

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

T.G., Appellant

and

**DEPARTMENT OF THE NAVY, ARMY WAR
COLLEGE, Carlisle, PA, Employer**

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**Docket No. 16-0910
Issued: November 23, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2016 appellant filed a timely appeal of a February 26, 2016 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 \$17,507.83; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$200.00 from appellant's continuing compensation payments.

On appeal, appellant contends that he was not at fault in creating the overpayment and that he tried to comply with all of the requirements with regard to completing the paperwork but

¹ 5 U.S.C. § 8101 *et seq.*

that there were various communication problems. He also requested waiver because he cannot afford to repay the debt.

FACTUAL HISTORY

On July 8, 2003 appellant, then a 56-year-old carpenter's worker, filed a traumatic injury claim (Form CA-1) alleging that on June 30, 2003 he injured his left shoulder when he lifted a roof, weighing approximately 60 to 70 pounds, off a display booth. On August 25, 2003 OWCP accepted his claim for left supraspinatus sprain and strain. It paid wage-loss compensation and medical benefits. Appellant received periodic rolls compensation benefits as of March 21, 2004.

OWCP requested that appellant complete annual EN1032 forms. The cover letters accompanying the forms, for example the letter dated November 7, 2012, informed him that the information requested was required in connection with his receipt of benefits under FECA, and would be used to determine whether he was entitled to continue receiving FECA benefits, or whether his benefits should be adjusted. Appellant was informed that: "Accordingly, you must report to OWCP any improvement in your medical condition, any employment, any change in the status of claimed dependents, any third party settlement, and any change in income from federally, assisted disability or benefits programs."

Appellant submitted multiple EN1032 forms, as required by FECA. In a Form EN1032 signed on November 27, 2012, he indicated that he no longer received Social Security Administration (SSA) disability benefits, but that he would start receiving SSA retirement benefits on December 1, 2012. In answering another question on the same form, appellant indicated that he did not receive benefits from SSA as part of an annuity for federal service. He answered the question similarly on forms dated November 18, 2013, November 20, 2014, and November 5, 2015.

On August 24, 2015 OWCP requested that SSA provide information regarding benefits appellant was receiving from SSA, including his SSA rate without Federal Employees Retirement System (FERS), and his SSA rate with FERS. It received the requested information from SSA on September 29, 2015, which reflected a retirement date of November 1, 2012.

By letter dated November 19, 2015, OWCP made a preliminary determination of an overpayment in the amount of \$17,507.83 for the period November 1, 2012 through November 14, 2015 because his compensation had not been reduced for the FERS portion of SSA benefits attributable to his federal service, which constituted a dual benefit.

OWCP calculated the overpayment as follows. It noted that appellant was paid a monthly SSA rate with FERS, effective November 1, 2012, of \$1,533.90, that the monthly SSA rate without FERS would be \$1,069.80, which resulted in a monthly difference of \$464.10. Effective December 1, 2012, he was paid a monthly rate with FERS of \$1,559.90; the monthly SSA rate without FERS was \$1,087.90, for a monthly difference of \$472.00. Effective December 1, 2013, appellant was paid a monthly SSA rate with FERS of \$1,583.20; the monthly rate without FERS would be \$1,104.20, which resulted in a difference of \$479.00. Effective December 1, 2014, he was paid based on a monthly rate of \$1,610.10; the monthly SSA rate without FERS was \$1,122.90, for a monthly difference of \$487.20. OWCP then converted these

figures to the daily amount that appellant was overpaid. It calculated that, for the 30 days for the period November 1 through 30, 2012, appellant was overpaid \$15.30 daily, for a total of \$459.00. For the period December 1, 2012 through November 30, 2013, a period of 365 days, appellant was overpaid daily \$15.56 for a total of \$5,679.56. For the period December 1, 2013 through November 30, 2014, a period of 365 days, he was overpaid \$15.79 for a total of \$5,763.79. For the period December 1, 2014 through November 14, 2015, a period of 346 days, appellant was overpaid daily in the amount of \$16.06 for a total of \$5,605.48. Adding these overpayments together (\$459.00 + \$5,679.56 + \$5,763.79 + \$5,605.48), OWCP found an overpayment of \$17,507.83.

OWCP made a preliminary determination that appellant was at fault in the creation because he failed to notify OWCP of a change in his SSA benefits, and because he was aware or should have reasonably been aware that the payment he received for that period was incorrect. It noted that, for the EN1032 forms completed on November 27, 2012, November 18, 2013, November 20, 2014, and November 5, 2015, he failed to notify OWCP of the change in his social security benefit status. Appellant was provided 30 days to respond to the preliminary determination of an overpayment and to provide financial information.

By letter dated December 10, 2015, appellant explained that he had done what was required and that he should not be required to repay the overpayment. He argued that he was not at fault in the creation of the overpayment. Appellant further contended that he was financially strapped and was currently repaying a debt to SSA of \$180.00 monthly.

On December 22, 2015 appellant submitted a response to OWCP's request for financial information. He indicated a monthly income of \$562.62 from OWCP plus \$1,430.00 from SSA, for a total monthly income of \$1,992.62. Appellant listed expenses of \$783.46 for rent or mortgage, \$100.00 for food, and \$75.00 for clothing. He then added \$180.00 for a payment to SSA that was deducted from his checks, and \$1,747.46 for other expenses. Appellant listed assets as \$22.00 in cash, \$1,700.00 in his checking account and \$1,170.00 in his savings account. He submitted copies of cancelled checks to Members 1st Federal Credit union in the amount of \$184.11, to Heart and Family Health Institute of \$25.00, and Titan Lawn Maintenance of \$48.75. Appellant also submitted a confirmation from the Government Employees Insurance Company (GEICO) of \$542.90 for a six-month automobile insurance policy. Finally, he contended that he believed that the overpayment was no fault of his own and requested waiver of recovery of the overpayment.

In a February 5, 2016 record of telephone conversation, OWCP indicated that appellant called to say that he would send a copy of his budget in writing. In a February 17, 2016 record, appellant was informed that he needed to submit a breakdown of the \$1,747.46 for expenses, that he needed to provide his most recent bank statement, and that he needed to amortize his expenses over the year. OWCP also encouraged him to estimate his monthly expenses for his diabetes or other medical conditions. Appellant did not submit the requested information.

By decision dated February 26, 2016, OWCP finalized the preliminary determination overpayment of compensation in the amount of \$17,507.83 and found appellant at fault in the creation of the overpayment. It noted that he had been given several extensions to submit supporting documentation for his expenses, but that the information had not been received.

Accordingly, OWCP found that \$200.00 should be deducted from appellant's continuing compensation payments.

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.²

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.³ 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.⁴

ANALYSIS -- ISSUE 1

Appellant received wage-loss compensation from FECA and retirement benefits from SSA from November 1, 2012 through November 14, 2015. As previously stated, the portion of the SSA benefits he received as a federal employee as part of his FERS retirement package concurrently with the benefits he received under FECA constitute a prohibited dual benefit.⁵ 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 he received from November 1, 2012 through November 14, 2015 created an overpayment of compensation in the amount of \$17,507.83.

The Board has reviewed OWCP's calculations of benefits received for the period November 1, 2012 through November 14, 2015 and finds that OWCP made mathematical errors in calculating the amount of the overpayment as \$17,507.83. The initial 30-day period of

² *Id.* at § 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).

³ 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).

⁴ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁵ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

overpayment from November 1 through 30, 2012 was correctly calculated to be \$459.00. The errors occurred when OWCP multiplied the amount appellant was overpaid on a daily basis by the number of days that he was overpaid. For the period December 1, 2012 through November 30, 2013, a period of 365 days, OWCP found that he was overpaid \$15.56 per day for a total overpayment compensation in the amount of \$5,679.56. The correct product is \$5,679.40. For the period December 1, 2013 through November 30, 2014, OWCP multiplied 365 days by \$15.79 and determined an overpayment of compensation in the amount of \$5,763.79. The actual amount is \$5,763.35. For the period December 1, 2014 through November 14, 2015, OWCP multiplied \$16.06 by 346 days, to find an overpayment compensation in the amount of \$5,605.48. However, \$15.56 multiplied by 365 equals \$5,556.76. When adding the new figures, the proper overpayment amount is \$17,458.51 ($\$459.00 + 5,679.40 + 5,763.35 + 5,556.76 = \$17,458.51$). Accordingly, the overpayment decision will be modified to reflect an overpayment of \$17,458.51.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. 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.⁶

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“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”⁷

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.⁸ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.⁹

⁶ *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

ANALYSIS -- ISSUE 2

The Board finds that appellant made an incorrect statement as to a material fact which he knew or should have known to be incorrect. Although appellant did indicate in the EN1032 form signed on November 27, 2012 that he would begin receiving SSA retirement on December 1, 2012, in another question on the same form he indicated that he did not receive benefits from SSA in the prior 15 months as part of an annuity for federal service. He continued to indicate that he did not receive an SSA annuity for federal services in forms signed on November 18, 2013, November 20, 2014, and November 5, 2015. As appellant was receiving SSA retirement benefits beginning November 1, 2012 based on the clear language of the forms which appellant knowingly signed, he made an incorrect statement as to a material fact.

The Board also finds that appellant accepted a payment, which he knew or should have known to be incorrect. Appellant received retirement benefits from SSA, which was in part based on his federal employment simultaneously while receiving compensation from FECA. He had been advised in the letters accompanying the EN1032 forms that the information requested in the forms would be used to determine whether the amount of benefits should be adjusted. Appellant was advised that benefits could be adjusted if he was in receipt of other federal benefits. With respect to whether an individual is with fault in the creation of the overpayment, section 10.433(b) of OWCP's regulations provides that it depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that, in applying the tests to determine fault, OWCP should apply a reasonable person test.¹⁰ The Board finds that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. Appellant had been advised that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits based on his federal service concurrently with FECA benefits.

The Board finds that appellant was at fault in the creation of the overpayment and therefore the overpayment is precluded from waiver.¹¹

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's 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

¹⁰ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

¹¹ *See R.B.*, Docket No. 15-0192 (issued August 16, 2015); *R.L.*, Docket No. 13-713 (issued August 15, 2013).

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

ANALYSIS -- ISSUE 3

OWCP determined that \$200.00 would be withheld from each of appellant's continuing compensation payments until the overpayment was recovered. In making this determination, it noted that he failed to submit the requested supporting financial documentation. Although appellant submitted a few copies of checks and a receipt from GEICO, he failed to account for the overwhelming majority of his expenses, including failing to submit documentation supporting his claim that he had \$1,747.46 in miscellaneous expenses. Because he failed to submit the requested financial documentation, OWCP properly determined that withholding \$200.00 from each of his continuing compensation benefits was reasonable. The Board will affirm OWCP's decision on rate of recovery.

CONCLUSION

The Board finds an overpayment in the amount of \$17,458.51 and OWCP's decision shall be modified accordingly. The Board further finds that OWCP properly denied waiver of recovery of the overpayment as appellant was at fault in the creation of the overpayment and OWCP properly required repayment of the overpayment by deducting \$200.00 from each of his continuing compensation payments.

¹² 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 February 26, 2016 is affirmed as modified.

Issued: November 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board