

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

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**J.B., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
CARL VINSON VA MEDICAL CENTER,  
Dublin, GA, Employer**

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**Docket No. 22-1301  
Issued: March 26, 2024**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 7, 2022 appellant filed a timely appeal from March 18 and August 22, 2022<sup>1</sup> merit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> OWCP assigned an April 22, 2017 right knee injury claim OWCP File No. xxxxxx401 and accepted right knee medial and lateral meniscal tears. The most recent OWCP decision is the August 22, 2022 overpayment decision. OWCP assigned a March 19, 2019 left knee injury OWCP File No. xxxxxx455 and accepted left knee medial and lateral meniscal tears. The most recent OWCP merit is a July 12, 2022 overpayment decision. OWCP assigned an October 14, 2020 claim for aggravation of the right knee OWCP File No. xxxxxx948 and accepted a right knee contusion on May 23, 2022. It has administratively combined the claims with OWCP File No. xxxxxx401, designated as the master file.

<sup>2</sup> The Board notes that following the August 22, 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.*

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

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,821.50, for the period October 11, 2020 through January 29, 2022, for which she was without fault, as she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether appellant has met her burden of proof to establish an additional four hours of wage-loss compensation for disability from work during the period January 6 through September 27, 2021 causally related to her accepted April 22, 2017 employment injury.

### **FACTUAL HISTORY**

On February 21, 2018 appellant, then a 54-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on April 22, 2017 she injured her left<sup>4</sup> knee when a motorized wheelchair backed into it while in the performance of duty. She did not stop work. On April 9, 2018 OWCP accepted the claim under OWCP File No. xxxxxx401 for right knee lateral and medial meniscus tears. It paid wage-loss compensation on the supplemental rolls beginning June 20, 2018, and on the periodic rolls beginning July 29, 2018.

Dr. Jonathan Harris, a Board-certified orthopedic surgeon, performed an OWCP-authorized right knee arthroscopy with medial and lateral meniscectomies on July 11, 2018. Appellant returned to full-time modified-duty work on September 10, 2018. She accepted a permanent position as a medical support assistant (MSA) on January 5, 2019. OWCP paid compensation based on appellant's actual earnings on the supplemental rolls beginning May 16, 2019, and on the periodic rolls beginning April 26, 2000.

Beginning on May 20, 2020, Dr. K. Scott Malone, a Board-certified physiatrist, recounted that appellant's right knee symptoms had worsened with severe pain exacerbated by walking. His physical examination revealed right knee swelling and tenderness to palpation along the medial joint line. Dr. Malone diagnosed other tear of the lateral and medial menisci, right knee. He opined that appellant's reported history was consistent with his clinical findings and diagnoses and submitted a series of similar treatment notes through October 29, 2021.

In a series of notes dated November 5, 2020 through March 22, 2021, Dr. Steven R. Garner, a Board-certified family practitioner, found that appellant was totally disabled from November 4 through February 12, 2021. He described her surgery and reviewed right knee x-rays which demonstrated degenerative changes. Dr. Garner reported that appellant sustained a second right knee claim on October 14, 2020 as she placed a supply order and pushed a cart into the

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The remainder of the case record indicates that the April 22, 2017 injury was to appellant's right knee rather than the left knee as described on the Form CA-1.

elevator resulting in additional right knee meniscal tears. On March 22, 2021 he determined that she could work from home on her computer beginning March 23, 2021.

On October 19, 2021 the employing establishment reported that appellant requested leave without pay (LWOP) for medical appointments on January 6, February 24, April 12, May 5, June 8, July 23, August 25, and September 8 and 27, 2021 totaling 72 hours. It further noted that she was in an LWOP status due to a denied claim in OWCP File No. xxxxxx948 and requested that OWCP verify that her medical treatment was due to her accepted condition in OWCP File No. xxxxxx401.

Appellant filed a claim for compensation (Form CA-7) on October 22, 2021 requesting 72 hours of LWOP intermittently for the period January 6 through September 27, 2021. She completed a time analysis form (Form CA-7a) on October 29, 2021 and indicated that she was claiming eight hours for each of her nine physicians' appointments from January 6 through September 27, 2021, as travel was required.

In a development letter dated November 18, 2021, OWCP informed appellant of the deficiencies of her disability claim for the period January 6 through September 27, 2021. It advised her of the type of factual and medical evidence needed and afforded her 30 days to respond.

Appellant responded on November 22, 2021 and provided a statement dated April 22, 2017 in which she asserted that all of her medical appointments were out of town and required eight hours of disability each. She asserted that including eating and waiting to see the physician, the round trip was eight hours.

Appellant retired on January 29, 2022 and was approved for OPM retirement benefits. On April 12, 2022 she completed an election of benefits form (Form CA-1105) indicating her election of OPM retirement benefits, in lieu of FECA wage-loss compensation, effective October 11, 2020. The case record reflects that OWCP received the form on April 14, 2022.

By decision dated March 18, 2022, OWCP denied, in part, appellant's claim for medical care during the period January 6 through September 27, 2021. It noted that as a general rule, a maximum of four hours of wage-loss compensation should be allowed for routine medical appointments. OWCP found that there was sufficient evidence to support authorization for payment of four hours on January 6, February 24, April 12, May 5, June 8, July 23, August 25, and September 8 and 27, 2021. It denied the additional four hours requested on those dates as it calculated the travel distance of 35 miles from her home to the medical appointments, such that a need to travel a substantial distance to obtain the medical care was not supported.

On April 29, 2022 appellant informed OPM that she elected to receive OPM retirement benefits effective January 30, 2022 in lieu of FECA wage-loss compensation.

On May 3, 2022 appellant completed an additional Form CA-1105 and changed her date of election of OPM retirement benefits to January 30, 2022. OWCP received this form on May 3, 2022.

On May 4, 2022 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective January 30, 2022 in lieu of FECA, requested reimbursement

from OPM in the amount of \$92.64 for the period January 30 through April 23, 2022, and requested that OPM commence retirement annuity payments effective January 30, 2022.

On May 19, 2022 appellant completed an additional Form CA-1105 and changed her date of election of OPM retirement benefits to October 11, 2020. OWCP received this form on May 23, 2022.

In a letter dated June 9, 2022, OWCP listed appellant's dates of election of OPM retirement benefits and noted that the record did not currently support her entitlement to OPM retirement benefits prior to January 30, 2022. It requested OPM documentation to support that her retirement entitlement would extend back to October 11, 2020.

On July 15, 2022 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective October 11, 2020 in lieu of FECA benefits, requested reimbursement from OPM in the amount of \$2,821.50 for the period October 11, 2020 through January 29, 2022, and requested that OPM commence retirement annuity payments effective October 11, 2020.

On July 20, 2022 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$2,821.50 for the period October 11, 2020 through January 29, 2022. It explained that the overpayment was the result of her receipt of FECA wage-loss compensation through January 30, 2022 after having elected receipt of OPM retirement benefits effective October 11, 2020. OWCP provided a calculation of the overpayment and found that appellant was without fault in its creation. It provided an overpayment recovery questionnaire (Form OWCP-20), to determine a reasonable repayment method, and advised her that she could request waiver of recovery of the overpayment. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records that support income and expenses. Additionally, it notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing. OWCP did not receive a response from appellant.

By decision dated August 22, 2022, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$2,821.50 for the period October 11, 2020 through January 29, 2022. It determined that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because no financial information had been submitted.

### **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>5</sup>

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<sup>5</sup> 5 U.S.C. § 8102(a).

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.<sup>6</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>7</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>8</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>9</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>10</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,821.50 for the period October 11, 2020 through January 29, 2022.

On May 19, 2022 appellant completed a Form CA-1105 indicating her election of OPM retirement benefits effective October 11, 2020. However, OWCP had continued to pay appellant wage-loss compensation for temporary total disability for the period October 11 through January 29, 2022.

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

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period October 11, 2020 through January 29, 2022.<sup>13</sup> It was not until

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<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> *Id.* at § 8116(a).

<sup>8</sup> 20 C.F.R. § 10.421(a).

<sup>9</sup> *Id.*

<sup>10</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>11</sup> *Id.*

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

<sup>13</sup> *See S.P.*, *supra* note 10; *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

July 15, 2022 that OWCP informed OPM that she had elected to receive retirement annuity benefits effective October 11, 2020 in lieu of FECA wage-loss compensation and requested that OPM commence annuity payments effective retroactively to that date. OWCP also requested that OPM reimburse it for the FECA benefits paid to appellant from October 11, 2020 through January 29, 2022.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period October 11, 2020 through January 29, 2022.<sup>14</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>15</sup> While the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that she also received OPM retirement benefits for that same period.<sup>16</sup>

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

An employee seeking benefits under FECA<sup>18</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>19</sup> The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>20</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>21</sup> Whether a particular injury causes an employee to become disabled from

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

<sup>15</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>16</sup> See *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

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

<sup>18</sup> *Supra* note 3.

<sup>19</sup> *C.L.*, Docket No. 20-0520 (issued July 7, 2022); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>20</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>21</sup> *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.<sup>22</sup>

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>23</sup>

OWCP's procedures provide that wages lost for compensable medical examinations or treatment may be reimbursed.<sup>24</sup> A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.<sup>25</sup> Wage loss is payable only if the examination, testing, or treatment is provided on a day which is a scheduled workday and during a scheduled tour of duty. Wage-loss compensation for medical treatment received during off-duty hours is not reimbursable.<sup>26</sup> The evidence should establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable.<sup>27</sup> For a routine medical appointment, a maximum of four hours of compensation may be allowed.<sup>28</sup> However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care. The claims for wage loss should be considered on a case-by-case basis.<sup>29</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant has not met her burden of proof to establish an additional four hours of wage-loss compensation for disability from work during the period January 6 through September 27, 2021, causally related to her accepted April 22, 2017 employment injury.

In his reports of record, Dr. Garner found that appellant was totally disabled from November 4 through February 12, 2021 due to her surgery and degenerative changes. He reported that she sustained a second right knee injury on October 14, 2020 as she placed a supply order and pushed a cart into the elevator resulting in additional right knee meniscal tears. As noted above, evidence that does not address the accepted conditions and specific dates of disability is of no

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<sup>22</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

<sup>23</sup> *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, *id.*

<sup>24</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Wages Lost for Medical Examination or Treatment*, Chapter 2.901.19 (February 2013).

<sup>25</sup> *Id.* at Chapter 2.901.19a; *see M.B.*, Docket No. 19-1049 (issued October 21, 2019); *T.S.*, Docket No. 19-0347 (issued July 9, 2019); *E.W.*, Docket No. 17-1988 (issued January 28, 2019).

<sup>26</sup> *Id.* at Chapter 2.901.19a(2).

<sup>27</sup> *Id.* at Chapter 2.901.19a(3).

<sup>28</sup> *A.F.*, Docket No. 20-0522 (issued November 4, 2020).

<sup>29</sup> *Id.* at Chapter 2.901.19c.

probative value and is insufficient to establish the claim.<sup>30</sup> These reports are therefore insufficient to establish appellant's claims for compensation.

As appellant has not provided rationalized medical opinion evidence sufficient to establish an additional four hours of wage-loss compensation for disability from work during the period January 6 through September 27, 2021 causally related to the accepted employment injury, the Board finds that appellant has not met her burden of proof.

The Board also notes that OWCP's procedures provide that wages lost for compensable medical examination or treatment may be reimbursed.<sup>31</sup> The evidence should establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable. For a routine medical appointment, a maximum of four hours may be allowed.<sup>32</sup> While appellant alleged eight hours of wage loss for attending medical appointments during the period January 6 through September 27, 2021, the medical evidence of record does not establish that she attended more than one medical appointment on each date or was disabled from work during this time frame as a result of the accepted employment injuries.<sup>33</sup> The record reflects that OWCP paid her four hours of wage loss on January 6, February 24, April 12, May 5, June 8, July 23, August 25, September 8 and 27, 2021 for attending medical appointments. As the evidence of record did not substantiate a need for more than four hours of compensation for appellant's routine medical appointments, she has not established entitlement to additional wage-loss compensation due to medical treatment on January 6, February 24, April 12, May 5, June 8, July 23, August 25, September 8 and 27, 2021.<sup>34</sup>

The Board finds that as appellant failed to submit probative evidence contemporaneous to the claimed dates of disability, she has not met her burden of proof.<sup>35</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,821.50 for the period October 11, 2020 through January 29, 2022. The Board further finds that appellant has not met her burden of proof to establish an additional four hours of disability from work during the period January 6 through September 27, 2021, causally related to her accepted April 22, 2017 employment injury.

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<sup>30</sup> See *E.B.*, Docket No. 19-1390 (issued May 7, 2020); *K.D.*, Docket No. 19-0628 (issued November 5, 2019); *A.T.*, Docket No. 19-0410 (issued August 13, 2019); see also *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>31</sup> *Supra* note 24.

<sup>32</sup> *Id.*

<sup>33</sup> *A.F.*, *supra* note 28; *V.H.*, Docket No. 19-0807 (issued December 3, 2019).

<sup>34</sup> *Id.*

<sup>35</sup> *A.F.*, *supra* note 28; *A.L.*, Docket No. 17-1975 (issued August 21, 2018).



**ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2022 decision of the Office of Workers' Compensation Programs is affirmed. The August 22, 2022 decision is reversed.

Issued: March 26, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board