

Personnel Management (OPM) retirement benefits and FECA wage-loss compensation for the period December 18, 2018 through January 5, 2019; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 29, 2011 appellant, then a 53-year-old driver, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2011 he injured his arms, back, and neck when he fell through a dock plate as he was attempting to pull it open while in the performance of duty. OWCP accepted the claim for bilateral shoulder and upper arm strain, right hip and thigh contusion, and bilateral lumbar sprain. Appellant underwent OWCP-approved right shoulder surgery on June 5, 2012. He stopped work on that date and did not return. OWCP paid appellant wage-loss compensation on the supplemental rolls from May 31 through September 22, 2012, and on the periodic rolls beginning September 23, 2012.

On December 21, 2018 appellant completed a form indicating his election of OPM retirement benefits effective December 18, 2018. The case record reflects that OWCP received the form on December 31, 2018. OWCP continued to pay appellant wage-loss compensation for temporary total disability for the period December 9, 2018 through January 5, 2019.

A memorandum of telephone call (Form CA-110) related that appellant called OWCP on January 9, 2019 to follow up on his election of benefits. Appellant was advised that his election of benefits was being processed and that a letter would be sent to OPM to process the election. He questioned when his OPM retirement benefits would begin and was informed that OPM was another jurisdiction outside of OWCP's control. In Form CA-110 notes dated January 10, 2019, OWCP informed appellant that it was his duty to follow up with OPM regarding his retirement benefits "because it can take a while."

In a letter dated January 11, 2019, OWCP confirmed that it had paid appellant wage-loss compensation through January 5, 2019 and had stopped payments as of that date.

In a compensation termination form dated January 16, 2019, OWCP noted that appellant had elected OPM retirement benefits effective December 18, 2018, but continued to be paid wage-loss compensation on the periodic rolls through January 5, 2019. It calculated that an overpayment of compensation in the amount of \$1,946.03 had therefore been created for the period December 18, 2018 through January 5, 2019.

On January 18, 2019 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective December 18, 2018 in lieu of FECA wage-loss compensation, requested reimbursement from OPM in the amount of \$1,946.03 for the period December 18, 2018 through January 5, 2019, and requested that OPM commence retirement annuity payments effective December 18, 2018.

On January 25, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,946.03 for the period December 18, 2018 through January 5, 2019. It explained that the overpayment was the result of his receipt of FECA

wage-loss compensation through January 5, 2019 after having elected receipt of OPM retirement benefits effective December 18, 2018. OWCP provided a calculation of the overpayment and found that appellant was at fault in its creation as he accepted a payment he knew, or reasonably should have known, to be incorrect. It notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a prerecoupment hearing.

On February 11, 2019 appellant requested a prerecoupment hearing on the issues of fault and eligibility for waiver of recovery of the overpayment. The hearing was held before an OWCP hearing representative on June 17, 2019.

In an overpayment recovery questionnaire form (OWCP-20) dated July 15, 2019, appellant contended that he reported the change in circumstances that affected his monthly payment, as he had informed both OPM and OWCP of his election of benefits. He also reported assets, monthly income and expenses.

By decision dated August 15, 2019, a representative of OWCP's Branch of Hearings and Review finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$1,946.03, for which appellant was at fault. The hearing representative explained that the overpayment occurred because appellant received both FECA wage-loss compensation and OPM retirement benefits between December 18, 2018 and January 5, 2019.

By decision dated September 5, 2019, OWCP issued an amended final decision finding that an overpayment of compensation in the amount of \$1,946.03 had occurred, for which appellant was at fault. Referring to the decision dated August 15, 2019, it explained that the overpayment occurred because he received both FECA compensation and OPM retirement benefits between December 18, 2018 and January 5, 2019. OWCP reaffirmed the finding that appellant was at fault in the creation 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.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁴ It 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.⁵

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

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

OWCP's procedures also explain that the employee must make an election between FECA benefits and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.⁸

ANALYSIS

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,946.03 for the period December 18, 2018 through January 5, 2019.

On December 21, 2018 appellant completed a form indicating his election of OPM retirement benefits effective December 18, 2018. OWCP, however, continued to pay him wage-loss compensation for temporary total disability for the period December 9, 2018 through January 5, 2019. It calculated that an overpayment of \$1,946.03 was therefore created.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹ 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.¹⁰

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period December 18, 2018 through January 5, 2019.¹¹ It was not until January 18, 2019 that OWCP informed OPM that he had elected to receive retirement annuity benefits effective December 18, 2018 in lieu of FECA wage-loss 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 December 18, 2018 through January 5, 2019. 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

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ 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).

⁹ *Supra* note 6.

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

¹¹ *See C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

benefit.¹² While the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that he also received OPM retirement benefits for that same period.¹³

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.¹⁴

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,946.03 for the period December 18, 2018 through January 5, 2019.¹⁵

¹² *Id.* See also *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹³ See *R.R.*, Docket No. 18-0032 (issued May 3, 2018) (The election form signed by appellant on December 21, 2018 was insufficient to show that he actually began receiving OPM retirement benefits). See also *E.R.*, Docket No. 18-0084 (issued July 27, 2018).

¹⁴ See *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

¹⁵ In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 4, 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