

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

R.M., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF PRISONS, FEDERAL MEDICAL)
CENTER DEVENS, Devens, MA, Employer)

Docket No. 22-1003
Issued: March 31, 2023

Appearances:

Norma Mercedes, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 21, 2022 appellant, through counsel, filed a timely appeal from a May 17, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 17, 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 an appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on an appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,585.40 as he concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation for the period August 12 through October 9, 2021; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 24, 2011 appellant, then a 47-year-old senior correctional officer, filed an occupational disease claim (Form CA-2) alleging that he sustained anxiety and depression causally related to factors of his federal employment including supervision/custody of inmates, maintaining security, responding to emergencies and institutional disturbances, visual and physical searches of inmates, restraint training, and use of firearms. He further alleged that he had been subjected to discrimination and had prevailed in an Equal Employment Opportunity (EEO) claim. Appellant stopped work on January 5, 2012. On June 13, 2016 he began work as an independent contractor in the private sector. Appellant left this position on November 20, 2020 and did not return to work. OWCP accepted the claim for recurrent episodes of major depression and generalized anxiety disorder. It paid appellant wage-loss compensation on the supplemental and periodic rolls.

On July 11, 2021 appellant completed a form indicating his election of OPM retirement benefits, effective August 12, 2021. The case record reflects that OWCP received the form on July 16, 2021. OWCP continued to pay appellant wage-loss compensation for temporary total disability for the period August 12 through October 9, 2021.⁴

On April 6, 2022 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,585.40 for the period August 12 through October 9, 2021 because he continued to receive FECA wage-loss compensation after having elected receipt of OPM retirement benefits. It provided a calculation of the overpayment and found that he was at fault in its creation as he accepted a payment he knew, or reasonably should have known, to be incorrect. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit financial documentation including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records supporting his reported income and expenses. Additionally, it provided an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a final decision based on the written record or a precoupment hearing.

On April 19, 2022 appellant requested a decision based on the written evidence on the issues of fault and possible waiver of recovery of the overpayment.

By decision dated May 17, 2022, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$5,585.40, for which

⁴ On October 14, 2021 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective August 12, 2021 in lieu of FECA wage-loss compensation. It requested reimbursement from OPM in the amount of \$5,585.40 for the period August 12 through October 9, 2021, and requested that OPM commence retirement annuity payments effective August 12, 2021.

appellant was at fault. The hearing representative explained that the overpayment occurred because appellant received both FECA wage-loss compensation and OPM retirement benefits between August 12 and October 9, 2021. It found appellant at fault in the creation of the overpayment as he was reasonably aware that he was not entitled to FECA benefits for an overlapping period with OPM retirement benefits.

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.⁵

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁶ 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.⁷

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.⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹

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.¹⁰

ANALYSIS

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$5,585.40 for the period August 12 through October 9, 2021.

On July 11, 2021 appellant completed a form indicating his election of OPM retirement benefits effective August 12, 2021. OWCP, however, continued to pay him wage-loss

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

compensation for temporary total disability for the period August 12 through October 9, 2021. It calculated that an overpayment of \$5,585.40 was therefore created.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ 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.¹²

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period August 12 through October 9, 2021.¹³ It was not until October 14, 2021 that OWCP informed OPM that he had elected to receive retirement annuity benefits effective August 12, 2021 in lieu of FECA wage-loss compensation and requested that OPM commence annuity payments effective that date.

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.¹⁴ 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.¹⁵

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.¹⁶

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$5,585.40 for the period August 12 through October 9, 2021.¹⁷

¹¹ *Supra* note 6.

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

¹³ *See C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

¹⁴ *Id.* *See also B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹⁵ *See R.R.*, Docket No. 18-0032 (issued May 3, 2018) (The 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).

¹⁶ *See J.A.*, Docket No. 18-0259 (issued August 5, 2019).

¹⁷ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 31, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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