

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

D.J., Appellant)	
)	
and)	Docket No. 20-0004
)	Issued: May 21, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Detroit, MI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 1, 2019 appellant filed a timely appeal from an August 30, 2019¹ 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 this case.³

¹ The Board notes that appellant also sought an appeal from OWCP's August 12, 2019 preliminary overpayment determination. However, the Board's jurisdiction is limited to the review of final adverse decisions of OWCP. *See* 20 C.F.R. §§ 501.2(c) and 501.3(a).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 30, 2019 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 evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019 because she received FECA benefits concurrently with Office of Personnel Management (OPM) retirement benefits; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 26, 2015 appellant, then a 40-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that her preexisting conditions of asthma and eczema were aggravated by factors of her federal employment, including sun and heat exposure. She related that she first became aware of her conditions on June 5, 2015 and first realized their relationship to factors of her federal employment on June 20, 2015. OWCP accepted appellant's claim for temporary aggravation of uncomplicated moderate persistent asthma and temporary aggravation of intrinsic allergic asthma. It paid appellant wage-loss compensation on the supplemental rolls commencing July 2, 2015. She returned to full-time modified-duty work on November 25, 2015 with restrictions.

OWCP placed appellant on the periodic rolls commencing November 11, 2018 because the employing establishment was unable to accommodate her work restrictions.

On March 27, 2019 OWCP sent appellant an election of benefits form (Form CA-1105). It explained that she could not receive FECA benefits while also receiving OPM benefits under the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS).

On April 30, 2019 OWCP received an April 24, 2019 letter from OPM to appellant which indicated that it found her to be disabled for her position due to her asthma, and that her application for disability retirement under FERS had been approved. It listed various steps appellant needed to take before she could receive annuity payments.

On May 16, 2019 OWCP received appellant's election of benefits form (Form CA-1105) dated May 17, 2019. Appellant elected to receive OPM benefits in preference to benefits to which she may be entitled under FECA, effective April 25, 2019, which she indicated was the official date of her retirement. A May 17, 2019 memorandum of telephone call (Form CA-110) indicated that OWCP left a voicemail informing appellant that the effective date she chose for her OPM benefits was prior to the end of her FECA compensation payments from the periodic rolls, which would create an overpayment. It stated that if appellant still used that date for her election of benefits, it would declare an overpayment; however, if she would prefer a different date she should send OWCP a statement in writing.

OWCP received a separate election of benefits form (Form CA-1105) from appellant dated May 18, 2019. In it, appellant elected to receive OPM benefits, effective April 27, 2019. A May 21, 2019 Form CA-110 indicated that OWCP informed her that the effective date she chose for her OPM benefits would still create an overpayment. Appellant related that she would choose a new effective date for her OPM benefits.

OWCP received another election of benefits form (Form CA-1105) from appellant dated May 21, 2019. Appellant elected to receive OPM benefits effective April 28, 2019.

An OWCP compensation termination fiscal worksheet dated May 22, 2019 noted that the effective date of the periodic rolls termination was April 28, 2019 due to appellant's selection of April 28, 2019 as the effective date for the receipt of her OPM benefits. It also noted that an overpayment in the amount of \$2,879.29 had been created as she continued to be paid FECA compensation for 28 additional days after her effective election date for the period April 28 to May 25, 2019.

In a May 22, 2019 letter to OPM, OWCP indicated that appellant elected to receive OPM benefits effective April 28, 2019 in lieu of compensation benefits under FECA, and it requested that OPM commence annuity payments effective retroactively to that date. It attached appellant's May 21, 2019 election of benefits form (Form CA-1105).

A May 22, 2019 Form CA-110 indicated that OWCP informed appellant that an overpayment was created because it was too late to stop the most recent compensation payment on the periodic rolls.

On June 10, 2019 OWCP received another election of benefits form (Form CA-1105) from appellant dated "June 11, 2018." Appellant elected to receive OPM benefits effective "July 21, 2018."

A July 24, 2019 letter from the employing establishment indicated that appellant retired and elected OPM benefits effective April 28, 2019. It noted that a compensation payment "in the amount of \$2,789.29" was issued to her for the period April 28 through May 25, 2019, and it requested that OWCP review the case for a possible overpayment.

On August 12, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019. It explained that the overpayment was the result of her receiving FECA compensation benefits through May 25, 2019 after having elected receipt of OPM benefits, effective April 28, 2019. OWCP determined that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known to be incorrect. It provided a calculation of the overpayment and requested that she 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 preresumption hearing.

On August 28, 2019 appellant requested a final decision based on the written evidence, and she submitted additional evidence. She indicated that she disagreed with OWCP's August 12, 2019 preliminary determination because she disagreed that the overpayment occurred, disagreed with the amount of the overpayment, and believed that the overpayment occurred through no fault of her own. Appellant requested a waiver of the overpayment. She explained that she did not receive FECA benefits concurrently with OPM retirement benefits.

OWCP received another election of benefits form (Form CA-1105) from appellant dated May 22, 2019. Appellant elected to receive OPM benefits in preference benefits to which she may be entitled under FECA, effective May 25, 2019.

An August 28, 2019 overpayment recovery questionnaire (Form OWCP-20) completed by appellant indicated that her monthly income was \$1,696.00, which consisted entirely of OPM retirement benefits. Appellant supported her husband and 24-year-old son, and she paid \$1,625.00 in monthly expenses, which included \$500.00 for food, \$200.00 for clothing, \$400.00 for utilities, \$25.00 to banking institution, \$200.00 for telephone service, and \$300.00 for other expenses. She indicated that she had \$1,000.00 of value in funds and other personal property. Appellant explained that her retirement benefit payments began on July 1, 2019.

Appellant's April 1, May 1, and June 1, 2019 OPM retirement benefits annuity statements printed on August 28, 2019 all indicated that she was not provided with any payments. Appellant's OPM July 1, 2019 retirement benefits annuity statement printed on August 28, 2019 indicated that she was provided with a payment of \$1,696.00.

By decision dated August 30, 2019, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019. It explained that the overpayment occurred because appellant received both FECA compensation and OPM retirement benefits between April 28 and May 25, 2019. OWCP determined that she was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known to be incorrect. It explained that appellant had selected April 28, 2019 as the effective date of her OPM benefits, and over 30 days had elapsed since her last EFT (electronic funds transfer) deposit was made, allowing ample time for her to have received and reviewed a statement from her financial institution showing details of the payment. OWCP requested payment for the full amount of \$2,879.29 within 30 days.

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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8116(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 OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019.

On May 16, 2019 OWCP received appellant's election of benefits form (Form CA-1105) dated May 17, 2019 electing to receive OPM benefits effective April 25, 2019. On May 17, 2019 it received another election of benefits form (Form CA-1105) from her dated May 18, 2019 electing to receive OPM benefits effective April 27, 2019. On May 21, 2019 OWCP received another election of benefits form (Form CA-1105) from appellant dated May 21, 2019 electing to receive OPM benefits effective April 28, 2019.

A May 22, 2019 OWCP compensation termination sheet indicated that appellant had been overpaid in the amount of \$2,879.29 for the period April 28 to May 25, 2019 due to her selection of April 28, 2019 as the effective date for her OPM benefits.

On August 30, 2019 OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019. It explained that the overpayment occurred because she received both FECA compensation benefits and OPM retirement benefits during this period. OWCP also determined that appellant was at fault in the creation of the overpayment.

However, prior to the final overpayment decision, appellant also submitted two additional election of benefit forms (Form CA-1105) -- one was received by OWCP on June 10, 2019 and elected to receive OPM benefits effective "July 21, 2018," and the other was received by OWCP on August 28, 2019 and elected to receive OPM benefits effective May 25, 2019. The last election form prior to OWCP's August 30, 2019 decision therefore elected OPM benefits as of May 25, 2019.

As well, the Board finds that the evidence of record is insufficient to establish that appellant actually received OPM benefits for the period April 28 through May 25, 2019.¹⁰ Appellant

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 *See C.P.*, Docket No. 19-0732 (issued September 5, 2019).

provided her April 1, May 1, and June 1, 2019 OPM annuity statements printed on August 28, 2019 which all indicated that she had not received any payments.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ 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.¹²

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period April 28 through May 25, 2019. While the record reflects that she received FECA benefits for this period, which she has elected to receive, the Board finds that OWCP has not established that she also received OPM benefits for that same period.¹³

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

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,879.29 for the period April 28 through May 25, 2019.¹⁵

¹¹ *Supra* note 6.

¹² *Id.*; *supra* note 7; Federal (FECA) Procedure Manual, *supra* note 9.

¹³ *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).

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

¹⁵ In light of the Board's finding on Issue 1, Issue 2 is moot.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 21, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board