

<sup>2</sup> The Board notes that, following the June 15, 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 evidence for the first time on appeal. *Id.*

wage-loss compensation for the period December 9, 2020 through January 2, 2021; and (2) whether it properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On July 25, 2005 appellant, then a 59-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained tendinitis of the lower extremities due to factors of her federal employment. OWCP accepted the claim for herniated disc at the L4-L5 and L5-S1 levels with associated lumbar radiculitis. It paid appellant wage-loss compensation on the supplemental rolls as of December 23, 2006 and on the periodic rolls as of February 15, 2009.

On December 16, 2020 OWCP received an OPM election form, dated December 9, 2020, wherein appellant elected to receive OPM retirement benefits in lieu of FECA compensation benefits, effective December 9, 2020.

In a January 22, 2021 letter, OWCP informed OPM that appellant had elected to receive OPM retirement benefits, in lieu of FECA compensation benefits, effective December 9, 2020. It advised that OWCP terminated appellant's compensation benefits, effective December 9, 2020, and requested information as to whether OPM retirement benefits had been paid for the period December 9, 2020 through January 2, 2021.

An OWCP compensation termination fiscal worksheet dated January 22, 2021 noted that the effective date of the periodic rolls termination was December 9, 2020 due to appellant's selection of that date as the effective date for her receipt of OPM benefits. It also noted that an overpayment in the amount of \$901.96 had been created, as she continued to be paid FECA compensation for the period December 9, 2020 through January 2, 2021. The record establishes that appellant received wage-loss compensation on the periodic rolls through January 2, 2021.

On January 22, 2021 OWCP issued a preliminary determination that appellant received an overpayment in the amount of \$901.96 for the period December 9, 2020 through January 2, 2021. It explained that the overpayment was the result of her receipt of FECA compensation benefits through January 2, 2021 after having elected receipt of OPM benefits, effective December 9, 2020. OWCP determined that appellant was without fault in the creation of the overpayment, because she was not reasonably aware that the payment was incorrect at the time it was received because 30 days had not passed since the improper compensation was deposited by electronic funds transfer (EFT). It provided a calculation of the overpayment and requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation including copies of tax returns, bank account statements, bills and cancelled checks, pay slips, and other records, which supported the income and expenses listed. Additionally, OWCP notified appellant 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 subsequently received a February 8, 2021 letter wherein appellant's then-counsel noted that appellant had elected OPM retirement benefits in lieu of FECA compensation, effective December 9, 2020. Counsel requested that the election of benefits be effectuated as soon as possible.

By decision dated June 15, 2021, OWCP finalized the preliminary overpayment determination. It noted that there was an error in the preliminary determination and appellant was only overpaid in the amount of \$865.88 during the period December 9, 2020 through January 2, 2021. OWCP explained that the overpayment occurred because she concurrently received both FECA compensation and OPM retirement for that period. It found that appellant was without fault in the creation of the overpayment. However, OWCP denied waiver of recovery of the overpayment because the record contained no evidence that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

### **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>3</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.<sup>4</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>5</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>6</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>7</sup>

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>8</sup>

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.421(a).

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

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

### ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$865.88 for the period December 9, 2020 through January 2, 2021.<sup>9</sup>

On December 9, 2020 appellant completed a form, indicating her election of OPM retirement benefits in lieu of FECA compensation effective that date. OWCP, however, continued to pay her wage-loss compensation for temporary total disability for the period December 9, 2020 through January 2, 2021.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement 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 December 9, 2020 through January 2, 2021. In a letter dated January 22, 2021, OWCP informed OPM that appellant had elected to receive OPM retirement benefits, effective December 9, 2020 in lieu of FECA compensation. It advised that OWCP had terminated benefits effective December 9, 2020, and requested information about whether benefits had been paid for the period December 9, 2020 through January 2, 2021. OWCP did not receive a response from OPM before the preliminary overpayment decision was finalized on June 15, 2021. 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>12</sup> While the record establishes that appellant received FECA compensation benefits for this period, the Board finds that OWCP had not established that she also received OPM retirement benefits for that same period.<sup>13</sup>

Therefore, the Board finds that OWCP failed to meet its burden of proof to establish that the overpayment occurred.<sup>14</sup>

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<sup>9</sup> See *V.C.*, Docket No. 20-0852 (issued January 28, 2021).

<sup>10</sup> *Supra* note 5.

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

<sup>13</sup> See *R.R.*, Docket No. 18-0032 (issued May 3, 2018); *E.R.*, Docket No. 18-0084 (issued July 27, 2018). See also *V.C.*, *supra* note 9; *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).

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

**CONCLUSION**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$865.88 for the period December 9, 2020 through January 2, 2021.<sup>15</sup>

**ORDER**

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

Issued: February 3, 2023  
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

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