

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

H.H., Appellant

and

DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD,
Charleston, SC, Employer

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**Docket No. 16-1063
Issued: September 15, 2016**

Appearances:

Paul H. Felser, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 25, 2016 appellant, through counsel, filed a timely appeal from a March 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$42,774.01 for the period January 1, 2001 through January 9, 2016 because OWCP failed to reduce his benefits by the Federal Employees Retirement System (FERS) offset amount; (2) whether he was at fault in creating the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$345.00 from continuing compensation payments.

FACTUAL HISTORY

On July 23, 1991 appellant, then a 52-year-old marine machinist, filed an occupational disease claim (Form CA-2) alleging that he sustained an avulsion fracture of his right foot causally related to factors of his federal employment.

On August 22, 1991 OWCP accepted the claim for right hallux rigidus. In the acceptance letter, it advised that receiving wage-loss compensation and federal retirement benefits constituted a prohibited dual benefit.

The employing establishment terminated appellant's employment effective October 4, 1991 as part of a reduction-in-force. OWCP paid him compensation for total disability beginning October 7, 1991.

By decision dated January 17, 1996, OWCP reduced appellant's wage-loss compensation effective February 4, 1996 based on its finding that he had the capacity to work as a computer-aided design technician.

Appellant signed a Form EN1032 on January 22, 2002 indicating that he received benefits from the Social Security Administration (SSA) as part of an annuity under FERS. He continued to submit CA-1032 forms dated 2003 to 2014 disclosing the receipt of benefits from SSA based at least in part on a FERS annuity.

On January 22, 2004 OWCP noted that appellant advised that he was receiving regular retirement benefits and asked for information regarding his retirement program. On February 3, 2004 appellant resubmitted his Form CA-1032 and noted that he received a regular retirement check from military service with the U.S. Coast Guard.

In letters dated January 30 and October 31, 2012, the employing establishment advised OWCP that appellant was receiving SSA benefits and also retirement benefits under FERS. It questioned whether OWCP was deducting for the FERS offset. In a November 29, 2012 response, OWCP notified the employing establishment that it was requesting information from SSA regarding whether an offset was necessary.³

³ By decision dated July 22, 2014, OWCP found that appellant received an overpayment of compensation in the amount of \$435.50 because he received augmented compensation from March 2 through May 31, 2014 when he had no dependents. It further found that he was at fault in the creation of the overpayment.

The employing establishment, on September 2, 2015, informed OWCP that appellant was employed under the FERS retirement system and disclosed on his CA-1032 form dated January 29, 2015 that he was receiving SSA benefits. It advised that he turned 66 years old on December 24, 2004, at which point his benefits changed from disability benefits to retirement benefits based on age. The employing establishment requested that OWCP determine the amount that should be offset from his compensation.

On December 17, 2015 SSA notified OWCP of appellant's SSA rate with and without FERS from January 2001 to December 2015. Including federal employment, he was entitled to a rate of \$974.80 effective January 2001 and July 2001, \$1,000.10 effective December 2001, \$1,014.00 effective December 2002, \$1,1035.20 effective December 2003, \$1,063.20 effective December 2004, \$1,106.70 effective December 2005, \$1,143.20 effective December 2006, \$1,169.40 effective December 2007, \$1,237.20 effective December 2008, December 2009, and December 2010, \$1,281.70 effective December 2011, \$1,303.40 effective December 2012, \$1,322.90 effective December 2013, and \$1,1345.40 effective December 2014 and December 2015. Without counting appellant's federal earnings, he was entitled to a rate of \$777.30 effective January 2001 and July 2001, \$797.50 effective December 2001, \$808.60 effective December 2002, \$825.50 effective December 2003, \$847.80 effective December 2004, \$882.50 effective December 2005, \$911.60 effective December 2006, \$932.50 effective December 2007, \$986.50 effective December 2008, December 2009, and December 2010, \$1,022.00 effective December 2011, \$1,039.40 effective December 2012, \$1,054.90 effective December 2013, and \$1,072.80 effective December 2014 and December 2015.

Beginning January 10, 2016 OWCP adjusted appellant's compensation to offset the portion of his SSA retirement benefits attributable to his federal service.

OWCP calculated that appellant received an overpayment of compensation by determining the difference between his SSA amount with and without FERS for each period. It multiplied the daily offset amount by the number of days in each period to find a total overpayment of compensation in the amount of \$42,774.01.

On February 2, 2016 OWCP notified appellant of its preliminary determination that he received an overpayment of \$42,774.01 as it paid him wage-loss compensation benefits for the period January 1, 2001 through January 9, 2016 that were not reduced by the portion of the SSA benefits that he earned based on his federal service. It found that he began receiving regular retirement benefits under SSA on January 1, 2001 and that the portion of the SSA benefits he received due to his federal service was part of his FERS retirement package and thus prohibited. It further informed appellant of its preliminary determination that he was at fault in creating the overpayment as he should have known that the portion of his retirement based on his federal service constituted a dual benefit. OWCP noted that the August 22, 1991 acceptance letter informed him that federal retirement benefits and compensation constituted a dual benefit. It further found that appellant reported annually on CA-1032 forms that he received SSA benefits due in part to federal service but continued to accept the payments from both SSA and OWCP that he should have known were incorrect. OWCP requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone

conference, a final decision based on the written evidence or a prerecoument hearing. Appellant did not respond within the time allotted.

In a decision dated March 23, 2016, OWCP determined that appellant received an overpayment of compensation in the amount of \$42,774.01 for the period January 1, 2001 through January 9, 2016 as it failed to offset from his compensation the portion of his SSA benefits based on his FERS service. It further found that he was at fault in the creation of the overpayment and thus not entitled to waiver of recovery of the overpayment. OWCP determined that it would recover the overpayment by deducting \$345.00 from his continuing compensation payments.

On appeal appellant, through counsel, challenges the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8129(a) of FECA provides that, 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.⁵

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 received SSA benefits based on federal service, his compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁶

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 the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefit, OWCP will obtain information from SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It 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

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

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.⁸

ANALYSIS -- ISSUE 1

Appellant received wage-loss compensation under FECA and SSA benefits concurrently from January 1, 2001 through January 9, 2016. As noted, the portion of the SSA benefits he earned as part of his FERS retirement package and the receipt of benefits under FECA concurrently constituted a prohibited dual benefit.⁹ Appellant, consequently, received an overpayment of compensation.

SSA provided appellant's SSA rate with FERS and his hypothetical SSA rate without FERS. The difference between the amounts must be deducted from FECA benefits. Based on the information provided by SSA, OWCP determined that he received an overpayment of compensation in the amount of \$42,774.01 for the period January 1, 2001 through January 9, 2016.

On appeal appellant, through counsel, generally challenges the overpayment but raises no specific argument. The Board finds that the evidence of record supports that appellant received a \$42,774.01 overpayment of compensation for the period January 1, 2001 through January 9, 2016.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹¹ Each recipient of 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 that 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).¹²

⁸ See *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

⁹ 5 U.S.C. § 8116(d); see also *B.M.*, Docket No. 15-0273 (issued June 26, 2015).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.435(a).

¹² *Id.* at § 433(a); see *Kenneth E. Rush*, 51 ECAB 116 (1999).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in creating the overpayment as he accepted a payment that he knew or should have known was incorrect. It must thus establish that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹³ OWCP based its fault finding on its 1991 acceptance letter informing him that the receipt of disability compensation and federal retirement benefits was a prohibited dual benefit. The acceptance letter, however, was sent to appellant 10 years before the overpayment occurred. OWCP has not sufficiently explained how this put him on notice that he was accepting incorrect payments of compensation beginning January 1, 2001. Appellant disclosed his receipt of FERS benefits based in part on federal service on annual CA-1032 forms, but the forms did not advise that the receipt of that portion of retirement constitutes a prohibited dual benefit.

OWCP's procedures provide, "In general, if the evidence shows either a lack of good faith or failure to exercise a reasonable degree of care in reporting changes in circumstances that may affect entitlement or the amount of benefits, an individual will be found with fault."¹⁴ The Board finds that, under the circumstances, the evidence is insufficient to establish that he knew or should have known that he received incorrect payments from January 1, 2001 through January 9, 2016. Consequently, the case will be remanded to OWCP to consider whether the overpayment created for this period should be waived.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$42,774.01 for the period January 1, 2001 through January 9, 2016 because OWCP failed to reduce his benefits by the FERS offset amount. The Board further finds that he was not at fault for the creation of the overpayment and that, consequently, the case will be remanded to OWCP to consider waiver of recovery of the overpayment.

¹³ See *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5 (June 2009).

¹⁵ In view of the Board's finding that the case must be remanded for OWCP to consider waiver of recovery of the overpayment, it is premature to address recovery of the overpayment from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 15, 2016
Washington, DC

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

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

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