

FACTUAL HISTORY

OWCP accepted that appellant sustained a lumbosacral sprain in the performance of duty as a park ranger on December 21, 1991. Appellant stopped working and received wage-loss compensation based on total disability. He was annually requested to complete EN1032 forms with respect to employment activity and receipt of benefits. The form specifically asks a claimant to report any benefits received from the Social Security Administration (SSA) which are received as part of an annuity for federal service. The record indicates that on EN1032 forms dated March 28, 2008, April 3, 2009, April 21, 2010, May 2, 2011, April 30, 2012, June 6, 2013, and April 2, 2014, appellant stated “no” in response to the question as to receipt of social security benefits.

On August 28, 2014 OWCP requested that the SSA provide information regarding appellant’s receipt of social security benefits. In a form completed September 10, 2014, SSA reported that appellant began receiving SSA retirement benefits as of April 2008.³ SSA provided the amount he would have received based on federal service with Federal Employee’s Retirement Service (FERS) and the amount he would have received without FERS.

By letter dated September 17, 2014, OWCP advised appellant that it was aware that he had been receiving age-related social security benefits since April 1, 2008. It stated that it would begin offsetting the social security benefits attributable to federal service as of September 21, 2014.

OWCP advised appellant in a letter dated October 10, 2014 of its preliminary overpayment determination of \$61,947.91 for the period April 1, 2008 to September 20, 2014. The basis for the overpayment was appellant’s receipt of wage-loss compensation while he was also receiving retirement benefits from SSA as part of an annuity under FERS. As to the amount of the overpayment, OWCP explained that the portion of the social security benefits attributable to federal service should have been deducted from appellant’s compensation. Using the figures provided by SSA, it calculated the daily amount to be deducted for specific periods and included a calculation worksheet.

It was explained that, for the period April 1 through November 30, 2008, appellant received \$1,386.80 per month in social security retirement benefits. The amount not based on federal service was \$648.00, thus the difference of \$738.80 per month should have been offset from appellant’s wage-loss compensation benefits. The monthly amount of \$738.80 was equivalent to the 28-day amount of \$681.969, or the daily amount of \$24.356. Since the period April 1 through November 30, 2008 covered 244 days, the amount that should have been offset for that period was \$5,942.87.

Similar calculations were provided for subsequent time periods at issue, with increased figures of social security retirement benefits reflected. It was calculated that, for the period December 1, 2008 to November 30, 2011, the amount that should have been offset was \$28,218.51. For the period December 1, 2011 through November 30, 2012 the offset amount

³ The record also contains a form dated July 8, 2013 from SSA indicating that appellant was eligible for disability benefits as of May 1972.

should have been \$9,772.20, for the period December 1, 2012 through November 30, 2013 the offset amount should have been \$9,911.55, and for the period December 1, 2013 through September 20, 2014 the offset amount should have been \$8,102.77. For the entire period April 1, 2008 to September 20, 2014, OWCP found \$61,947.91 should therefore have been deducted.

In the October 10, 2010 letter, OWCP made a preliminary determination that appellant was at fault in creating the overpayment as he had made an incorrect statement as to a material fact that he knew or should have known was incorrect, citing the submission of Forms EN1032. Appellant was advised that he had 30 days to submit an enclosed Form OWCP-20 and relevant financial information with respect to waiver or recovery of the overpayment. In addition, OWCP advised him that he had 30 days to request a prerecoupment hearing before an OWCP hearing representative.

The record contains a memorandum of telephone call dated November 7, 2014 stating that appellant was seeking a 30-day extension as he was looking to go into a facility for brain injuries. A memorandum of telephone call dated November 19, 2014 indicated that OWCP spoke with a social worker, with appellant in attendance, regarding the overpayment. In a letter dated November 19, 2014, appellant's congressional representative asserted that appellant suffered from a traumatic brain injury and had difficulty processing information. The hearing representative stated that appellant claimed that he had acted in good faith and had answered the questions on the EN1032 forms to the best of his ability.

By decision dated November 21, 2014, OWCP finalized its determination of a \$61,947.91 overpayment. It found that no evidence had been presented as to a brain injury, that appellant had been provided 30 days to respond to the October 10, 2014 preliminary determination, but no response was received and that it found him at fault for the overpayment. OWCP affirmed its preliminary finding of fault, which was that he had made an incorrect statement as to material fact on the EN1032 forms, and it also stated that he had accepted a payment he knew or reasonably should have known was incorrect. It found that the overpayment would be recovered by deducting \$336.23 from his 28-day continuing compensation payments.⁴

On December 1, 2014 OWCP received a November 20, 2014 request for a prerecoupment hearing before an OWCP hearing representative.⁵ Appellant submitted a November 20, 2014 letter from a social worker stating that he had significant mental health and psychological problems. He also submitted a Form OWCP-20 overpayment recovery questionnaire dated November 20, 2014.

By decision dated December 12, 2014, OWCP denied the request, finding it was untimely filed.

⁴ A November 20, 2014 memorandum states that this represents 27 percent of appellant's net compensation. According to the memorandum, a lesser percentage triggered an error message based on his life expectancy and the recovery end date.

⁵ The postmark date is difficult to read, but appears to be November 21, 2014.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by “the amount of any such [SSA] benefits payable that are attributable to federal service.” OWCP procedures provide that, while social security benefits are payable concurrently with FECA benefits, in disability cases, FECA benefits will be reduced by social security benefits paid on the basis of age and attributable to the employee’s federal service.⁶ It obtains information from SSA on the amount of the claimant’s benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of social security benefits received by the claimant/beneficiary. SSA will also provide a hypothetical social security benefit computed without 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.⁷

ANALYSIS -- ISSUE 1

The overpayment in this case is based on the evidence provided by the SSA on the benefits it paid to appellant. This evidence shows that in April 2008 he began receiving SSA retirement benefits. The SSA benefits attributable to appellant’s federal service was provided by SSA. However, a claimant cannot simultaneously receive both wage-loss compensation under FECA and SSA retirement benefits attributable to the claimant’s federal service. In this case, appellant received wage-loss compensation from April 1, 2008 to September 20, 2014, while also receiving social security benefits based his on federal service. Accordingly, an overpayment of FECA wage-loss compensation was created.

As to the amount of the overpayment, OWCP provided a detailed discussion as to its calculations, as well as a calculation worksheet. Based on the information from SSA, it identified the offset amount for specific periods: April 1 to November 30, 2008, December 1, 2008 to November 30, 2011, December 1, 2011 to November 30, 2012, December 1, 2012 to November 30, 2013, and December 1, 2013 to September 20, 2014. OWCP identified the number of days in each period and found that the overpayment amount was \$5,942.87, \$28,218.51, \$9,772.20, \$9,911.55, and \$8,102.77 respectively. The total overpayment was therefore \$61,947.91, and no contrary evidence is of record. The Board finds that OWCP properly found an overpayment of \$61,947.91 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) 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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (June 2009). This same section of the manual explains that if social security benefits are paid for disability rather than age, social security benefits paid for disability shall be reduced by FECA compensation payable.

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997). *See also P.G.*, Docket No. 13-589 (issued July 9, 2013).

conscience.”⁸ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁹ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(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 was incorrect.”

ANALYSIS -- ISSUE 2

As noted above, a finding of fault may properly be based on any of the three standards found under 20 C.F.R. § 10.433. As discussed in the preliminary determination, appellant had completed EN1032 forms from March 28, 2008 to April 2, 2014. The EN1032 forms specifically require a claimant to provide information with respect to receipt of social security benefits. The “no” response was an incorrect statement as to a material fact. The period of the overpayment, however, extended to September 20, 2014. There is no evidence of record that appellant made an incorrect statement as to material fact between April 2 and September 20, 2014. OWCP has therefore not established that he was at fault in the creation of the overpayment after April 2, 2014 based on making an incorrect statement of material fact.

The Board notes that in the final overpayment decision dated November 21, 2014 OWCP affirmed the finding of fault based on making incorrect statements of material fact, but also found that appellant was at fault for accepting payments he knew or should have known were incorrect.

Extensive due process rights attach to any attempt by OWCP to recoup benefits already paid, even if paid in error. The Board has held that OWCP may not change the grounds for fault to a standard to which the claimant has had no opportunity to respond. As making an incorrect statement as to material fact was the only reason provided for finding fault in both the preliminary determination and the final decision, the Board may affirm the finding of fault only on this basis.¹⁰ Upon return of the case record OWCP shall determine whether the overpayment appellant received after April 2, 2014 should be waived.

The November 19, 2014 letter from appellant’s congressional representative states that appellant claimed the answers provided were to the best of his ability and in good faith. To the extent that appellant asserts that he did not know that he needed to report SSA retirement benefits he was receiving, the Board notes that the standard is knew or should have known to be incorrect. As the Board has indicated, the forms provide clear language as to the necessity of reporting social security benefits.¹¹ Although appellant’s congressional representative referred to a difficulty in processing information, there was no probative evidence of record on this issue submitted to OWCP prior to November 21, 2014. There was no supporting evidence for an

⁸ 5 U.S.C. § 8129(b).

⁹ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁰ See *Anna E. Eacker*, Docket No. 05-1245 (issued April 12, 2006).

¹¹ See *R.B.*, Docket No. 15-0192 (issued August 6, 2015); *P.G.*, Docket No. 15-0413 (issued June 25, 2015).

argument that appellant could not understand the clear language provided on the EN1032 forms. The evidence establishes that he made an incorrect statement as to a material fact that he knew or should have known to be incorrect through April 2, 2014.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide:

“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.”¹²

With respect to the submission of financial evidence, OWCP’s regulations at 20 C.F.R. § 10.438 provide:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 3

In this case, OWCP advised appellant that he needed to submit a Form OWCP-20 overpayment questionnaire and relevant financial documents. In determining amount to be deducted from his continuing compensation, OWCP regulations identified above require that OWCP consider financial circumstances and other relevant factors to minimize hardship.

Appellant did not submit any relevant financial information prior to the final overpayment decision. As noted above, it is his responsibility to submit the necessary financial information. When a claimant fails to submit financial information, OWCP may recover the overpayment in installments large enough to recover the debt promptly.¹³ In the present case,

¹² 20 C.F.R. § 10.441.

¹³ *P.P.*, Docket No. 14-2048 (issued May 13, 2015).

OWCP considered appellant's life expectancy and indicated that it would recover the minimum amount from continuing compensation to recover the overpayment in a timely fashion.¹⁴

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations on the recovery of overpayments provide that, before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount, or finding of fault and the right to request waiver of the overpayment.¹⁵ The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.¹⁶ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.¹⁷

ANALYSIS -- ISSUE 4

The preliminary determination of overpayment and fault was dated October 10, 2014. Appellant had 30 days from that date to request a prerecoupment hearing before an OWCP hearing representative. A memorandum of telephone call dated November 7, 2014 indicated that he requested an extension of time. The Board, however, has held that there is no provision in the regulations for extending the 30-day time period.¹⁸ The prerecoupment request was postmarked November 21, 2014. Since this is more than 30 days after the October 10, 2014 preliminary determination, it is untimely. The Board finds that appellant waived his right to a prerecoupment hearing.

On appeal, appellant states that he is unable to understand the letters received from OWCP due to a brain injury and mental illness. He states that he submitted letters from a social worker and a psychologist regarding his mental condition. OWCP did receive a letter from a social worker on December 1, 2014. This letter was not before OWCP at the time of the November 21, 2014 decision, and it is well established that a social worker is not a physician under FECA and therefore the letter is of no probative medical value.¹⁹ With respect to the request for a prerecoupment hearing, as noted above, there is no provision for extension of the

¹⁴ If OWCP receives financial information and determines that the overpayment should be waived after April 2, 2014, it should also determine whether the rate of the recovery of the overpayment should be adjusted.

¹⁵ 20 C.F.R. § 10.431.

¹⁶ *Id.* at 10.432.

¹⁷ *Id.*

¹⁸ See *G.W.*, Docket No. 12-0297 (issued October 25, 2012); *H.K.*, Docket No. 11-543 (issued November 25, 2011).

¹⁹ *R.W.*, Docket No. 14-1890 (issued February 11, 2015).

30-day time period. As to evidence from a psychologist, the record did not contain a medical report that was before OWCP as of December 12, 2014.²⁰

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$61,947.91 was created, that appellant was not entitled to waiver of the overpayment through April 2, 2014, and that recovery of the overpayment would be accomplished by deductions from continuing compensation payments. In addition, OWCP properly denied his request for a prerecoupment hearing. The Board also finds that OWCP has not established that appellant was at fault in the creation of the overpayment after April 2, 2014. Upon return of the case record OWCP shall determine whether the overpayment after April 2, 2014 should be waived.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 12 and November 21, 2014 are affirmed in part, and reversed in part.

Issued: November 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ The Board can review only evidence that was before OWCP at the time of the final decisions on appeal. 20 C.F.R. § 501.2(c)(1).