

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

<hr/>)	
A.I., Appellant)	
)	
and)	
)	Docket No. 22-0931
DEPARTMENT OF HOMELAND SECURITY,)	Issued: January 23, 2023
TRANSPORTATION SECURITY)	
ADMINISTRATION, FEDERAL AIR)	
MARSHAL SERVICE, South San Francisco, CA,)	
Employer)	
<hr/>)	

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 11, 2022 appellant filed a timely appeal from a March 1, 2022 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 1, 2022 decision, a ppellant submitted additional evidence to OWCP. 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.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,902.61, for the period October 22 through December 5, 2020, for which she was at fault, because she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation benefits; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On August 3, 2015 appellant, then a 29-year-old air marshal, filed a traumatic injury claim (Form CA-1) alleging that on July 27, 2015 she sustained a lumbar spine injury with bilateral sciatica when she lifted a purse, which contained mandatory equipment while in the performance of duty. She stopped work on July 28, 2015. OWCP accepted the claim for sciatica and paid appellant wage-loss compensation on the supplemental rolls beginning September 21, 2015 and on the periodic rolls beginning May 1, 2016. Appellant remained off work.

On November 4, 2020 OWCP received an election of benefits form signed by appellant on October 24, 2020, in which she indicated that, effective October 22, 2020, she was electing to receive benefits from OPM in lieu of any benefits she might be entitled to under FECA.

In a December 2, 2020 letter, OWCP requested that OPM reimburse it in the amount of \$8,902.61 for FECA benefits paid to appellant during the period October 22 through December 5, 2020. It terminated her wage-loss compensation effective December 5, 2020.

On December 22, 2021 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$8,902.61 for the period October 22 through December 5, 2020 because she elected OPM benefits in lieu of FECA benefits effective October 22, 2020 and received both, retirement benefits from OPM and compensation from OWCP concurrently, through December 5, 2020. It found that she was at fault in the creation of the overpayment. OWCP enclosed an overpayment recovery questionnaire (Form OWCP-20) and an overpayment action request form. It notified appellant that, within 30 days of the date of the letter, she could contest the overpayment and request a final decision based on the written evidence, or a precoupment hearing. Appellant did not respond.

By decision dated March 1, 2022, OWCP finalized the December 22, 2021 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$8,902.61 for the period October 22 through December 5, 2020. It found that she was at fault in the creation of the overpayment. OWCP required that appellant repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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.³ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁴

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.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶ 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. This policy also applies to reemployed annuitants.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$8,902.61 for the period October 22 through December 5, 2020.

On October 24, 2020 appellant elected OPM retirement benefits, retroactive to October 22, 2020. OWCP, however, continued to pay her wage-loss compensation on the periodic rolls from October 22 through December 5, 2020. On December 2, 2020 it requested that OPM reimburse it in the amount of \$8,902.61 for FECA benefits paid to appellant during the period October 22 through December 5, 2020.

While the record reflects that appellant received FECA wage-loss compensation benefits for the period October 22 through December 5, 2020, the case record does not establish that she also received OPM benefits for this period.⁸ The Board has previously held that the mere fact that a claimant received FECA wage-loss compensation benefits after the effective date of an OPM election will not, on its own, establish receipt of a prohibited dual benefit.⁹ Therefore, the Board finds that OWCP did not meet its burden of proof to establish that the overpayment occurred.¹⁰

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *L.H.*, Docket No. 19-1485 (issued August 14, 2020); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁸ *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

⁹ *M.D.*, Docket No. 21-0410 (issued July 7, 2022); *C.P., id.*; *J.M.*, Docket No. 15-1604 (issued May 23, 2016); *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹⁰ In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$8,902.61 for the period October 22 through December 5, 2020.

ORDER

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

Issued: January 23, 2023
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