

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

J.G., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, Baltimore, MD, Employer**

)
)
)
)
)
)
)

**Docket No. 15-1116
Issued: February 25, 2016**

Appearances:

*Anthony Grande, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 21, 2015 appellant, through his representative, filed a timely appeal from a March 17, 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 this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$49,769.17 for the period August 1, 2004 through September 20, 2014; (2) whether OWCP abused its discretion in denying waiver of the \$49,769.17 overpayment; and (3) whether it properly determined that the overpayment should be collected by deducting \$5,000.00 every 28 days from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 10, 1998 appellant, then a 56-year-old special agent in charge, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 1998 he sustained a concussion when he landed on his head during a Red Man training session. OWCP accepted the claim for concussion and postconcussion syndrome. Appellant stopped work and received wage-loss compensation benefits for which he was placed on periodic rolls.²

By letter dated July 7, 2014, OWCP notified appellant that he was approaching his 62nd birthday, the minimum age at which an individual is eligible to receive Social Security Administration (SSA) retirement benefits. It explained that if he had been approved for SSA retirement benefits, or was currently receiving them, to contact the district office immediately in order to make the necessary adjustments to his compensation benefits.

In a July 7, 2014 (Form CA-110) telephone note, appellant called OWCP regarding the July 7, 2014 letter stating that he was unsure how his SSA benefits would affect his compensation benefits.

In an August 29, 2014 Federal Employees' Retirement System (FERS) SSA Dual Benefits Calculations worksheet, SSA provided appellant's SSA rate with FERS and SSA rate without FERS from August 2004 through December 2013. It noted no offset for the period of July 2007 through April 2008 due to receipt of disability benefits. Appellant's date of birth was incorrectly recorded as April 7, 1952.

OWCP provided a worksheet where it calculated the FERS offset by subtracting the SSA rate without FERS from the SSA rate with FERS to get the monthly FERS offset. The monthly FERS offset amount was multiplied by 12 and divided by 13 to calculate FERS offset for the 28-day compensation cycle. OWCP calculated the overpayment by adding FERS offset by the number of days overpaid to arrive at \$49,769.17.

By letter dated September 15, 2014, OWCP informed appellant that his current monthly benefit amount was \$2,274.30, but that SSA had determined that he would only be entitled to \$1,751.90 as his federal service increased his monthly social security payment by \$522.40. It noted that this difference of \$522.40 as the portion of social security benefits attributed to federal service and was the amount that must be offset against his compensation benefits. OWCP explained that since social security benefits were paid monthly (12 payments per year), and compensation benefits were paid every 28 days (13 payments per year), the monthly offset amount of \$522.40 would be adjusted to a 28-day payment cycle of \$482.22. Accordingly, the offset of appellant's compensation payments in the amount of \$482.22 would begin with his payment dated October 18, 2014 and his new net compensation would be \$6,921.90.

² The Board notes that all fiscal forms pertaining to benefits submitted by appellant note his date of birth as July 4, 1942. Appellant's FECA Automated Compensation Payment System reports, for which he was placed on periodic rolls, documented his date of birth as July 4, 1952 for the period November 2, 1998 through September 12, 2014.

By notice dated October 1, 2014, OWCP made a preliminary determination that an overpayment of \$49,769.17 of compensation was created for the period August 1, 2004 through September 20, 2014 as appellant was paid dual compensation under FECA and SSA without an appropriate offset.³ It found that he was at fault in the creation of the overpayment because he knew or reasonably should have known that he was accepting compensation to which he was not entitled and was aware that he must report any additional federal benefits he was receiving *via* the requested (Form CA-1032). OWCP provided appellant with an overpayment calculation worksheet and his July 11, 2014 Form CA-1032, which indicated that he was not receiving an annuity from the SSA. A fiscal pay rate memorandum was provided which showed monthly compensation amounts with FERS and without FERS from August 1, 2004 through September 20, 2014. The period July 1, 2007 through April 30, 2008 was not calculated in the offset. OWCP memorandum noted that the offset did not apply because of disability benefits received.

OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (OWCP-20 form) and submit supporting financial documents. It notified him that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP further informed appellant to contact the district office if he had any questions or required assistance in responding to the letter. If a reply was not received within 30 days, it would issue a final decision based on the information in file. OWCP mailed the preliminary determination to appellant's address of record and his then-counsel on record.

On October 15, 2014 appellant authorized his son to represent him in his workers' compensation claim.

By letter dated October 15, 2014, appellant's representative argued that appellant was not at fault for the overpayment and the full amount should be waived. He stated that he had called OWCP and spoke with Valerie Fleming to explain that he was unsure how to complete the OWCP-20 form and was advised to do the best that he could.⁴ The representative explained that appellant was a senior citizen with a certified, permanent brain injury and a permanent cognitive disability which resulted in his inability to return to employment with the SSA. Appellant was denied employment following his injury in 1998 because he could not understand the rules and regulations associated with SSA as defined by OWCP's independent medical examiner. The representative argued that appellant could not be at fault for the overpayment as his disability prevented him from understanding the regulations cited pertaining to the CA-1032 form. He noted that appellant's prior counsel had previously submitted a proper letter of representation and was copied on official correspondence sent from OWCP prior to appellant's 62nd birthday. Appellant's prior counsel never withdrew his representation, but was not copied on the Form CA-1032's which were sent to appellant, including the July 11, 2014 CA-1032 form used by OWCP to make its fault finding. The representative argued that this error prevented him from providing assistance with respect to the issue in question.

³ OWCP preliminary determination stated, "If you have a disability (a substantially limiting physical or mental impairment), please contact our office claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations, and modifications."

⁴ A Form OWCP CA-110 note documents this conversation.

Appellant's representative stated that OWCP should have known appellant was born on July 4, 1942 and not July 4, 1952, as provided in their supporting evidence which accompanied the overpayment letter. He stated that appellant's federal employers were required to have appellant's date of birth and age records which would demonstrate whether his prior federal employment would qualify him for SSA retirement benefits. The representative noted that OWCP sent letters to appellants when they approached their 62nd birthday for the purpose of avoiding offset issues. However, because OWCP incorrectly documented appellant's date of birth, he did not receive this letter until he was 72 years old, resulting in 10 years of overpayment through no fault of his own. He concluded that because of appellant's mental disability and the fact that the employing establishment knew he qualified for SSA, OWCP should have written SSA and asked if they were paying benefits.

On October 29, 2014 appellant, through his representative, requested a prerecoupment hearing before the Branch of Hearings and Review. He disputed the amount of overpayment stating that it occurred through no fault of his own and requested a waiver of recovery. Appellant argued that he was without fault because he completely and accurately disclosed the benefits received more than 10 years ago.

By letter dated January 20, 2015, OWCP notified appellant that his hearing was scheduled for March 18, 2015. In a February 3, 2015 Form OWCP CA-110 telephone note, appellant's representative informed the claims examiner that they would be unable to attend the hearing on that date and requested review of the written record.⁵

By letter dated February 4, 2015, OWCP sent notice that the request for a review of the written record had been granted and that appellant would be afforded 30 days to submit any written evidence or argument relevant to his disagreement with the overpayment and the finding of fault. Appellant was also asked to submit a Form OWCP-20 Overpayment Recovery Questionnaire with supporting financial documentation to support any waiver. He was advised that under 20 C.F.R. § 10.438, failure to submit the requested information would result in denial of the waiver.⁶

By letter dated February 20, 2015, appellant's representative reported that he requested help from the claims examiner regarding the OWCP-20 form twice by telephone and once by written letter on October 15, 2015. He stated that appellant has a disability and requested assistance as offered on OWCP development letters. However, OWCP was unable to assist appellant in completing the form which he submitted to the best of his ability. The representative argued that some of the information requested on the OWCP-20 form was in conflict with appellant's financial situation since most of his assets were placed in an irrevocable trust involving multiple people who were not involved in the claim. He stated that appellant's income was placed in a trust and used to pay for his and his wife's bills and medical expenses.

⁵ By letter dated February 6, 2015, then-counsel for appellant requested that the oral hearing be changed to review of the written record. He withdrew his representation and stated that appellant's representative should be provided all direct communications thereafter.

⁶ The letter stated, "If you have a disability (a substantially limiting physical or mental impairment), please contact our office claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations, and modifications."

The representative explained that a labor agreement protected appellant from any deductions made on these assets. He requested OWCP inform him immediately if they needed additional financial information beyond what was written in the statement and the OWCP-20 form.

Appellant's representative argued that an overpayment likely did not occur as evidenced by a Form SSA-1826 received in appellant's OWCP file on November 13, 2008 which noted that appellant had no SSA earnings. He further argued that an OWCP memorandum failed to explain why the prior SSA-581 forms failed to indicate the same results. The representative reiterated that appellant was not at fault for the overpayment as he qualified for social security in August 2004 and notified OWCP multiple times that he was receiving social security benefits. He also informed OWCP that appellant's date of birth was off by 10 years in over a dozen corrections and notices *via* SSA, OWCP-20 forms, employment records, and appellant corrections. Moreover, appellant again alerted OWCP to the issue when he received their letter informing him of his upcoming 62nd birthday.

Appellant's representative argued that the overpayment should be waived based on detrimental reliance as appellant used substantial funds to help others and would not have done so had he known OWCP was paying him incorrectly. The issue of detrimental reliance was exacerbated because of appellant's cognitive impairment and appellant donated a large portion of his income to charity, family members, wounded warriors, strangers, and those in hospice. The representative explained that appellant's primary responsibility was to support his wife and he would have distributed his money differently had he known of the overpayment. He stated that interest alone during the 10-year overpayment period would exceed the overpayment amount if invested in the S&P 500 which is where appellant invested his retirement monies before entering a trust. The representative stated that appellant could submit additional evidence which was not requested in the OWCP-20 form and, if such additional evidence was needed, he requested OWCP set up a conference call so that they could explain to him what was required to prove appellant's case.

Appellant submitted an OWCP-20 form dated February 20, 2015 which stated that his monthly earnings included \$2,169.00 in social security benefits and \$2,300.00 in retirement pension benefits pursuant to a collective bargaining agreement. With respect to available funds, he stated that his assets had been transferred into a trust removing all of his rights of ownership to the assets and trust.

Appellant also submitted multiple documents in support of the arguments made on his behalf. In a September 12, 2011 OWCP decision, he was deemed totally disabled for all work as his condition not expected to improve. The decision placed the case in a permanent status based on the July 13, 2011 medical report from Dr. Michael Myers, a Board-certified surgeon, who found that appellant was permanently disabled due to his work-related brain injury.

Multiple SSA-581 forms were submitted dated June 7, 2002 through July 12, 2011, which noted appellant's birthday incorrectly as July 4, 1952. In SSA-581 forms dated June 7, 2002, June 30, 2003, May 12, 2007, June 20, 2008, and June 24, 2010, appellant notified OWCP that the correct date of birth was July 4, 1942. In a Form CA-1032 received on May 16, 2006 he informed OWCP that he was receiving social security benefits. In an itemized statement of

earnings SSA-1826, received on November 13, 2008, SSA notified DOL that appellant had no earnings reported for the period July through December 2007.

By decision dated March 17, 2015, OWCP found that there was an overpayment in the amount of \$49,769.17 for the period August 1, 2004 through September 20, 2014 as appellant was paid dual compensation under FECA and SSA without an appropriate offset. It modified the preliminary decision, finding that he was without fault in the creation of the overpayment because he was not and could not have been aware that he was not entitled to the payment received. OWCP stated that a May 14, 2007 medical report from Dr. Myers indicated that appellant had cognitive difficulties since the date of the work injury and trouble following instructions. Dr. Myer's July 13, 2011 report explained that appellant had cognitive confusion and was permanently disabled due to the brain injury. For the medical reasons related to the brain injury, the hearing representative found that appellant did not have the requisite knowledge to know he was completing the CA-1032 form incorrectly and receiving an overpayment.

OWCP further determined that the overpayment was not subject to waiver because appellant failed to establish that recovery would defeat the purpose of FECA or be against equity and good conscience. The hearing representative stated that no evidence was provided to support that appellant's reliance on the overpaid compensation was the sole reason he placed his money in a trust or provided financial assistance to family members and charities. It also stated that appellant was advised twice that he would need to submit financial documentation in support of a waiver, but provided none to indicate that repayment would cause a hardship. The hearing representative noted that not listed on the OWCP-20 form was the \$6,997.58 net amount he received every 28 days from OWCP which brought his monthly income to \$11,466.58. Appellant did not identify any assets or expenses, stating "A majority [appellant's] assets have been transferred into a trust removing all of his rights of ownership to the assets and the trust." As no expenses were documented, OWCP found that appellant's monthly income of \$11,466.58 exceeded the resource base for an individual with a spouse and exceeded his documented ordinary and necessary monthly expenses by more than \$50.00. It determined that appellant could repay the overpayment by deducting \$5,000.00 from continuing compensation every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁷ Section 8129(a) of FECA provides, in pertinent part: "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁸

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

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.⁹ 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.

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.¹⁰ 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 on 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 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.¹¹

A final decision of OWCP shall contain findings of fact and a statement of reasons.¹² With respect to overpayment decisions, OWCP must provide clear statements showing how the overpayment was calculated.¹³ Its 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, right to submit evidence challenging the fact, amount or finding of fault, and the right to request waiver of the overpayment.¹⁴

ANALYSIS -- ISSUE 1

The Board finds the case not in posture for decision regarding whether OWCP properly determined that appellant received a \$49,769.17 overpayment of compensation.¹⁵ With respect to the fact and amount of this claimed overpayment, OWCP has not provided adequate findings of facts or clear reasoning which would allow appellant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁶ It found that appellant

⁹ *Id.* at § 8116(d). See *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

¹⁰ 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. See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

¹¹ See *W.C.*, Docket No. 15-1280 (issued November 13, 2015).

¹² 20 C.F.R. § 10.126.

¹³ *James Tackett*, 54 ECAB 611 (2003); *Sandra K. Neil*, 40 ECAB 924 (1989).

¹⁴ 20 C.F.R. § 10.431.

¹⁵ *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

¹⁶ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

received a \$49,769.17 overpayment of compensation because he received dual benefits from FERS and SSA between August 1, 2004 and September 20, 2014. OWCP did not adequately explain how this finding was supported by documents of record. The record does not contain any document from the SSA establishing that appellant was receiving SSA benefits or indicating a start date of August 1, 2004, or otherwise, for such benefits. The record contains a FERS SSA Dual Benefits Calculations Fax Transmittal which was completed on August 29, 2014 by an SSA official. It listed August 2004 through December 2013 for receipt of SSA benefits with FERS and SSA benefits without FERS. The remarks noted that the offset did not apply for the period July 2007 through April 2008 due to disability benefits. The record contains an OWCP worksheet which notes that SSA benefits in the amount of \$49,769.17 were not offset against FECA benefits for the period of August 1, 2004 to September 20, 2014. The worksheet provided the monthly benefit received with and without FERS and provided a calculation to determine the 28-day offset amount for the 11 periods noted. The calculations contained in the worksheets are not supported by the SSA documents of record. The basis for the determination of fact and amount of overpayment has not been adequately explained by OWCP.

Moreover, the record contains an SSA itemized statement of earnings SSA-1836 received by OWCP on November 13, 2008. SSA notified OWCP that appellant did not obtain earnings for the period July 2007 through December 2007. OWCP worksheet provided indicates that no monthly offset is required for the period July 1, 2007 through April 30, 2008 due to disability benefits. As appellant was placed on periodic rolls beginning November 2, 1998, it is unclear why he was not paid FERS benefits from July 2007 through April 2008, but received the benefit beginning in April 2004 through September 2014. It is unclear whether FERS benefits were received for the larger period in question. Furthermore, as the record indicates that appellant provided OWCP annual authorization to obtain earnings data from SSA since before the start of the overpayment in 2004, the record fails to document that FERS benefits were received beginning August 2004 through SSA statement of earnings, particularly of importance considering OWCP should have received these statements, and been notified by SSA annually that appellant was in receipt of dual benefits.

In the case of *J.J.*, the Board remanded the case to OWCP for further development because OWCP did not adequately explain its finding that appellant received dual benefits from FERS and SSA because the finding was not supported by the documents of record.¹⁷ Similarly, in this case, it is unclear as to how OWCP determined that he received an overpayment of compensation for the period in question as the evidence of record lacks documentation establishing receipt of social security benefits without a FERS offset.¹⁸ Neither SSA nor OWCP provided a complete payment history substantiating appellant's receipt of SSA age-related benefits during the purported overpayment period August 1, 2004 through September 20, 2014.¹⁹

¹⁷ *Supra* note 15.

¹⁸ *N.J.*, Docket No. 13-2164 (issued April 18, 2014).

¹⁹ *A.P.*, Docket No. 12-122 (issued May 7, 2012).

OWCP finalized its March 17, 2015 decision without weighing the evidence of and without making findings of fact with respect thereto.²⁰

The case will be remanded to OWCP for the purpose of providing adequate findings of fact, supported by appropriate documents, to support its determination that appellant received a \$49,769.17 overpayment of compensation. On remand, OWCP should obtain a complete payment history from SSA regarding the age-related benefits he reportedly received beginning on August 1, 2004. After completion and development directed by the Board, OWCP shall issue a *de novo* decision regarding this overpayment matter.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant received an overpayment of compensation in the amount of \$49,769.17 for the period August 1, 2004 through September 20, 2014. As the amount of the overpayment is not yet established, it is premature to address the issues of fault, waiver, and recovery.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2015 decision of the Office of Workers' Compensation Programs is set aside on the issues of fact and amount of overpayment. The case is remanded for further action consistent with this opinion.

Issued: February 25, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²⁰ A claimant is entitled to an adequate statement of reasons with respect to any final decision by OWCP. 20 C.F.R. § 10.126. *See also L.D.*, Docket No. 12-1408 (issued April 26, 2013).