

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

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<b>V.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0852</b>
	)	<b>Issued: January 28, 2021</b>
<b>DEPARTMENT OF THE ARMY, U.S. ARMY</b>	)	
<b>CORPS OF ENGINEERS, Mobile, AL, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 7, 2020 appellant filed a timely appeal from an October 17, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$966.54, for which she was without fault, because she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation for the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the October 17, 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 additional evidence for the first time on appeal. *Id.*

period July 21 through August 17, 2019; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On June 9, 1999 appellant, then a 44-year-old office automation assistant, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition due to factors of her federal employment. OWCP accepted the claim for adjustment disorder with mixed anxiety and depression. It paid appellant wage-loss compensation on the supplemental rolls as of August 16, 1999 and on the periodic rolls as of April 23, 2000.

In a letter dated May 14, 2018, OWCP informed appellant that it was reducing her compensation benefits paid on the periodic rolls based on her actual earnings as a substitute teacher for the period September 17, 2017 through April 28, 2018 with the first regular payment effective April 29, 2018. By separate letter of even date, it informed her that she may be entitled to receive benefits provided by OPM under the Civil Retirement System or the Federal Employees Retirement System. OWCP enclosed an election of benefits form (Form CA-1105).

On November 9, 2018 OWCP received appellant's completed Form CA-1105 dated November 1, 2018. Appellant elected to receive OPM benefits in lieu of benefits to which she may be entitled under FECA, effective July 21, 2019. In an accompanying letter she explained that she would turn 65 in July 2019 and this notice should provide ample time to prevent any overpayment from occurring.

In a December 6, 2018 letter to OPM, OWCP indicated that appellant elected to receive OPM benefits effective July 21, 2019 in lieu of compensation benefits under FECA, and it requested that OPM commence annuity payments effective that date. It attached her November 1, 2018 Form CA-1105.

On August 9, 2019 OWCP received a completed Form EN1032 dated July 31, 2019 in which appellant indicated that, while she had been assigned a Civil Service Active number, she had not received a regular retirement check from OPM in the past 15 months.

An OWCP compensation termination fiscal worksheet dated September 5, 2019 noted that the effective date of the periodic rolls termination was July 21, 2019 due to appellant's selection of July 21, 2019 as the effective date for the receipt of her OPM benefits. It also noted that an overpayment in the amount of \$966.54 had been created as she continued to be paid FECA compensation for 28 additional days after her effective election date for the period July 21 through August 17, 2019.

In a September 5, 2019 letter to OPM, OWCP indicated that appellant elected to receive OPM benefits effective July 21, 2019 in lieu of compensation benefits under FECA, and it requested that OPM commence annuity payments effective that date. It attached her November 1, 2018 Form CA-1105.

On September 9, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$966.54 for the period July 21 through August 17, 2019. It explained that the overpayment was the result of her receipt of FECA

compensation benefits through August 17, 2019 after having elected receipt of OPM benefits, effective July 21, 2019. OWCP determined that appellant was without fault in the creation of the overpayment because it erred in timely terminating her wage-loss compensation and she would not have had actual knowledge of the calculation error. 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 precoupment hearing.

In a September 16, 2019 memorandum of telephone call (Form CA-110), appellant informed OWCP that she was not receiving any payment from OPM nor had she received any correspondence from OPM regarding the commencement of her retirement benefits as of July 21, 2019.

In a letter dated September 17, 2019, appellant disputed the overpayment as she had not received her retirement annuity or any money from OPM since electing to receive retirement benefits in lieu of FECA benefits more than a year ago.

In an October 17, 2019 Form CA-110, OWCP noted that appellant was not receiving either FECA benefits or any payment from OPM. It also noted the possibility that OPM would reimburse OWCP once her retirement payments commenced.

By decision dated October 17, 2019, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$966.54 for the period July 21 through August 17, 2019. It explained that the overpayment occurred because appellant received both FECA compensation and OPM retirement benefits between July 21 and August 17, 2019. OWCP found that she was without fault in the creation of the overpayment. However, it denied waiver of recovery of the overpayment because the record contained no evidence that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

### **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.<sup>3</sup> Section 8116 of FECA defines the limitations on the right to receive compensation benefits.<sup>4</sup> 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

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<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116.

for under FECA.<sup>5</sup> 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.<sup>6</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>7</sup>

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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$966.54 for the period July 21 through August 17, 2019.

On November 1, 2018 appellant completed a form indicating her election of OPM retirement benefits effective July 21, 2019. OWCP, however, continued to pay her wage-loss compensation for temporary total disability for the period July 21 through August 17, 2019. It calculated that an overpayment of \$966.54 was therefore created.

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

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period July 21 through August 17, 2019.<sup>11</sup> In letters dated December 6, 2018 and September 5, 2019, OWCP informed OPM that she had elected to receive retirement annuity benefits effective July 21, 2019 in lieu of FECA wage-loss compensation and requested that OPM commence annuity payments effective to that date. The record also contains a form EN1032 dated July 31, 2019 in which appellant indicated that she had not received any payment from OPM as of that date and memorandum of calls dated September 16 and October 17, 2019 in which she stated that she had not received any retirement annuity from OPM. Additionally, OWCP

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<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.421(a).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); *see also D.J.*, Docket No. 20-0004 (issued May 21, 2020); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

<sup>9</sup> *Supra* note 5.

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

<sup>11</sup> *See V.B.*, Docket No. 19-1874 (issued June 4, 2020); *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

noted in the October 17, 2019 memorandum of call that OPM might reimburse it for the FECA benefits paid for the period July 21 through August 17, 2019.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period July 21 through August 17, 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 benefit.<sup>12</sup> 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 retirement benefits for that same period.<sup>13</sup>

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

### **CONCLUSION**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$966.54 for the period July 21 through August 17, 2019.<sup>15</sup>

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

<sup>13</sup> See *V.B.*, *supra* note 11; *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).

<sup>14</sup> See *V.B.*, *supra* note 11; *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

<sup>15</sup> In light of the Board's disposition of issue 1, issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 17, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 28, 2021  
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