

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

C.N., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
LOGISTICS AGENCY, Stockton, CA, Employer)

**Docket No. 16-0134
Issued: March 8, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 29, 2015 appellant filed a timely appeal of the September 25, 2015 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$14,234.11 overpayment of compensation for the period June 1, 2012 to June 27, 2015; (2) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² In a June 4, 2004 decision, the Board affirmed a June 29, 2003 OWCP decision finding an overpayment of compensation in the amount of \$5,610.14 from October 12, 1998 to December 28, 2002 for which appellant was without fault.³ The overpayment was created because he had received a prohibited dual benefit for the period noted. The prior facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

From April 5, 2002 to April 7, 2015 OWCP provided appellant an EN1032 form to complete which stated:

“PART D--OTHER FEDERAL BENEFITS OR PAYMENTS

“2. SSA Retirement Benefits. Report any benefits received from the Social Security Administration (SSA) which you receive as part of an annuity under the Federal Employees' Retirement System (FERS). DO NOT report any benefits received from the SSA on account of employment in the private sector.

“a. Do you receive benefits from the SSA as part of an annuity for Federal service? Yes or No: _____ Monthly Amount: _____ Note: If you receive Social Security disability benefits, those SSA benefits may be reduced due to your receipt of FECA benefits. Please report SSA disability benefits in the response to question 4, Part D, below.”

* * *

“PART H -- CERTIFICATION

“I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third[-]party settlement, and any monies or income or change in monies or income from Federally assisted disability or benefit programs.

“I certify that all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief. I have placed 'Not Applicable' (N/A) or 'None' next to those questions that do not apply to me or my claim.”

From April 5, 2002 to April 14, 2015 appellant completed the EN1032 forms.

² On January 2, 1997 appellant, then a 52-year-old meat cutter, filed a claim alleging that on January 2, 1997 he injured his back when lifting a piece of beef. OWCP accepted that appellant sustained a lumbar strain and displacement of lumbar intervertebral disc without myelopathy and authorized a lumbar fusion. He stopped work on January 2, 1997 and thereafter retired. Appellant was placed on the periodic compensation rolls.

³ Docket No. 04-172 (issued June 4, 2004).

In a memorandum dated October 30, 2014, the employing establishment advised OWCP that appellant was a Federal Employment Retirement Systems (FERS) retiree who had reached full retirement age. It indicated that there was currently no information to determine if appellant was in receipt of SSA benefits. The employing establishment instructed OWCP to contact SSA to determine present benefits and the FERS offset amount that should be deducted from compensation benefits.

On November 26, 2014 the SSA provided OWCP with a FERS/SSA dual benefits calculation form. It noted that appellant was entitled to retirement benefits subject to an SSA/FERS offset from June 2012 through the present time. In a FERS offset calculation dated June 26, 2015, OWCP calculated that for the period June 1 to November 30, 2012 appellant received an overpayment of \$2,211.08; from December 1 to 31, 2012 appellant received an overpayment of \$380.99; from January 1, 2013 to November 30, 2014 appellant received an overpayment of \$4,226.02; from December 1, 2013 to November 30, 2014 appellant received an overpayment of \$4,686.84 and from December 1, 2014 to June 27, 2015 appellant received an overpayment of \$2,729.17. The total overpayment for the period June 1, 2012 to June 27, 2015 was \$14,234.11.⁴

In a letter dated June 30, 2015, OWCP informed appellant that he was receiving FERS/SSA dual benefits. It advised that the portion of SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits and federal retirement benefits concurrently is a prohibited dual benefit. Therefore, SSA benefits which are attributable to the federal service of an employee covered under FECA must be adjusted for the FERS portion of the SSA benefits and in compliance his compensation would be offset.

On July 7, 2015 OWCP made a preliminary determination that appellant had received a \$14,234.11 overpayment of compensation from June 1, 2012 to June 27, 2015 because he was in receipt of FERS and SSA benefits for the period June 1, 2012 to June 27, 2015. It noted that the portion of SSA benefits earned as a federal employee, which is part of the FERS retirement package, and the receipt of FECA benefits concurrently is a prohibited dual benefit. Therefore, the SSA benefits which were attributable to the federal service of an employee covered under FECA must be deducted from FECA.⁵

OWCP also found appellant at fault in the creation of the overpayment because the EN1032 forms for that period submitted by appellant specifically denied receipt of any retirement or SSA benefits. It informed appellant that he had the right to submit evidence or arguments to dispute the overpayment or finding of fault. OWCP also informed him that he had a right to a prerecouperment hearing before an OWCP hearing representative. It instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

⁴ The total amount calculates to \$14,234.10 rather than \$14,234.11.

⁵ OWCP calculated the overpayment noting that the SSA benefits prepared a dual benefits calculation outlining appellant's entitlement to SSA benefits with and without FERS. It noted FECA benefits are issued every 28 days and SSA benefits are paid monthly. To accurately calculate his overpayment benefits OWCP determined the 28-day and the daily amount of his SSA benefits based on his federal service.

On July 14, 2015 appellant requested a telephone conference. He submitted an overpayment recovery form and argued that the overpayment occurred through no fault of his own. Appellant indicated that, when his wife died, he notified SSA of her death and was informed that he could collect social security benefits. He noted being informed that there would be no conflict if he received FECA benefits concurrently with SSA benefits. Appellant noted reporting his wife's death in 2010 to OWCP and his benefits were reduced. He reported monthly income of \$2,384.00, monthly expenses of \$3,652.00, no cash on hand, a checking account balance of \$2,200.00, and a savings account balance of \$400.00.

In a decision dated September 25, 2015, OWCP found that appellant received a \$14,234.11 overpayment of compensation from June 1, 2012 to June 27, 2015 for which he was at fault in creating. It advised that the overpayment occurred because he was in receipt of FERS and SSA dual benefits for the period June 1, 2012 to June 27, 2015. OWCP noted that the portion of SSA benefits earned as a federal employee is part of the FERS retirement package and the concurrent receipt of FECA benefits and those federal retirement benefits is a prohibited dual benefit. It found that appellant was at fault in creating the overpayment because he failed to provide information which he knew or should have known to be incorrect. OWCP noted that for the period June 1, 2012 to June 27, 2015 appellant failed to report on the EN1032 forms his receipt of SSA benefits. As he knowingly failed to report the receipt of those benefits, he was found at fault in the creation of the overpayment. OWCP noted that appellant had submitted a completed overpayment questionnaire form, and after reviewing appellant's financial situation determined that the overpayment would be collected by withholding \$200.00 from continuing compensation payments every four weeks, beginning October 17, 2015.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of FECA⁶ states:

“(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services....

⁶ 5 U.S.C. § 8116(a).

“However, eligibility for or receipt of benefits under subchapter 3 of [C]hapter 83 of this title or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-7 explains that FECA benefits would be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbar strain and displacement of lumbar intervertebral disc without myelopathy and authorized a lumbar fusion. He stopped work on January 2, 1997 and thereafter retired. Appellant was placed on the periodic compensation rolls and he was paid compensation benefits under FECA. The record establishes that starting on June 1, 2012 appellant began receiving SSA benefits. The record supports that he simultaneously received SSA and FECA benefits for the period June 1, 2012 to June 27, 2015. In this case, OWCP properly determined that for the period June 1, 2012 to June 27, 2015, appellant received an overpayment in the amount of \$14,234.11 due to his receipt of dual benefits. Appellant did not dispute that he received the overpayment in question, nor does he dispute the amount of the overpayment. FECA explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that OWCP properly determined fact and amount of the overpayment that covered the period June 1, 2012 to June 27, 2015.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹¹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹²

⁷ *Id.*

⁸ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-9 (issued February 3, 1997).

¹⁰ The Board finds that the one cent calculation error is harmless error.

¹¹ 5 U.S.C. § 8129(b).

¹² *Gregg B. Manston*, 45 ECAB 344 (1994).

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁴

ANALYSIS -- ISSUE 2

OWCP applied the second standard of 20 C.F.R. § 10.433(a) in determining that appellant was at fault in creating the overpayment. In order for OWCP to establish that he was at fault in creating the overpayment of compensation, it must establish that appellant failed to furnish information which the individual knew or should have known to be material.

Appellant began to receive SSA benefits on June 1, 2012 and continued to receive them until June 27, 2015. From April 5, 2002 to April 14, 2015 appellant had regularly completed the Form EN1032 which specifically stated that he must immediately report "any monies or income or change in monies or income from federally assisted disability or benefit programs," and any retirement benefits or SSA benefits under FERS. As noted above, the evidence establishes for the EN1032 forms covering the period June 1, 2012 to June 27, 2015, appellant failed to report his receipt of SSA benefits. These EN1032 forms provided information to appellant regarding reporting income or monies from federally-assisted programs such as SSA.

The record reflects that on EN1032 forms dated April 15, 2013, April 23, 2014 and April 14, 2015, which cover the previous 15 months, appellant signed and acknowledged: "I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs." In these forms he reported receiving no retirement benefits, no SSA benefits and no other federal benefits.

Each of these forms advised appellant of the need to update information or change in monies or income from April 5, 2002 to April 14, 2015, and is evidence supporting that appellant was not forthcoming with providing information that was material. Consequently, the evidence establishes that appellant failed to furnish information which he knew or should have known to be material. The Board therefore finds that OWCP met its burden of proof to establish that appellant was with fault in creating the overpayment, thereby precluding waiver of recovery.

¹³ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹⁴ *Id.* at § 10.433(b).

Appellant noted that his wife died, he had notified SSA of her death, and he was informed that he could collect SSA benefits. He indicated that he was informed that there would be no conflict in receiving OWCP benefits and SSA benefits concurrently. Appellant further noted that he was told that he could receive his wife's social security benefits. However, as previously set forth, the EN1032 forms sent to him clearly advised appellant of the circumstances in which he had to report any monies or income or change in monies or income from federally-assisted disability or benefit programs.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁵

ANALYSIS -- ISSUE 3

With respect to the \$200.00 withheld from appellant's continuing compensation payments to recoup the amount of the outstanding overpayment, OWCP's regulations note the factors to be considered in determining repayment from continuing compensation.¹⁶ As noted above OWCP must take into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁷

Prior to OWCP's September 25, 2015 decision, appellant submitted an overpayment recovery questionnaire dated July 14, 2015 in which he indicated that his monthly income was \$2,384.00 and that his monthly expenses totaled \$3,652.00. Although there was no proof submitted by appellant to verify the specific income and expenses claimed, the record indicates that appellant's monthly expenses exceed his monthly income by approximately \$1,268.00. There is no indication in OWCP's September 25, 2015 decision or elsewhere in the record that OWCP evaluated appellant's financial situation in setting the rate of adjustment at \$200.00 from each continuing compensation payment. Therefore, the Board finds that OWCP abused its discretion in determining the rate of adjustment in this case and must redetermine the rate of

¹⁵ *Id.* at § 10.441(a). See *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993); *Roger Seay*, 39 ECAB 441 (1988).

¹⁶ *Id.*

¹⁷ *Id.*

adjustment after considering the evidence of record concerning appellant's financial circumstances.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation from June 1, 2012 to June 27, 2015 in the amount of \$14,234.11. The Board finds that he was not "without fault" in the creation of the overpayment. The Board further finds that the case is set aside with respect to the rate of recovery from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2015 decision of the Office of Workers' Compensation Programs is affirmed as to the issues of fact and amount of overpayment and waiver of recovery but is remanded on the issue of recovery.

Issued: March 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *Stephen A. Hund*, 47 ECAB 432 (1996) (where the Board found that OWCP abused its discretion in determining the rate of adjustment without considering the evidence of record including an overpayment questionnaire).