

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

M.D., Appellant)

and)

U.S. POSTAL SERVICE, EDENDALE POST)
OFFICE, Los Angeles, CA, Employer)

**Docket No. 21-0410
Issued: July 7, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 28, 2021 appellant filed a timely appeal from a December 30, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$159,363.88, for the period April 1, 2014 through August 15, 2020, for which she was at fault, because she concurrently received Office of Personnel Management (OPM) retirement

¹ The Board notes that, following the December 30, 2020 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.*

² 5 U.S.C. § 8101 *et seq.*

benefits and FECA wage-loss compensation benefits; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment.

FACTUAL HISTORY

On December 22, 2010 appellant, then a 66-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 7, 2010 she fractured her ribs, sustained head and elbow contusions, and sustained a lumbar strain when her work vehicle was struck by a private vehicle while in the performance of duty. She stopped work on December 8, 2010. OWCP accepted the claim for closed rib fractures, neck and back sprain, and elbow contusion. It paid appellant wage-loss compensation on the supplemental rolls beginning January 22, 2011 and on the periodic rolls beginning August 26, 2012.

Following vocational rehabilitation efforts, by notice dated February 4, 2015 and finalized March 27, 2015, OWCP determined that the constructed position of information clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-022, properly represented appellant's wage-earning capacity, with entry level wages of \$400.00 a week. It reduced her compensation, effective March 11, 2015, to reflect her loss of wage-earning capacity (LWEC). Appellant remained off work.

On August 31, 2020 OWCP received an election of benefits form signed by appellant on August 25, 2020 in which she indicated that, effective April 1, 2014, she was electing to receive benefits from OPM in preference to any benefits she might be entitled to under FECA.

In a September 9, 2020 letter, OWCP requested that OPM reimburse it in the amount of \$159,363.88 for FECA benefits paid to appellant during the period April 1, 2014 through August 15, 2020.

On October 29, 2020 OWCP issued a preliminary overpayment determination that an overpayment of compensation was created in the amount of \$159,363.88 for the period April 1, 2014 through August 15, 2020 because appellant "elected OPM benefits in lieu of FECA benefits effective April 1, 2014 and received both retirement benefits from OPM and compensation from [OWCP] concurrently through August 15, 2020." It found that she was at fault in the creation of the overpayment. OWCP enclosed an overpayment recovery questionnaire (Form OWCP-20) an overpayment action request form and notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

Appellant responded on November 8, 2020 requesting that OWCP render a decision based on the written evidence and regarding possible waiver of recovery of the overpayment.

By decision dated December 30, 2020, OWCP finalized the October 29, 2020 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount \$159,363.88 for the period April 1, 2014 through August 15, 2020. It found that she was at fault in the creation of the overpayment. OWCP required that appellant 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 in the amount of \$159,363.88 for the period April 1, 2014 through August 15, 2020.

On August 25, 2020 appellant elected OPM retirement benefits, retroactive to April 1, 2014. OWCP, however, paid her wage-loss compensation on the supplemental rolls beginning January 22, 2011 and on the periodic rolls August 26, 2012 through August 15, 2020. On September 9, 2020 it requested that OPM reimburse it in the amount of \$159,363.88 for FECA benefits paid to appellant during the period April 1, 2014 through August 15, 2020. On October 29, 2020 OWCP issued a preliminary overpayment determination that an overpayment of compensation was created in the amount of \$159,363.88 for the period April 1, 2014 through August 15, 2020 because she received prohibited dual benefits. It finalized the October 29, 2020 preliminary overpayment determination by decision dated December 30, 2020.

While the record reflects that appellant received FECA wage-loss compensation benefits for the period April 1, 2014 through August 15, 2020, the case record does not establish that she also received OPM benefits for this period.⁸ The Board has previously held that the mere fact that a claimant received FECA wage-loss compensation benefits after the effective date of an OPM

³ *Id.* at § 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); *L.H.*, Docket No. 19-1485 (issued August 14, 2020); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁸ *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

election will not establish receipt of a prohibited dual benefit.⁹ Therefore, the Board finds that OWCP did not meet its burden of proof to establish that the overpayment occurred.¹⁰

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$159,363.88 for the period April 1, 2014 through August 15, 2020.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 7, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

⁹ *C.P., id.; J.M.*, Docket No. 15-1604 (issued May 23, 2016) *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹⁰ In light of the Board's disposition on Issue 1, Issue 2 is rendered moot.