

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

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<b>L.W., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 22-0742</b>
	)	<b>Issued: April 25, 2023</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF PRISIONS, FEDERAL</b>	)	
<b>CORRECTIONAL COMPLEX, Beaumont, TX,</b>	)	
<b>Employer</b>	)	
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*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 April 1, 2022 appellant filed a timely appeal from a March 1, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees'

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because he would like to explain the circumstances surrounding the overpayment. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,614.64, for which he was without fault, as he concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation during the period November 7, 2021 through January 1, 2022; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On January 8, 2002 appellant, then a 42-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that he developed cervical stenosis and a pinched nerve in the left arm due to factors of his federal employment, including repetitive lifting and pulling of heavy loads. He stopped work on November 25, 2021. OWCP accepted the claim for cervical sprain/strain, displacement of cervical intervertebral disc without myelopathy, and spinal stenosis of the cervical spine. It paid appellant wage-loss compensation on the periodic rolls beginning April 28, 2022.

On August 3, 2021 appellant completed an election of benefits form indicating his election of OPM retirement benefits effective November 8, 2021.

In a letter dated September 1, 2021, OWCP suggested that appellant change his effective date of OPM benefits to November 7, 2021, the start date of a new periodic pay cycle.

On September 7, 2021 appellant completed a second election of benefits form indicating his election of OPM retirement benefits effective November 7, 2021.

On October 7, 2021 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective November 7, 2021 in lieu of FECA wage-loss compensation. It continued to pay him wage-loss compensation for temporary total disability for the period November 7, 2021 through January 1, 2022.

On January 4, 2022 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$4,614.64 for the period November 7, 2021 through January 1, 2022. It explained that the overpayment was the result of his receipt of FECA wage-loss compensation through January 1, 2022 after having elected receipt of OPM retirement benefits effective November 7, 2021. OWCP provided a calculation of the

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the March 1, 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.*

overpayment and found that appellant was at fault in its creation. It notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a precoupment hearing. OWCP provided an overpayment action request form and overpayment recovery questionnaire (Form OWCP-20) and afforded appellant 30 days to respond.

On January 26, 2022 appellant disagreed with the fact of overpayment and finding of fault, asserting that he had not received an OPM annuity check. He completed the Form OWCP-20 on January 20, 2022 and reported his monthly income as \$3,233.00 and his monthly expenses as \$3,846.59. Appellant also reported that he had \$16,000.00 in funds. He again contended that he had not received payments from OPM and that OPM had no record of his election.

By decision dated March 1, 2022, OWCP finalized the preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$4,614.64 for the period November 7, 2021 through January 1, 2022. It determined that he was without fault in the creation of the overpayment, but denied waiver of recovery 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.<sup>4</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.<sup>5</sup> 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.<sup>6</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>7</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 20 C.F.R. § 10.421(a).

<sup>8</sup> *Id.*

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.<sup>9</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$4,614.64 for the period November 7, 2021 through January 1, 2022.

On September 7, 2021 appellant completed an election of benefits form indicating his election of OPM retirement benefits, effective November 7, 2021. However, OWCP continued to pay him wage-loss compensation for temporary total disability for the period November 7, 2021 through January 1, 2022.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>10</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>11</sup>

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period November 7, 2021 through January 1, 2022.<sup>12</sup>

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>13</sup> While the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that he also received OPM retirement benefits for that same period.<sup>14</sup>

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see also* *S.P.*, Docket No. 22-0908 (issued November 23, 2022); *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).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 9.

<sup>12</sup> *See S.P.*, *supra* note 9; *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

<sup>13</sup> *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).

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

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.<sup>15</sup>

**CONCLUSION**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$4,614.64 for the period November 7, 2021 through January 1, 2022.

**ORDER**

**IT IS HEREBY ORDERED THAT** March 1, 2022 decision of Office of Workers' Compensation Programs is reversed.

Issued: April 25, 2023  
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

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