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C.N., Appellant	)	
	)	
and	)	Docket No. 24-0549
	)	Issued: April 2, 2025
U.S. POSTAL SERVICE, POST OFFICE,	)	
Cleveland, OH, Employer	)	
	)	

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

## JURISDICTION

On April 25, 2024 appellant, through counsel, filed a timely appeal from a March 28, 2024 merit decision of the OWCP of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the March 28, 2024 decision and on appeal, 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.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,041.51, during the period November 1, 2022 through February 25, 2023, as she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation; 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**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 14, 1988 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim alleging that on that day she slipped on water in the restroom and fell while in the performance of duty. OWCP accepted the claim for right shoulder contusion, low back strain, right shoulder strain, bilateral shoulder adhesive capsulitis, and bilateral osteoarthritis of the lower legs. The record reflects that OWCP paid appellant wage-loss compensation on the supplemental rolls from December 5, 2002, and continuously on the periodic rolls from September 15, 2019.

A November 7, 1987 notification of personnel action (PS Form 50) indicated that appellant's retirement plan was the Federal Employees Retirement System (FERS).

On December 29, 2022 OWCP received a copy of a form letter signed by appellant on October 5, 2022, electing OPM retirement benefits in preference to FECA benefits effective November 1, 2022.

By letter dated January 10, 2023, OWCP sent appellant an election form (Form CA-1105) advising appellant of her FECA entitlement so that she could make an informed election. It advised her that for the period January 1 through 28, 2023 she received a weekly compensation amount of \$1,264.73; a monthly compensation amount of \$4,492.58; and a four-week compensation amount of \$4,147.00. OWCP explained that although compensation is paid each four weeks, "the monthly payment is also shown for ease of comparison." It pointed out that annuity benefits paid by OPM and benefits for FECA wage-loss compensation were not payable for the same time period.

A memorandum of telephone call (Form CA-110) dated January 19, 2023, indicated that OWCP received a call from the OPM retirement center. OPM indicated that it had received appellant's election of benefits forms dated December 29, 2022, and January 5, 2023, electing OPM benefits as of November 1, 2022, but that the forms had not yet been processed to avoid an overpayment. A Form CA-110 dated January 25, 2023 indicated that OWCP received another call from OPM requesting that OWCP send a "stop letter" if appellant was no longer receiving FECA wage-loss compensation benefits. A Form CA-110 dated March 15, 2023 indicated that a call was

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<sup>4</sup> Docket No. 24-0034 (issued March 27, 2024).

received from the OPM retirement center. OPM advised that OWCP had its election letter and was waiting for OWCP's stop letter.

On March 13, 2023 OWCP received a Form CA-1105 signed by appellant on March 6, 2023, in which she selected OPM retirement benefits "in preference to" FECA benefits and noted that her election date was November 1, 2022.

By preliminary overpayment determination dated March 17, 2023, OWCP declared an overpayment of compensation in the amount of \$10,041.51, for receipt of dual OPM and FECA benefits for the period November 1, 2022 through February 25, 2023. It found that appellant was without fault in the creation of the overpayment because she was entitled to FECA benefits at the time she accepted the payments, which was prior to her retroactive election of OPM benefits.

On March 20, 2023 OWCP notified OPM that appellant had elected to receive benefits from OPM effective November 1, 2022. It requested that OPM reimburse it in the amount of \$10,041.51 "for FECA benefits paid during the period November 1, 2022 to February 25, 2023."

Appellant disagreed with the March 17, 2023 preliminary overpayment determination and the amount of the overpayment, and submitted two overpayment recovery questionnaires (Form OWCP-20) dated March 24 and April 2, 2023. On March 24 and April 7, 2023 she requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding a possible waiver of the overpayment. Appellant argued that she was not at fault, and that she believed that the money she received was due to her. She listed her monthly income, expenses, and assets. Appellant did not submit any financial documentation with her request.

Following a June 5, 2023 preliminary review of the written record, the OWCP hearing representative found that the March 17, 2023 preliminary overpayment determination should be remanded back to OWCP for additional development because there was no confirmation of record that OPM began paying appellant benefits on November 1, 2022. Further development was also necessary to determine whether appellant was without fault, if appellant made a future, not retroactive election.

In a June 27, 2023 Form OWCP-20, appellant listed her monthly income as \$3,958.16. She listed her monthly expenses totaling \$2,975.00. Appellant listed assets of \$531.78. She did not submit any financial documentation with her request.

On July 31, 2023 OPM completed OWCP's form dated July 5, 2023. The form indicated that it was in follow up to a letter dated March 20, 2023, which advised that appellant had elected to receive OPM retirement benefits effective November 1, 2022. By checkmarks, OPM indicated that an application for OPM retirement benefits had been received, that benefits were payable, that benefits had been paid, and that payments were currently being made.

On August 17, 2023 OWCP received one page of a bank statement showing withdrawals and a negative balance of \$100.00.

On August 28, 2023 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$10,041.51, for the period November 1, 2022 through February 25, 2023, because she continued to receive FECA wage-loss compensation after she elected OPM retirement benefits. It noted that she elected OPM retirement

benefits effective November 1, 2022, and calculated that she received \$445.82 in FECA benefits for the period November 1 through 5, 2022; for the period November 6 through December 3, 2022, she received \$2,496.60; for the period December 4 through 31, 2022, she received \$2,405.35; for the period January 1 through 28, 2023, she received \$2,346.87; and for the period January 29 through February 25, 2023, she received \$2,346.87, which resulted in a total overpayment of \$10,041.51. OWCP found that appellant was at fault in its creation as she accepted payments she knew, or reasonably should have known, to be incorrect. It explained that since the claimant knowingly selected an election date of November 1, 2022, and it was unable to or otherwise failed to stop compensation benefits timely, the claimant must be found with fault as she accepted a payment that she reasonably knew she was not entitled to. OWCP further explained that the claimant could only be found without fault if she elected a date in the past and received FECA wage-loss compensation beyond the election date, because she would have been entitled to FECA benefits at the time she accepted them, *i.e.*, prior to her retroactive election of OPM benefits. That did not occur in this case, as the claimant did not make a retroactive election, she made a future election, and was aware that she was not entitled to. OWCP requested that appellant complete an enclosed Form OWCP-20 and submit financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records supporting the reported income and expenses. Additionally, it provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written record or a prerecoupment hearing.

On September 18, 2023 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 13, 2023. In a letter dated September 14, 2023, she explained that she did not receive her first payment from OPM until March 1, 2023, and that her payments from OWCP ended in February 2023. Appellant submitted an incomplete Form OWCP-20 and explained that she had already completed it twice previously.

By decision dated March 28, 2024, OWCP's hearing representative explained that the overpayment occurred because appellant received both FECA wage-loss compensation and OPM retirement benefits during the period November 1, 2022 through February 25, 2023. She explained that appellant elected and received OPM retirement benefits effective November 1, 2022, and explained how the overpayment was calculated for the period November 1, 2022 through February 25, 2023 for a total overpayment of \$10,041.51. The hearing representative found appellant at fault in the creation of the overpayment, as she was reasonably aware that she was not entitled to FECA benefits for an overlapping period with OPM retirement benefits and that appellant had begun receiving OPM retirement benefits in November 2022.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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 duty.<sup>5</sup> Section 8116 limits the right of an employee to receive compensation. While an employee

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<sup>5</sup> 5 U.S.C. § 8102(a).

is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup>

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.<sup>7</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>8</sup> OWCP's procedures also explain that the employee must make an election between FECA and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.<sup>9</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$10,041.51, for the period November 1, 2022 through February 25, 2023.

The record reflects that on October 5, 2022 appellant elected OPM retirement benefits effective November 1, 2022, but instead she continued to receive FECA wage-loss compensation benefits for the period November 1, 2022 through February 25, 2023.

The record further reflects a series of telephone calls made to OWCP from OPM noting appellant's election of OPM benefits effective November 1, 2022, and requesting a copy of a stop letter from OWCP indicating that appellant was no longer receiving FECA benefits. In a Form CA-110 dated January 19, 2023, OPM advised it had not yet processed appellant's election form to avoid an overpayment. CA-110 forms dated January 25, 2023 and March 15, 2023 indicated that OPM was still waiting for receipt of OWCP's "stop letter." These CA-110 forms memorializing telephone calls from OPM to OWCP establish that OPM had not yet paid appellant retroactive OPM retirement benefits as of November 1, 2022.

Although the letter sent by OWCP on July 5, 2023 and returned by OPM on July 31, 2023 indicates that payments had been made as of November 1, 2022, there is contradictory evidence contained in the record regarding whether this is factually accurate. The Board finds, as there is a discrepancy between the OPM checkmark letter and the communication between OPM and OWCP regarding whether appellant actually received dual benefits from OPM and OWCP during the alleged overpayment period, OWCP failed to meet its burden of proof.<sup>10</sup>

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<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(a).

<sup>8</sup> *Id.*

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see R.M.*, Docket No. 22-1103 (issued March 31, 2023); *see also R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

<sup>10</sup> *T.M.*, Docket No. 20-0967 (issued April 12, 2020).

**CONCLUSION**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$10,041.51, during the period November 1, 2022 through February 25, 2023.<sup>11</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 28, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 2, 2025  
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

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<sup>11</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.