

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

E.C., Appellant)
and) Docket No. 14-1743
DEPARTMENT OF VETERANS AFFAIRS,) Issued: December 4, 2014
NEW JERSEY HEALTH CARE SYSTEM,)
East Orange, NJ, Employer)

)

Appearances:
Appellant, pro se
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 August 12, 2014 appellant filed a timely appeal of a June 20, 2014 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,348.29; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required collection of the overpayment by deducting \$248.00 from appellant's continuing compensation.

On appeal, appellant argues that the overpayment was not his fault; that he answered everything truthfully and honestly; that OWCP representatives helped him complete the forms

¹ 5 U.S.C. § 8101 *et seq.*

over the telephone; that the mistake was made by OWCP; and that he is experiencing extreme financial difficulties.

FACTUAL HISTORY

On April 20, 1999 appellant, then a 54-year-old housekeeping aid, filed a traumatic injury claim alleging that on March 19, 1999 he injured his back while lifting chairs during the course of his federal employment. He stopped work on the date of the injury. OWCP accepted appellant's claim for sprain of the lumbar region of the back and nontraumatic hematoma of soft tissue. It paid compensation and medical benefits.

By letter to appellant dated February 16, 2010, the Social Security Administration (SSA) advised that beginning December 2009 his full monthly benefit before deductions was \$1,070.80 per month, and that, after deduction for medical insurance premiums of \$96.00, his regular monthly SSA payment was \$974.00. It further indicated that appellant's SSA benefits with Federal Employees Retirement System (FERS) were \$1,070.80 and without FERS were \$790.40.

In an OWCP EN-1032 form completed by appellant on July 22, 2011, appellant stated that he received no benefits from SSA as part of an annuity for federal service. In an EN-1032 form completed on July 22, 2012, he did not answer the question with regard to his receipt of SSA benefits.

By letter dated December 26, 2012, OWCP informed appellant that SSA had confirmed receipt of SSA benefits attributed to his federal service, and that the difference between appellant's SSA income with benefits with federal service and without federal service was \$290.50, and that this difference must be offset against his compensation benefits. It noted that when the \$290.50 monthly difference was adjusted to the 28-day cycle for OWCP benefits, appellant's compensation should be adjusted in the amount of \$268.15, and that this will commence with his first payment on January 12, 2013.

In a September 16, 2013 EN-1032 form, appellant indicated that he did not receive benefits from SSA as part of an annuity for federal service.

In an April 22, 2014 preliminary determination, OWCP indicated that appellant was overpaid benefits in the amount of \$9,348.29 for the period July 1, 2010 through December 15, 2012 because he received retirement benefits from SSA that were attributable to his federal service at the same time that he received full compensation benefits from OWCP.² It also made

² In attached calculations sheet, OWCP noted that for the period July 1 to November 30, 2010, the offset amount was \$1,511.67; for the period December 1, 2010 through November 30, 2011, the offset was \$3,606.28; for December 1, 2011 through November 30, 2012, the offset was \$3,746.47; for the period December 1, 2012 through November 30, 2013, the offset was \$3,800.01; for the period December 1, 2013 through April 5, 2014, the offset was \$1,331.72. Accordingly, the total offset for the difference between appellant's SSA with FERS and without FERS for the period July 1, 2010 through April 5, 2014 is \$13,996.16. However, starting with the pay period beginning December 16, 2012, OWCP started making deductions to offset appellant's retirement income from SSA. The total of these offsets from December 16, 2012 through April 5, 2014 amounted to \$4,647.87. The difference between \$13,996.16 that should have been deducted from appellant's compensation payments for this period and the \$4,647.87 that was deducted is \$9,348.29, the amount of the overpayment.

a preliminary determination that appellant was at fault in the creation of the overpayment. Appellant was given instructions as to how to contest the overpayment and fault determination and was provided financial forms to complete with regard to the collection of the overpayment. OWCP informed him that failure to submit the requested information within 30 days would result in the denial of waiver. Appellant was also advised that the completed financial form would assist OWCP in determining a fair repayment amount.

By decision dated June 20, 2014, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$9,348.29. It noted that he failed to respond to the preliminary determination. OWCP determined that appellant knew or should have known that the payments he received were incorrect and was therefore at fault in the creation of the overpayment and not entitled to waiver of recovery of the overpayment. It determined that it would collect the overpayment by deducting \$248.00 from each continuing compensation payment until the overpayment was absorbed on or about July 25, 2017.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits 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.³

OWCP 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 service.⁴ 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.⁵

ANALYSIS -- ISSUE 1

Appellant received wage-loss compensation under FECA and SSA benefits from July 1, 2010 through April 5, 2014. As previously stated, the portion of the SSA benefits appellant

³ 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).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); and 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. See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁵ FECA Bulletin No. 97-09 (issued February 3, 1997).

received as a federal employee as part of his FERS retirement package concurrently with the benefits he received under FECA is a prohibited dual benefit.⁶ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, OWCP determined that the prohibited dual benefits appellant received from July 1, 2010 through April 5, 2014 created an overpayment of compensation in the amount of \$9,346.29.

The Board has reviewed OWCP's calculations of benefits appellant received for the period July 1, 2010 through April 5, 2014 and finds that OWCP properly determined that appellant received dual benefits totaling \$9,348.29 for this period, thus creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁷ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁸ In determining whether an individual is with fault, section 10.433(a) of OWCP regulations provide that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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.⁹

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he made an incorrect statement as to a material fact that he knew or should have known to be incorrect. In his EN-1032 forms completed on July 22, 2011 and September 16, 2013, appellant indicated that he did not receive benefits from SSA as part of an annuity for federal service. This was not an accurate statement as appellant was clearly receiving SSA benefits for his federal employment at these times. Appellant did not respond to the question with regard to SSA benefits on the EN-1032 form he completed on July 22, 2012.

The Board finds that appellant was aware that he received SSA and FECA benefits simultaneously. Appellant either failed to inform OWCP that he was receiving SSA benefits or inaccurately indicated that he did not receive SSA benefits on the EN-1032 forms he completed. Based on the clear language of the forms which appellant knowingly signed, appellant made an

⁶ See P.G., Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁷ 5 U.S.C. § 8129(b).

⁸ See Robert W. O'Brien, 36 ECAB 541, 547 (1985).

⁹ 20 C.F.R. § 10.433(a).

incorrect statement as to a material fact. The Board finds that appellant was at fault in the creation of the overpayment and is therefore precluded from receiving a waiver.¹⁰

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP regulations provide that, 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 the 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 hardship.¹¹

ANALYSIS -- ISSUE 3

OWCP determined that \$248.00 would be withheld from each of appellant's continuing compensation payments until the overpayment was recovered. In making this determination, it noted that appellant failed to submit supporting financial documentation. Because appellant failed to submit the requested financial documentation, OWCP did not abuse its discretion when it ordered withholding \$248.00 from each of appellant's continuing compensation benefits. The Board will affirm OWCP's decision on rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,348.29, properly denied waiver of recovery of the overpayment and acted within its discretion when it required that appellant repay the overpayment by deducting \$248.00 from appellant's continuing compensation.

¹⁰ See *R.L.*, Docket No. 13-713 (issued August 15, 2013).

¹¹ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. See *Desiderio Martinez*, 55 ECAB 245, 251 (2004); see also *J.M.*, Docket No. 10-1913 (issued July 11, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2014 is affirmed.

Issued: December 4, 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