

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

S.S., Appellant	)	
	)	
and	)	<b>Docket No. 21-1317</b>
	)	<b>Issued: November 16, 2022</b>
DEPARTMENT OF THE ARMY, U.S. ARMY	)	
CHEMICAL MATERIALS ACTIVITY,	)	
PUEBLO CHEMICAL DEPOT, Pueblo, CO,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On August 30, 2021 appellant filed a timely appeal from a May 27, 2021 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 \$276,281.44 for the period May 1, 2011 through February 27, 2021 because he

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

<sup>2</sup> The Board notes that following the May 27, 2021 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.*

concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On July 31, 2014 appellant, then a 58-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 2014 he sustained left knee and right shoulder injuries when conducting unarmed self-defense training while in the performance of duty.<sup>3</sup> He stopped work on July 29, 2014 and did not return. OWCP accepted the claim for left knee anterior cruciate ligament (ACL) tear; left knee chondromalacia patellae; temporary aggravation left knee osteoarthritis; left ankle strain; right shoulder rotator cuff tendinitis; right shoulder biceps tendinitis; neck sprain; lumbar sprain, L3 through L5; temporary aggravation spondylolisthesis, L5; temporary aggravation degenerative disc disease, L3-4 through L5-S1; and temporary aggravation herniated disc, L4-5. It subsequently expanded the acceptance of the claim to include permanent aggravation left knee osteoarthritis; permanent aggravation spondylolisthesis, L5; permanent aggravation of degenerative disc disease, L3-4 through L5-S1; and permanent aggravation of herniated disc, L4-5. OWCP paid appellant wage-loss compensation on the supplemental rolls from September 21, 2014 through February 6, 2016 and on the periodic rolls from February 7, 2016 through February 27, 2021.

By letter dated February 17, 2016, OWCP explained to appellant that he would receive regular payments on the periodic rolls commencing February 7, 2016 and every 28 days thereafter. OWCP's February 17, 2016 letter also included a Form EN-1049 which informed appellant of his rights and responsibilities as a FECA benefits recipient. The EN-1049 advised appellant that he must report to OWCP any retirement income from any federal agency. It explained that a recipient of compensation benefits under FECA is not permitted to receive benefits under certain other federal programs including the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).

In correspondence dated December 3, 2019 and April 17, 2020, OWCP requested that OPM provide information as to whether appellant was in receipt of OPM retirement benefits. On May 11, 2020 OPM informed OWCP that appellant had been in receipt of OPM retirement benefits since May 1, 2011.

In letters dated June 10 through December 15, 2020, OWCP advised appellant that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time, and that employees who are entitled to both FECA and OPM retirement benefits must elect which benefit to receive. It included a Form CA-1105 election form and copies of OPM's acknowledgment that appellant had been in receipt of OPM benefits since May 1, 2011.

In its December 15, 2020 letter, OWCP further advised appellant that if he did not provide a completed election form within 30 days, it would make a default election for OPM benefits,

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<sup>3</sup> The record reflects that appellant had retired as a property disposal specialist (environmental) effective April 8, 2011. Effective June 30, 2014, he began a career-conditional appointment as a security guard.

terminate his entitlement to compensation, and declare an overpayment. No response was received.

On March 1, 2021 OWCP issued a preliminary overpayment determination that an overpayment of compensation in the amount of \$276,281.44 had been created for the period May 1, 2011 through February 27, 2021 because appellant concurrently received FECA wage-loss compensation and OPM retirement benefits during that period. OPM calculated the overpayment from September 21, 2014 through February 27, 2021. OWCP found appellant at fault because he accepted a payment he knew or should have reasonably known was incorrect. It provided an overpayment action request form and overpayment recovery questionnaire (Form OWCP-20) and afforded appellant 30 days to respond. An accompanying FECA overpayment calculation memorandum and supporting fiscal worksheets documented that appellant received FECA wage-loss compensation in the amount of \$276,281.44 for the period September 21, 2014 through February 27, 2021. It further noted that appellant had elected OPM benefits effective May 1, 2011.

By decision dated May 27, 2021, OWCP finalized the preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$276,281.44 for the period May 1, 2011 through February 27, 2021 had been created. It explained that appellant was in receipt of retirement benefits from OPM as of May 1, 2011 and that he concurrently received FECA wage-loss compensation for the period September 21, 2014 through February 27, 2021, which was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment because he accepted a payment he knew or reasonably should have known was incorrect. It related that appellant should forward \$464.50 each month to OWCP to repay 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.<sup>4</sup> Section 8116(a) states 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.<sup>5</sup>

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.<sup>6</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>7</sup> OWCP procedures also explain that the employee must make an election between FECA benefits and OPM benefits. The

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.421(a).

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

employee has the right to elect the monetary benefit which is the more advantageous. This policy also applies to reemployed annuitants.<sup>8</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$276,281.44 during the period September 21, 2014 through February 27, 2021 because he concurrently received OPM retirement benefits and FECA wage-loss compensation.

The record reflects that appellant had formally retired from a previous position in April 2011 and was in receipt of OPM retirement benefits effective May 1, 2011. He subsequently resumed federal employment effective June 30, 2014. The record supports that appellant received both wage-loss compensation under FECA and OPM retirement benefits for the period September 21, 2014 through February 27, 2021. There is no evidence of record that the OPM benefits stopped after appellant resumed federal employment and appellant reported on the EN-1032 forms of record that he had received regular retirement checks from OPM.

As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,<sup>9</sup> an overpayment of compensation was created.<sup>10</sup> Section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.<sup>11</sup> This policy also applies to reemployed annuitants and the Board has affirmed that reemployed civilian annuitants must elect between an OPM annuity and FECA wage-loss compensation benefits.<sup>12</sup> The Board finds that appellant was in receipt of an OPM annuity and FECA wage-loss compensation benefits, a prohibited dual benefit, during the period September 21, 2014 to February 27, 2021. Therefore, fact of overpayment is established.

While OWCP indicated that the period of the overpayment began on May 1, 2011, its calculations properly established that appellant received \$276,281.44 in FECA compensation for the period September 21, 2014 through February 27, 2021, while concurrently receiving OPM retirement benefits.<sup>13</sup> The Board therefore finds that appellant received an overpayment of compensation in the amount of \$276,281.44 during the period September 21, 2014 through February 27, 2021.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (February 1995, January 1997); *see also E.F.*, Docket No. 18-1320 (issued March 13, 2019); *S.H.*, Docket No. 16-0680 (issued August 4, 2016); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

<sup>9</sup> *Id.*

<sup>10</sup> *See E.F.*, *supra* note 8; *C.H.*, Docket No. 18-0772 (issued November 14, 2018); *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>11</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a), Federal (FECA) Procedure Manual, *supra* note 8.

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *Id.*

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>14</sup>

Section 10.433(a) of OWCP regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).<sup>15</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>16</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined appellant was at fault in the creation of the overpayment for the period September 21, 2014 through February 16, 2016.

OWCP paid appellant wage-loss compensation on the supplemental rolls from September 21, 2014 through February 6, 2016 and on its periodic rolls commencing February 7, 2016. It, however, did not inform appellant until February 17, 2016 that a recipient of compensation benefits under FECA was not permitted to receive benefits under certain other federal programs including OPM retirement benefits. Therefore, there is no documented evidence to demonstrate that appellant knew or should have known at the time of his acceptance of wage-loss compensation payments for the period September 21, 2014 through February 16, 2016 that

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<sup>14</sup> *Supra* note 11 at § 8129; *see M.O.*, Docket No. 18-0686 (issued January 25, 2019); *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>15</sup> 20 C.F.R. § 10.433(a); *see also* 20 C.F.R. § 10.430.

<sup>16</sup> *Id.* at § 10.433(b); *C.H.*, *supra* note 10; *Neill D. Dewald*, 57 ECAB 451 (2006).

the payments were incorrect. As OWCP has not established that appellant accepted a payment which he knew or should have known to be incorrect,<sup>17</sup> the Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period September 21, 2014 through February 16, 2016. The case must, therefore, be remanded for consideration of waiver of recovery of the overpayment with regard to this period. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* final decision on the issue of waiver of recovery of this portion of the overpayment.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the period February 17, 2016 through February 27, 2021. The case record establishes that in a letter dated February 17, 2016, OWCP explained to appellant that the dual receipt of OPM and FECA benefits was prohibited. It also provided notice that employees who are entitled to both FECA and OPM benefits must elect which benefit to receive. Therefore, based on the circumstances of this case, appellant knew or should have known that the wage-loss compensation benefits he received were incorrect.<sup>18</sup> The Board thus finds him at fault in the creation of this portion of the overpayment, as he accepted compensation which he knew or should have known was incorrect.<sup>19</sup> As such, appellant is precluded from waiver of recovery of the overpayment of compensation for the period February 17, 2016 through February 27, 2021.<sup>20</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$276,281.44 for the period September 21, 2014 through February 27, 2021 because he concurrently received OPM retirement benefits and FECA wage-loss compensation. The Board further finds that he was without fault in the creation of the overpayment for the period September 21, 2014 through February 16, 2016, but that he was at fault in the in the creation of

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<sup>17</sup> *Supra* note 15.

<sup>18</sup> *E.K.*, Docket No. 18-0599 (issued February 26, 2020).

<sup>19</sup> *See S.U.*, Docket No. 17-1281 (issued April 2, 2018).

<sup>20</sup> *E.F.*, *supra* note 8; *E.M.*, Docket No. 17-1987 (issued July 25, 2018).

the overpayment for the period February 17, 2016 through February 27, 2021, thereby precluding waiver of recovery of that portion of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed as modified in part, and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 16, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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