

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

_____)	
Y.M., Appellant)	
)	
and)	Docket No. 23-0854
)	Issued: November 8, 2023
U.S. POSTAL SERVICE, MORGAN PROCESSING & DISTRIBUTION CENTER, New York, NY, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 6, 2023 appellant filed a timely appeal from a May 12, 2023 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

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,808.57 for the period July 1 through December 3, 2022, for which he was without fault, because he concurrently received retirement

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 12, 2023 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.*

benefits from the Office of Personnel Management (OPM) and FECA wage-loss compensation; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 6, 2005 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his lower back when he sat and stood up from his driver's seat while in the performance of duty. OWCP accepted the claim for a lumbar sprain. It paid appellant wage-loss compensation for disability on the supplemental rolls, effective February 21, 2005, and on the periodic rolls, effective August 1, 2010.

By letter dated December 13, 2022, OPM advised OWCP that appellant had elected to receive OPM retirement benefits effective July 1, 2022. It enclosed a December 6, 2022 election of benefits form (Form CA-1105), whereby he elected to receive retirement benefits from OPM in lieu of workers' compensation benefits from FECA, effective July 1, 2022.

In a January 9, 2023 response, OWCP requested that OPM advise whether appellant had been paid retroactive OPM retirement benefits for the period July 1 through December 3, 2022 and also advise as to appellant's "final effective date." No response was received.

On January 18, 2023 OWCP issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$10,808.57 for the period July 1 through December 3, 2022. It explained that the overpayment occurred because he "elected to receive retirement benefits effective July 1, 2022," but was paid FECA wage-loss compensation through December 3, 2022, which resulted in a prohibited dual benefit payment. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised him that he could request waiver of recovery of the overpayment. OWCP further requested that appellant submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, and canceled checks, pay slips, and any other records supporting 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 telephone conference, a final decision based on the written evidence, or a preresoupment hearing.

By decision dated May 12, 2023, OWCP finalized its determination that appellant received a \$10,808.57 overpayment of compensation, because he elected to receive OPM benefits effective July 1, 2022, but was paid FECA wage-loss compensation through December 3, 2022. It found that he was without fault in the creation of the overpayment, but denied waiver of recovery, noting that he had not completed Form OWCP-20 or provided financial documentation. OWCP determined that appellant should forward the full amount of the overpayment, \$10,808.57, 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

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 \$10,808.57 for the period July 1 through December 3, 2022.

On December 6, 2022 appellant elected OPM retirement benefits effective July 1, 2022. OWCP, however, continued to pay him FECA wage-loss compensation through December 3, 2022. On January 18, 2023 OWCP issued a preliminary overpayment determination that an overpayment of compensation was created in the amount of \$10,808.57 for the period July 1 through December 3, 2022 because appellant "elected to receive retirement benefits effective July 1, 2022," but was paid FECA wage-loss compensation through December 3, 2022. On January 6, 2023 an OWCP claims examiner requested that OPM advise whether appellant received retroactive benefits for the period July 1 through December 3, 2022 and his final effective

³ *Supra* note 1.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.421(a).

⁸ *Id.*

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

date. However, no response was received. OWCP finalized the January 18, 2023 preliminary overpayment determination by decision dated May 12, 2023.

While the record reflects that appellant received FECA benefits for the period July 1 through December 3, 2022, OWCP has not established that he actually also received OPM benefits for this concurrent period.¹⁰ 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.¹¹ Therefore, the Board finds that OWCP failed to meet its burden of proof.¹²

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$10,808.57 for the period July 1 through December 3, 2022.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 8, 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

¹⁰ *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *M.C.*, Docket No. 18-0074 (issued August 1, 2019).

¹¹ *T.M.*, Docket No. 20-0967 (issued April 12, 2020); *C.P., id.*; *J.M.*, Docket No. 15-1604 (issued May 23, 2016); *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

¹² *T.M., id.*; *C.P., id.*