

the effective date of her election of Office of Personnel Management (OPM) retirement benefits; and (2) whether it properly found that appellant was at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 15, 2010 appellant, then a 46-year-old secretary, filed an occupational disease claim (Form CA-2) alleging that on September 28, 2010 she realized that she had developed acute right carpal tunnel syndrome due to prolonged typing in the course of her federal employment. She stopped work on February 27, 2010. On February 4, 2011 OWCP accepted her claim for right carpal tunnel syndrome and de Quervain's disease.

In a July 14, 2011 letter, OWCP informed appellant that it was placing her on the periodic rolls effective May 21, 2011. It explained that she would receive regular payments beginning July 3, 2011 and every 28 days thereafter. OWCP's July 14, 2011 letter also informed appellant that she must report any retirement income, disability income, or compensation benefits from any federal agency as a recipient of compensation benefits under FECA was not permitted to receive benefits under other federal programs including the Civil Service retirement program.

In a form dated December 20, 2017, appellant elected to receive Civil Service Retirement System/Federal Employees Retirement System (CSRS/FERS) benefits from OPM in preference to benefits to which she may be entitled under FECA. The effective date of her election was October 28, 2017. The case record reflects that OWCP received this form on December 26, 2017. Notwithstanding her election of OPM benefits, effective October 28, 2017, OWCP continued to pay appellant wage-loss compensation for temporary total disability through December 8, 2018.

By a memorandum of telephone call (Form CA-110) dated January 31, 2018, OWCP reported that it had contacted appellant by telephone to verify that she had indeed elected to receive retirement benefits through OPM as opposed to compensation benefits under FECA. Appellant confirmed that she had opted to receive retirement benefits, but indicated that she had not yet received any monetary benefits from OPM as of that date.

In a March 28, 2018 letter, OWCP informed appellant that, for the period March 4 to 31, 2018, she was entitled to weekly wage-loss compensation in the amount of \$744.79 and monthly wage-loss compensation in the amount of \$2,445.00. It further informed her that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time. OWCP requested that appellant complete a Form CA-1105 and verify her election of OPM benefits.

In a form dated April 3, 2018, a representative of OPM's Retirement Services Program indicated that appellant had not been paid through its program. Subsequently, on June 11, 2018 OWCP received a June 7, 2018 form signed by another representative of OPM's Retirement

Services Program indicating that OPM had received appellant's application for OPM benefits and provided a claim number.³

On October 10, 2018 OWCP again requested that appellant complete a Form CA-1105 and return it within 30 days. On October 17, 2018 appellant completed the Form CA-1105 and elected to receive OPM retirement benefits effective October 28, 2017.

In a letter dated January 7, 2019, OWCP informed OPM that appellant had elected to receive OPM benefits, effective October 28, 2017, in lieu of FECA compensation benefits, requested reimbursement in the amount of \$36,085.61 for the period from October 28, 2017 to December 8, 2018, and requested that OPM commence annuity payments retroactive to that date.

In a Form CA-110, memoranda of telephone calls, dated January 7, 9, 17, and 21, 2019, OWCP recorded that appellant had not heard back from OPM relative to her benefits.

On January 10, 2019 OWCP made a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$30,521.73 for the period October 28, 2017 through December 8, 2018. It explained that the overpayment was the result of her receiving OWCP compensation benefits through December 8, 2018 after electing receipt of OPM benefits, effective October 28, 2017. OWCP provided a calculation of the overpayment, and found that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. It requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP 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 precoupment hearing. No response was received.

By decision dated May 16, 2019, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$30,521.73 for the period October 28, 2017 through December 8, 2018 for which appellant was at fault. It explained that the overpayment occurred because she received both FECA compensation and OPM retirement benefits between October 28, 2017 and December 8, 2018.

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) states that, while an employee is receiving workers'

³ Although the OPM representative had checked "No" in response to whether an application for OPM benefits had been received from appellant, the fact that OPM assigned a claim number indicates that it had received the application and that the check mark "No" was mistaken.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

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'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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$30,521.73 for the period from October 28, 2017 through December 8, 2018.

On December 20, 2017 appellant elected OPM retirement benefits effective October 28, 2017. OWCP, however, continued to pay appellant compensation on the periodic rolls through December 8, 2018. It calculated that an overpayment of \$30,521.73 was, therefore, created.

On May 16, 2019 OWCP finalized its preliminary overpayment determination, finding an overpayment of compensation in the amount of \$30,521.73, for which appellant was at fault.

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 October 28, 2017 through December 8, 2018.¹² It was not until January 7, 2018 that OWCP informed OPM that appellant had elected to receive retirement annuity

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); *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.A.*, Docket No. 18-0259 (issued August 5, 2019); *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 *Supra* note 6; *supra* note 7; Federal (FECA) Procedure Manual, *supra* note 9.

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

benefits, effective October 28, 2017, in lieu of FECA compensation and requested that OPM commence annuity payments effective retroactively to that date. On April 3, 2018 a representative of OPM's Retirement Services Program informed OWCP that appellant had not yet been paid through its program.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period October 28, 2017 through December 8, 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 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 \$30,521.73 for the period from October 28, 2017 through December 8, 2018 as it has not been established that she actually received a dual payment after the effective date of her election of OPM retirement benefits.¹⁶

¹³ *C.P. and J.A.*, *supra* note 9; *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹⁴ *R.R.*, Docket No. 18-0032 (issued May 3, 2018). The election form signed by appellant on October 17, 2018 is insufficient to show that she actually began receiving OPM benefits at any time. *E.R.*, Docket No. 18-0084 (issued July 27, 2018).

¹⁵ *C.P. and J.A.*, *supra* note 9.

¹⁶ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 20, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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