

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

L.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Columbia, VA, Employer**

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**Docket No. 19-1485
Issued: August 14, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 1, 2019 appellant filed a timely appeal from a March 22, 2019 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 appellant received an overpayment of compensation in the amount of \$10,421.59 because she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation benefits for the period October 1, 2018

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 22, 2019 decision, OWCP and the Board 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.*

through January 5, 2019; and (2) whether OWCP properly found appellant at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 6, 2003 appellant, then a 44-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed lower extremity and lumbar conditions due to factors of her federal employment including repetitive duties over the course of the past 10 years. She first stopped work and sought medical treatment on July 14, 2003. OWCP accepted the claim for intervertebral disc disorder with myelopathy, thoracic region (T3-4, T7-9, and C4-5) and intervertebral disc disorder with myelopathy, lumbar region (L4-5 and L5-S1). Appellant returned to light-duty work on September 8, 2003 with permanent restrictions. On November 16, 2010 OWCP accepted her claim for a recurrence of total disability beginning October 23, 2010. Appellant received wage-loss compensation on the supplemental rolls and on the periodic rolls effective August 28, 2011.

In a letter dated September 7, 2011, OWCP advised appellant of her weekly compensation rate on the periodic rolls. It further informed her that she must report any retirement income received from any federal agency, as federal employees who receive wage-loss compensation benefits under FECA are not permitted to concurrently receive benefits under certain other federal programs, including the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).

On January 22, 2019 OWCP received an election of benefits form, signed by appellant on September 12, 2018 in which she indicated that, effective October 1, 2018, she was electing to receive benefits from OPM under CSRS or FERS in preference to any benefits which she might be entitled to under FECA. Appellant reported that a lump-sum annuity had not been paid from OPM as part of an alternative annuity under CSRS, or as part of the death benefit under FERS. The form was stamped as received on October 16, 2018.

On January 25, 2019 OWCP identified an overpayment in the claim as appellant elected OPM benefits, effective October 1, 2018, yet continued to receive wage-loss compensation on the periodic rolls.

In a letter dated January 28, 2019, OWCP informed OPM that appellant had elected to receive OPM retirement benefits, effective October 1, 2018, in lieu of wage-loss compensation benefits under FECA. It requested that OPM commence monthly annuity payments, effective October 1, 2018, and to process her health benefits enrollment forms which it was transferring to OPM. OWCP indicated that it terminated appellant's FECA compensation benefits, effective January 5, 2019, the date it last deducted her health and life insurance benefits. It attached a copy of the election form completed by appellant on September 12, 2018.

On February 8, 2019 OWCP issued a preliminary determination that an overpayment of compensation was created in the amount of \$10,421.59 because appellant received prohibited dual benefit payments for the period October 1, 2018 through January 5, 2019. It explained that the overpayment occurred because she concurrently received both FECA benefits and OPM retirement benefits during this period, which resulted in a prohibited dual benefit payment. Appellant was

found to be 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 subsequent to the effective date of her election of OPM retirement benefits. OWCP provided her an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to respond.

Records of telephone conversations (Form CA-110) dated February 15 through 25, 2019, indicated that appellant notified OWCP that, although she had elected OPM retirement benefits, effective October 1, 2018, she was never paid by OPM and had yet to receive any retirement payments. Appellant further explained that her election form was not received by OPM until 2019. The claims examiner noted that OWCP provided OPM the election forms on January 28, 2019 and notified them that OWCP would no longer be processing appellant's compensation payments, effective October 1, 2018.

In a letter dated February 26, 2019, OWCP informed OPM that on January 28, 2019 it had previously provided notification that appellant had elected to receive retirement benefits in lieu of FECA compensation benefits effective October 1, 2018. It resubmitted the election form and prior letter for processing of her benefit payments. OWCP further requested that OPM advise OWCP if it had paid any annuity payments to appellant.

In a completed overpayment action request dated February 20, 2019, received on March 5, 2019, appellant contested OWCP's findings that an overpayment had occurred and that she was at fault in the creation of the overpayment, and she requested a possible waiver of the overpayment. She explained that she never received a dual benefit, stating that her election form was not sent to OPM until January 28, 2019 which established that she could not have received OPM retirement benefits since October 2018. Appellant further reported that OPM did not receive her election form until 2019, rendering OPM incapable of issuing dual benefit payments for that time period as OWCP failed to provide OPM any of the necessary information until January 28, 2019. She explained that repayment would cause her financial hardship as she had not yet received retirement benefit payments from OPM. Appellant completed the Form CA-20 documenting her financial information, and also provided bank statements and check deposits from October 1, 2018 through February 22, 2019 to document that she was not in receipt of OPM retirement payments, as alleged.

In a letter dated March 8, 2019, E.T., the employing establishment's manager of health and resource management, notified OWCP that the preliminary overpayment determination in appellant's claim was made in error. He explained that appellant attempted on at least three occasions, around September 12, 2018, to transfer her benefits to OPM using the election form. However, OWCP had not received the election form until months later, on or around January/February 2019, and incorrectly used the October 1, 2018 effective date to determine that appellant had been receiving improper dual OPM benefits since that time. E.T. reported that appellant had not been in receipt of OPM benefits and the current situation had created a financial hardship for her. He provided a copy of the election form and stated that OWCP did not issue benefit letters until January 28 and February 26, 2019, establishing that appellant could not have been getting compensated by OPM prior to those dates.

In a letter dated March 21, 2019, OWCP again requested that OPM commence monthly annuity payments, effective October 1, 2018, and to process appellant's health benefits enrollment

forms which it transferred. It further requested that OPM reimburse OWCP in the amount of \$10,421.59 for FECA benefits paid during the period October 1, 2018 through January 5, 2019.

By decision dated March 22, 2019, OWCP finalized the preliminary overpayment determination, finding that appellant received of an overpayment of compensation in the amount of \$10,421.59 for the period October 1, 2018 through January 5, 2019 and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It requested that she repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.³ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁴

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.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶ OWCP's 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation, as alleged.⁸

OWCP based its overpayment finding on its determination that appellant had received a prohibited dual benefit by receipt of OPM and FECA benefits for the period October 1, 2018 through January 5, 2019. While the record reflects that she received FECA benefits for this period,

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ 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).

⁸ *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

the Board finds that OWCP has not established that she also received OPM benefits for this period.⁹

On September 12, 2018 appellant elected OPM retirement benefits, effective October 1, 2018, in lieu of FECA benefits. However, there is no evidence of record which establishes that OWCP or OPM received the election forms in September or October 2018. On March 8, 2019 the employing establishment explained that OPM and OWCP had not received appellant's election form until January 28 and February 26, 2019, establishing that she was never paid OPM retirement benefits as alleged. Appellant asserted that she had yet to receive any monetary compensation from OPM and provided bank documents in support of her claim. The record reflects that OWCP did not transfer her health benefit enrollment forms, or request that OPM commence monthly annuity payments, until January 28, 2019, citing an October 1, 2018 effective date. OWCP resubmitted the request to OPM on February 26 and March 21, 2019 after OPM failed to process the request with no annuity payments provided to appellant. Given the three requests sent to OPM to commence annuity payments, it appears that OWCP was at least aware that appellant had not received OPM benefits for the period in question to establish that her receipt of FECA benefits amounted to prohibited dual payments.¹⁰

OWCP's March 21, 2019 letter to OPM also requested that OPM reimburse OWCP in the amount of \$10,421.59 for FECA benefits paid during the period October 1, 2018 through January 5, 2019. However, its final overpayment decision instructed that appellant submit repayment in full. The record is also silent as to whether OPM reimbursed OWCP for FECA benefits paid to her during the period in question.¹¹

The Board thus finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$10,421.59 for the period October 1, 2018 through January 5, 2019, as alleged.¹²

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation, as alleged.¹³

⁹ See *R.R.*, Docket No. 18-0032 (issued May 3, 2018).

¹⁰ *Id.*

¹¹ *S.F.*, Docket No. 17-1935 (issued August 13, 2018).

¹² *G.M.*, Docket No. 17-0784 (issued August 23, 2017); *D.O.*, Docket No. 15-1004 (issued July 28, 2015).

¹³ In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 14, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board