

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

_____)
A.V., Appellant)

and)

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Washington, DC, Employer**)
_____)

**Docket No. 21-0645
Issued: September 26, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 21, 2021 appellant filed a timely appeal from a March 15, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation for which she was without fault in the amount of \$1,572.18 for the period December 21, 2020 through January 2, 2021 because she concurrently received retirement benefits from the Office of Personnel Management (OPM) and FECA wage-loss compensation benefits; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 20, 2018 appellant, then a 31-year-old financial program specialist, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2018 she injured her right hip, right hand, fingers, wrist, neck, right shoulder, right knee, and low back when she fell on debris while in the performance of duty. She stopped work on October 19, 2018. OWCP accepted the claim for a sprain of an unspecified part of the right wrist and hand, a right hip contusion, and an unspecified sprain of the right wrist. It paid appellant wage-loss compensation for total disability on the supplemental rolls beginning December 3, 2018 and on the periodic rolls beginning June 23, 2019.²

A notification of personnel action, Standard Form (SF) 50 indicated that appellant had retired on disability effective October 26, 2019.

On October 20, 2020 appellant informed OWCP that she sought to elect disability retirement benefits. In a December 15, 2020 response, OWCP requested that she complete an enclosed election of benefits form (Form CA-1105) specifying a date of election for OPM benefits.

In a December 21, 2020 Form CA-1105, appellant elected to receive benefits from OPM under Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS) in preference to any benefits to which she might be entitled to under FECA. She provided the effective date of her election as both October 21 and December 21, 2020.

On January 19, 2021 OWCP advised OPM that appellant had elected to receive retirement benefits, effective October 21, 2020, in lieu of workers' compensation benefits under FECA. It indicated that OPM should commence monthly payments effective October 21, 2020 and process her health benefits enrollment forms.

On January 19, 2021 OWCP issued a preliminary overpayment determination based on its finding that appellant had elected retirement benefits from OPM, effective October 21, 2020, but continued to receive FECA benefits.

On January 21, 2021 appellant advised that she had not received any benefits from OPM and that the date of her election of retirement benefits was December 21, 2020.

On January 26, 2021 OWCP notified OPM that appellant had elected to receive retirement benefits from OPM benefits in lieu of workers' compensation benefits under FECA. It requested that it process the transfer of her health benefits.

Appellant, in a January 29, 2021 Form CA-1105, elected to receive retirement benefits from OPM, effective December 21, 2020. She also submitted an overpayment action request form contesting that an overpayment had occurred and requesting waiver of recovery.

On February 9, 2021 OWCP informed OPM that appellant had elected OPM benefits, effective December 21, 2020, in lieu of FECA wage-loss compensation benefits. It advised that

² By decision dated April 29, 2019, OWCP denied appellant's request for authorization for a right hip arthroplasty.

OPM should begin monthly annuity payments, effective December 21, 2020, and process her health benefit enrollment forms.

On February 9, 2021 OWCP issued a preliminary overpayment determination, which superseded the January 19, 2021 preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$1,572.18 for the period December 21, 2020 through January 2, 2021. It explained that the overpayment occurred because she concurrently received FECA wage-loss compensation benefits and OPM retirement benefits during this period, which resulted in a prohibited dual benefit payment. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment. It requested that she complete the enclosed overpayment action request form and overpayment recovery questionnaire (Form OWCP -20) and afforded her 30 days to respond.

In a memorandum dated February 10, 2021, OWCP noted that appellant had requested waiver of recovery of the overpayment as she was without fault.

By decision dated March 15, 2021, OWCP finalized its preliminary overpayment determination finding that appellant received a \$1,572.18 overpayment of compensation for the period December 21, 2020 through January 2, 2021 because she concurrently received retirement benefits from OPM and FECA wage-loss compensation. It indicated that it had calculated the overpayment based on the net wage-loss compensation it had paid her for the period December 21, 2020 through January 2, 2021. OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery, noting that she had not submitted a completed OWCP-20 form or provided any financial documentation. It determined that she should forward the full amount of the overpayment, \$1,572.18, within 30 days, as repayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA³ 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.⁴ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁵ 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 for under FECA.⁶

³ *Supra* note 1.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8116(a).

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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,572.18 for the period December 21, 2020 through January 2, 2021.

On January 29, 2021 appellant notified OWCP of her election of retirement benefits from OPM effective December 21, 2020. OWCP, however, paid her wage-loss compensation for temporary total disability for the period December 21, 2020 through January 2, 2021.

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

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period December 21, 2020 through January 2, 2021. However, there is no evidence of record establishing that she actually received OPM retirement benefits during this period.¹² On January 26, 2021 OWCP advised OPM that appellant had elected OPM retirement benefits, but failed to specify the date of her election. On February 9, 2021 it notified OPM that she had elected retirement benefits, effective December 21, 2020, in lieu of FECA wage-loss compensation benefits and requested that it commence annuity payments effective to that date. The Board has previously held, however, 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

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see also D.J.*, Docket No. 20-0004 (issued May 21, 2020); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹⁰ 5 U.S.C. § 8116(a).

¹¹ *Id.* at § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 9.

¹² *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).

¹³ *V.C.*, Docket No. 20-0852 (issued January 28, 2021); *E.B.*, Docket No. 20-0183 (issued May 20, 2020).

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 fact of overpayment.¹⁵

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,572.18 for the period December 21, 2020 through January 2, 2021.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2022
Washington, DC

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

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

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

¹⁴ The election form signed by appellant on January 29, 2021 is insufficient to show that she actually began receiving OPM benefits at any time. *See R.R.*, Docket No. 18-0032, n.12 (issued May 2, 2018).

¹⁵ *C.P.*, *supra* note 12; *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

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