form indicating her election of Office of Personnel Management (OPM) retirement benefits effective September 1, 2018. The case record reflects that OWCP received the form on July 28, 2018. Notwithstanding her election of OPM benefits effective September 1, 2018, OWCP continued to pay appellant wage-loss compensation for temporary total disability through October 13, 2018.

On November 2, 2018 OWCP informed OPM that appellant had elected to receive OPM benefits effective September 1, 2018 in lieu of FECA compensation, requested reimbursement in the amount of \$3,737.04 for the period September 1 through October 13, 2018, and requested that OPM commence annuity payments effective retroactively to that date.

³ OWCP assigned the present claim OWCP File No. xxxxxx623. Under OWCP File No. xxxxxx221, appellant has an accepted occupational disease claim for bilateral carpal tunnel syndrome, bilateral ulnar nerve lesion, and bilateral hand/wrist tenosynovitis, which arose on or about June 10, 2003. OWCP has administratively combined File Nos. xxxxxx623 and xxxxxx221, with the latter designated as the master file.

In a manual adjustment form dated November 6, 2018, a claims examiner noted that appellant elected OPM benefits effective September 1, 2018, but was paid on the periodic rolls through October 13, 2018. The claims examiner calculated that an overpayment of \$3,737.04 had been created as she continued to be paid FECA compensation from September 1 through October 13, 2018.

On November 14, 2018 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,737.04 for the period September 1 through October 13, 2018. It explained that the overpayment was the result of appellant receiving OWCP compensation benefits through October 13, 2018 after having elected receipt of OPM benefits, effective September 1, 2018. OWCP provided a calculation of the overpayment, noting that she was without fault in its creation. It requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP advised that failure to submit the requested information within 30 days would result in the denial of waiver of the overpayment. Additionally, it notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a preresoucement hearing. No response was received.

By decision dated December 17, 2018, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$3,737.04 for which appellant was without fault. It explained that the overpayment occurred because appellant received both FECA compensation and OPM retirement benefits between September 1, 2018 and October 13, 2018. OWCP also determined that it had not received a response to the preliminary determination, and that as such, there was no basis for waiver 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.⁴ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.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 provide 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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

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. This policy also applies to reemployed annuitants.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$3,737.04 for the period September 1 through October 13, 2018.

On July 26, 2018 appellant elected OPM retirement benefits effective September 1, 2018. OWCP, however, continued to pay appellant compensation on the periodic rolls through October 13, 2018. OWCP calculated that an overpayment of \$3,737.04 was therefore created.

On December 17, 2018 OWCP finalized its preliminary overpayment determination finding an overpayment of compensation in the amount of \$3,737.04 for which appellant was without fault. OWCP also determined that it had not received a response to the preliminary determination, and that as such, there was no basis for waiver of the overpayment.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹⁰ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP's procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.¹¹

However, there is no evidence of record which establishes that appellant actually received OPM benefits for the period September 1 through October 13, 2018.¹² It was not until November 2, 2018 that OWCP informed OPM that appellant had elected to receive retirement annuity benefits effective September 1, 2018 in lieu of FECA compensation and requested that OPM commence annuity payments effective retroactively to that date.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period September 1 through October 13, 2018. The Board has previously held that the mere fact that a claimant received FECA benefits after the effective date of an OPM election will not establish receipt of a prohibited dual benefit.¹³ While

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 *Supra* note 6.

¹¹ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 8.

¹² *See J.M.*, Docket No. 15-1604 (issued May 23, 2016).

¹³ *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that she also received OPM benefits for that same period.¹⁴

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.¹⁵

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$3,737.04 for the period September 1 through October 13, 2018.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *R.R.*, Docket No. 18-0032 (issued May 3, 2018). The election form signed by appellant on July 26, 2018 is insufficient to show that she actually began receiving OPM benefits at any time. See also *E.R.*, Docket No. 18-0084 (issued July 27, 2018).

¹⁵ See *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

¹⁶ In light of the Board's finding on Issue 1, Issue 2 is moot.