

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

R.C., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS AIR STATION, Yuma, AZ, Employer**

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**Docket No. 14-1383
Issued: December 5, 2014**

Appearances:
Linda J. Cerasale, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 2, 2014 appellant, through his representative, filed a timely appeal of a February 3, 2014 merit decision and a May 7, 2014 nonmerit 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.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,079.47 for the period September 1, 2012 through December 14, 2013 because he received full compensation benefits concurrent with Social Security Act (SSA) retirement benefits; (2) whether appellant was at fault in creating the overpayment, thereby precluding waiver of recovery; (3) whether OWCP properly required repayment of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation; and (4) whether OWCP properly denied appellant's request for a precoupment hearing.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant argues that he was unaware that he was receiving dual benefits as he thought he was in receipt of disability benefits and not retirement benefits from SSA.

FACTUAL HISTORY

This case has previously been before the Board. The Board, by decision dated April 10, 2001, set aside OWCP's October 25, 1999 denial of appellant's request for the purchase of a whirlpool spa tub due to a conflict in the medical opinion evidence.² OWCP had accepted that he sustained cervical and lumbosacral strains, internal derangement of the left knee and subluxation at L5 when he slipped on a truck step on December 4, 1985.³ In an October 29, 2004 decision, the Board reversed OWCP's September 15, 2003 decision terminating compensation.⁴ The Board, in an April 18, 2005 decision reversed a June 23, 2004 OWCP decision concerning an overpayment of compensation as it found that he was not in receipt of dual payments for the period April 1, 1990 through October 4, 2003.⁵ On August 23, 2005 the Board issued an order denying the Director's petition for reconsideration.⁶

Appellant completed and signed a Form EN1032 on September 7, 2013 indicating that he had not worked for the previous 15 months, was not self-employed and had not received either retirement benefits or SSA benefits as part of an annuity under the Federal Employees Retirement System (FERS). He noted that he received SSA benefits for his private sector employment and disability. This form stated, "I understand that I must immediately report to OWCP any improvement 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 a facsimile (fax) transmittal dated September 24, 2013, OWCP requested SSA to provide information regarding the dual benefits appellant received. It forwarded a form entitled "FERS SSA DUAL BENEFITS CALCULATIONS FAX TRANSMITTAL." Appellant's name, date of birth and social security number were noted on the form. OWCP also provided information regarding the date he was first eligible to receive benefits under FECA. The form asked SSA to provide separate benefit calculations of SSA with FERS and SSA without FERS.

An SSA representative responded on November 19, 2013. Effective September 2012, appellant's SSA rate with FERS was \$1,453.90 a month. Excluding his FERS contributions, he would have received only \$1,385.20 in SSA benefits a month. Beginning December 2012, the amounts increased to \$1,478.60 (with FERS) and \$1,408.70 (without FERS). Effective

² Docket No. 00-1203 (issued April 10, 2001).

³ On the nonfatal summary sheet, OWCP lists appellant's post-traumatic stress syndrome under concurrent disabilities not due to the accepted employment injury.

⁴ Docket No. 04-253 (issued October 29, 2004).

⁵ Docket No. 04-2136 (issued April 18, 2005).

⁶ *Order Denying Petition for Reconsideration*, Docket No. 04-2136 (issued August 23, 2005).

December 5, 2013, OWCP reduced appellant's 28-day compensation rate by \$64.52 based on the recent information provided by SSA.

On December 30, 2013 OWCP issued a preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$1,079.47 for the period September 1, 2012 through December 14, 2013. It explained that part of his SSA retirement benefits were subject to offset. For the period September 1 through November 30, 2012, the FERS offset (based on 28 days) was \$2.2648 per day for 91 days equaling \$206.10. For the period December 1, 2012 through December 14, 2013 the FERS offset (based on 28 days) was \$2.3044 per day for 379 days equaling \$873.37. This created an overpayment in the amount of \$1,079.47. OWCP noted that appellant's compensation had not been reduced effective September 1, 2012 and thus, an overpayment existed. It found that he was at fault in the creation of the overpayment because he should have known or reasonably been aware that he was not entitled to receive SSA retirement benefits and FECA benefits at the same time. OWCP advised appellant of his right to either request a telephone conference, request a decision on the written record, or to request a precoupment hearing with the Branch of Hearings and Review. Appellant was afforded 30 days to respond in writing to the preliminary determination but did not respond.

By decision dated February 3, 2014, OWCP finalized the overpayment decision. It denied waiver of recovery of the overpayment because appellant was at fault in the creation of the overpayment. OWCP directed recovery of the overpayment by deducting \$300.00 from his continuing compensation payments every 28 days.

In a letter dated February 4, 2014, appellant and his wife requested a precoupment hearing and submitted a completed overpayment questionnaire form.

By decision dated May 7, 2014, the Branch of Hearings and Review denied appellant's February 5, 2014 request for a hearing finding that, "The final decision concerning an overpayment is not subject to the hearing provision of 5 U.S.C. § 8124(b)." It noted that it did not receive a request for a hearing following the preliminary overpayment determination.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁷

OWCP's procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: "in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal

⁷ 5 U.S.C. § 8116(d). See *D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

service.”⁸ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA in the amount of the claimant’s benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁹

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits from September 1, 2012 to December 14, 2013. As previously stated, the portion of SSA benefits he earned as federal employee as part of his FERS retirement package and the receipt of benefits under FECA and FERS benefits concurrently is a prohibited dual benefit.¹⁰ OWCP requested and SSA provided information regarding appellant’s applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefits he received from September 1, 2012 to December 14, 2013, created an overpayment of compensation in the amount of \$1,079.47.

The Board has reviewed OWCP’s calculations of the dual benefits appellant received for the period September 1, 2012 to December 14, 2013 and finds that it properly determined that he received benefits totaling \$1,079.47 for this period, thus creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ provides: Adjustment 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 FECA or would be against equity and good conscience.¹²

OWCP may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of

⁸ See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee’s federal service.

⁹ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

¹⁰ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

¹¹ 5 U.S.C. § 8129(b).

¹² *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹³

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 found appellant at fault in creating the overpayment because he accepted a payment that he knew or should have known was incorrect. However, it did not adequately explain this finding. OWCP based fault on appellant's knowledge that he knew he was receiving SSA retirement benefits and not disability benefits. It bases its decision on an assumption that he should have been aware that his SSA disability payments had been converted into retirement benefits. OWCP has offered no proof supporting this contention. Appellant has stated that he was unaware that his benefits from SSA were for retirement and not for his disability. OWCP must establish that he knew or should have known beginning September 2012 that he was accepting both SSA and FERS retirement benefits and FECA compensation benefit. The Board finds that the record is devoid of any evidence showing that appellant was aware that his SSA disability benefits became part of his FERS retirement benefits on September 1, 2012. As OWCP has not shown that he knew or should have known that he was accepting dual payments, it erred in finding that he was at fault in the creation of the overpayment.

The Board will set aside OWCP's February 3, 2014 decision on the issue of fault. On remand, OWCP must determine whether appellant is eligible for waiver of recovery of the overpayment and if he is not, OWCP must, by law, recover the debt. The Board will remand the case for further development of the evidence on appellant's current financial circumstances and for an appropriate final decision on the issue of waiver.¹⁵

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations provide that a claimant may request a precoupment hearing with respect to an overpayment.¹⁶ Failure to request the precoupment hearing within 30 days shall

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.* at § 10.433(b).

¹⁵ In view of the Board's decision on waiver, the issue on recovering the overpayment from continuing compensation payments is moot.

¹⁶ 20 C.F.R. § 10.432.

constitute a waiver of the right to a hearing.¹⁷ The only right to a review of a final overpayment decision is with the Board.¹⁸ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.¹⁹

ANALYSIS -- ISSUE 4

The December 30, 2013 preliminary determination of overpayment provided appellant with a right to request a prerecoumpment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing.²⁰ When the final overpayment decision is issued, there is no right to a hearing or a review of the written record and OWCP does not have discretion to grant such a request. The only right to appeal is with the Board.²¹ As appellant's written request for a hearing was dated more than 30 days after the December 30, 2013 preliminary determination, it was untimely and he thus waived his right to a prerecoumpment hearing.²² Furthermore, the Branch of Hearings and Review properly advised appellant that the decision was not subject to the hearing provision under 5 U.S.C. § 8124(b).²³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,079.47 and that OWCP properly denied his request for a prerecoumpment hearing before an OWCP hearing representative as it was untimely filed. The Board further finds that OWCP has not established that appellant was at fault in creating this overpayment and the case is remanded for further development on the issue of waiver of recovery of the overpayment.

¹⁷ *Id.*; see also *L.C.*, 59 ECAB 569 (2008); *Willie C. Howard*, 55 ECAB 564 (2004).

¹⁸ 20 C.F.R. § 10.440(b).

¹⁹ *Id.*; see also *Philip G. Feland*, 48 ECAB 485 (1997).

²⁰ 20 C.F.R. § 10.432.

²¹ *Id.* at 10.440(b).

²² 20 C.F.R. § 10.432; see also *A.M.*, Docket No. 13-222 (issued September 25, 2013) and *E.V.*, Docket No. 10-1284 (issued February 3, 2011) (where appellants not only untimely requested a prerecoumpment hearing following a preliminary overpayment determination, but also submitted said request after the preliminary determination was finalized).

²³ *Id.* at § 10.440(b); see *A.M.* and *E.V.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2014 is affirmed. The decision of OWCP dated February 3, 2014 is affirmed in part, set aside in part and the case remanded for further proceedings consistent with this decision of the Board.

Issued: December 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board