

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

S.P., Appellant)

and)

U.S. POSTAL SERVICE, LEAKESVILLE POST)
OFFICE, Leakesville, MS, Employer)
_____)

**Docket No. 22-0908
Issued: November 23, 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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2022 appellant filed a timely appeal from a May 2, 2022 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,565.02 during the period October 30 through December 5, 2020 as she concurrently received Office of Personnel Management (OPM)

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 2, 2022 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.*

retirement benefits and FECA wage-loss compensation; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 2, 2009 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 30, 2009 she sustained a neck and shoulder injury as a result of reaching for a parcel wedged between two others while in the performance of duty. She stopped work on June 2, 2009 and did not return. OWCP accepted the claim for cervical intervertebral disc degeneration and a right complete rotator cuff rupture. It paid appellant wage-loss compensation on the supplemental rolls beginning July 16, 2009 and on the periodic rolls beginning April 11, 2010.

On November 23, 2020 appellant completed a Form CA-1105 indicating her election of OPM retirement benefits effective October 30, 2020. The case record reflects that OWCP received the form on December 2, 2020. OWCP continued to pay appellant wage-loss compensation for temporary total disability for the period October 30 through December 5, 2020.

On December 17, 2020 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective October 30, 2020 in lieu of FECA wage-loss compensation, requested reimbursement from OPM in the amount of \$2,865.02 for the period October 30 through December 5, 2020, and requested that OPM commence retirement annuity payments effective October 30, 2020.

On March 31, 2022 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$2,865.02 for the period October 30 through December 5, 2020. It explained that the overpayment was the result of her receipt of FECA wage-loss compensation through December 5, 2020 after having elected receipt of OPM retirement benefits effective October 30, 2020. OWCP provided a calculation of the overpayment and found that appellant was with fault in its creation as she accepted a payment she knew, or reasonably should have known, to be incorrect. It notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a prerecoupment hearing. OWCP did not receive a response from appellant.

By decision dated May 2, 2022, OWCP finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$2,565.02 for the period October 30 through December 5, 2020 for which she was at fault. It explained that the overpayment occurred because she received both FECA compensation and OPM retirement benefits for the period October 30 through December 5, 2020. OWCP reaffirmed the finding that appellant was at fault in the creation of 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.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁴ It 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.⁵

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.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

OWCP's procedures also explain that the employee must make an election between FECA benefits and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,565.02 for the period October 30 through December 5, 2020.

On November 23, 2020 appellant completed a form indicating her election of OPM retirement benefits effective October 30, 2020. However, OWCP continued to pay appellant wage-loss compensation for temporary total disability for the period October 30 through December 5, 2020.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹ The clear language of section 8116(a) of FECA, section 10.421(a)

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see also* V.B., Docket No. 19-1874 (issued June 4, 2020); R.S., Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁹ *Supra* note 6.

of OWCP's implementing regulations, and OWCP's procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.¹⁰

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period October 30 through December 5, 2020.¹¹ It was not until December 17, 2020 that OWCP informed OPM that she had elected to receive retirement annuity benefits effective October 30, 2020 in lieu of FECA wage-loss compensation and requested that OPM commence annuity payments effective retroactively to that date. OWCP also requested that OPM reimburse it for the FECA benefits paid to appellant from October 30 through December 5, 2020.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period October 30 through December 5, 2020. 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.¹² 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.¹³

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

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,565.02 for the period October 30 through December 5, 2020.¹⁵

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

¹¹ *See C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

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

¹³ *See R.R.*, Docket No. 18-0032 (issued May 3, 2018) (finding that 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).

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

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 23, 2022
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