

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

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R.C., Appellant )  
and ) Docket No. 17-0058  
DEPARTMENT OF THE AIR FORCE, ) Issued: August 3, 2017  
NATIONAL GUARD BUREAU, Mansfield, OH, )  
Employer )  
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)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 14, 2016 appellant filed a timely appeal of a September 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$3,868.45 for the period December 1, 2011 through February 8, 2014; (2) whether appellant was at fault in the creation of the overpayment such that it is not subject to waiver; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$300.00 from appellant's continuing compensation benefits beginning October 16, 2016.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 12, 1991 appellant, then a 45-year-old aircraft pneudraulic systems mechanic, injured his back while installing a brake assembly on an aircraft. OWCP accepted his claim for lumbosacral strain. It authorized compensation benefits on September 12, 1991. On October 29, 1991 OWCP entered appellant on the periodic compensation rolls. The accompanying Form EN1049 provided, “You must also report any retirement income, disability income, or compensation benefits from any federal agency. This is because a recipient of compensation benefits under [FECA] is not permitted to receive benefits under certain other federal programs, including the Civil Service retirement program.” A Form EN1049 also advised, “If you are receiving or have filed for [Social Security Administration (SSA)] disability benefits, please contact your local [SSA] office about this award. On October 31, 1991 appellant certified that he had read and understood the terms and conditions under which he could receive compensation.

Appellant returned to part-time work in the private sector on July 18, 1994. OWCP reduced his compensation benefits based on his actual earnings on August 4, 1994. Appellant stopped work in January 1996. On April 24, 2002 OWCP accepted that appellant sustained a recurrence of disability on November 19, 2001. It reduced appellant’s wage-loss compensation in a March 18, 2004 decision. OWCP’s Branch of Hearings and Review set aside the March 18, 2004 decision on October 18, 2004 and reinstated compensation.<sup>2</sup>

In a letter dated April 6, 2010, the employing establishment informed OWCP that appellant was receiving SSA benefits. It noted that he was a Federal Employees Retirement System (FERS) employee and requested that OWCP verify the amount of his SSA benefits so that he would not receive an overpayment.

OWCP requested additional information from appellant regarding his SSA benefits on April 15, 2010. Appellant responded on April 23, 2010 and indicated that he was receiving SSA benefits, specifically Social Security Disability Insurance (SSDI) benefits beginning in January 1992. He indicated that he did not receive a regular retirement check, or a disability retirement check, but that he received a monthly military retirement check.

Appellant completed a Form EN1032 on December 12, 2011 and indicated that he had received a military retirement check. He indicated that he was unclear how to respond to whether he had received a regular retirement check. Appellant answered “no” to the question of whether he received benefits from SSA as part of an annuity for federal service.

On June 13, 2011 OWCP accepted the additional conditions of aggravation of degenerative disc disease at L4-5 and L5-S1 and aggravation of herniated bulging disc at L4-5. On July 18, 2011 it also accepted major depressive disorder and panic disorder with agoraphobia. On January 11, 2012 OWCP updated appellant’s accepted conditions to include post-traumatic stress disorder.

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<sup>2</sup> On December 12, 2008 appellant appealed to the Board. However, the Board found that there was no OWCP decision over which it had jurisdiction. On August 21, 2009 the Board dismissed the appeal. Docket No. 09-0505 (issued August 21, 2009).

OWCP requested information from SSA on April 20, 2012 regarding dual benefits. On July 16, 2012 appellant indicated that he was eligible for FERS retirement, but could not receive these benefits as he was receiving FECA benefits. He indicated that he was receiving benefits from the SSA and provided his monthly SSA benefits.

Appellant completed a Form EN1032 on December 14, 2012 and indicated that he was not receiving benefits from SSA as part of an annuity for federal service. He completed a Form EN1032 on December 12, 2013 and also indicated that he was not receiving benefits from SSA as part of an annuity for federal service.

On January 21 and 23, 2014 SSA provided OWCP with two calculations of appellant's SSA benefits. On the first form dated January 13, 2014 the handwritten figures indicate that the SSA with FERS rate was \$1,481.20 and without FERS the SSA rate was \$1,264.00 beginning December 2011. Beginning December 2012 the SSA rate with FERS was \$1,506.30 and without FERS the SSA rate was \$1,285.50. Beginning December 2013 the SSA rate with FERS was \$1,528.80 and without FERS \$1,304.70.

On the second form, dated January 15, 2014, the handwritten figures indicate that the December 2011 SSA rate with FERS remained \$1,481.20 while without FERS the SSA rate was listed as \$1,272.90. The second form indicated that the December 2012 SSA rate with FERS remained \$1,506.30, while the SSA rate without FERS was listed as \$1,294.50. The second form also indicated that the December 2013 SSA rate with FERS was \$1,528.50 and the SSA rate without FERS was \$1,313.90.

OWCP informed SSA on March 14, 2014 of the receipt of two calculation forms with varying sums and requested a correct calculation. On March 26, 2014 appellant informed OWCP that the benefit amounts provided by SSA to OWCP were different than the amounts which appeared on his benefits statements for the periods in question. OWCP contacted SSA by telephone and was instructed that the January 15, 2014 form was correct. It notified appellant on April 3, 2014.

OWCP calculated appellant's overpayment based on the SSA offset for FERS and found that appellant received an overpayment in the amount of \$5,557.84.

On July 30, 2014 OWCP made a preliminary determination that appellant received a \$5,532.37 overpayment of compensation because he was receiving SSA benefits while receiving FECA benefits. It made the preliminary determination that appellant was at fault in the creation of the overpayment because "you were receiving dual benefits which you know or should have known constitutes dual benefits under FECA."

Appellant requested a prercoupmant hearing with OWCP's Branch of Hearings and Review on August 19, 2014 on the issues of fault and possible waiver. He disagreed that an overpayment occurred, with the amount of the overpayment, and with the finding of fault. Appellant completed an overpayment recovery questionnaire (OWCP-20) on August 18, 2014. He alleged that he was not informed of the conditions under which he could receive SSA and FECA benefits.

On December 12, 2014 appellant completed a Form EN1032 and indicated that he had not received benefits from SSA as part of an annuity for federal service.

Appellant testified at the oral hearing before an OWCP hearing representative on March 24, 2015. On March 25, 2015 OWCP's hearing representative requested that appellant complete an additional Form OWCP-20. Appellant completed the additional form on April 6, 2015.

By decision dated June 9, 2015, OWCP's hearing representative set aside the July 30, 2014 preliminary overpayment finding. She found that, due to the discrepancies in the information provided by SSA, OWCP must request written clarification of appellant's actual entitlement. Following this, the hearing representative directed that OWCP provide appellant with a new preliminary overpayment determination.

OWCP requested clarification of appellant's actual entitlement to SSA benefits on October 19 and December 7, 2015. On November 12, 2015 the SSA responded and provided a third set of handwritten computations. These provided that during the period beginning December 2011, appellant's SSA rate with FERS was \$1,481.20 and the SSA rate without FERS was \$1,336.20. For the period beginning December 2012, the SSA rate with FERS was \$1,506.30 and appellant's SSA rate without FERS was \$1,358.90. Beginning December 2013 appellant's SSA rate with FERS was \$1,528.80 and without FERS was \$1,379.20. On December 2014 the SSA rate with FERS was \$1,554.70 and without FERS was \$1,402.60. On the bottom of the form was the handwritten note, "Conferred with technical expert. Rates above are correct."

OWCP calculated the overpayment from dual SSA and FERS benefits from December 1, 2011 through November 30, 2012 in the amount of \$1,749.56 and from December 1, 2012 through November 30, 2013 in the amount of \$1,773.66, and from December 1, 2013 through February 8, 2014 in the amount of \$345.23. OWCP totaled the three periods to reach an overpayment of \$3,868.45.

On December 16, 2015 OWCP revised the preliminary overpayment finding noting that appellant received a \$3,868.45 overpayment because he received SSA benefits as a FERS employee while receiving FECA benefits. It found appellant at fault in creating the overpayment because he knew or should have known that he was receiving dual benefits. OWCP informed him of his appeal rights and asked that he complete an overpayment recovery questionnaire for OWCP to consider questions of fault and waiver and to determine a reasonable method for collection.

In a file memorandum dated February 8, 2016, OWCP determined that an overpayment in the amount of \$43.84 had been identified due to a cost-of-living increase to FERS benefits in December 2014. It administratively terminated this overpayment.

By decision dated September 27, 2016, OWCP found that appellant had received an overpayment in the amount of \$3,868.45 for the period December 1, 2011 through February 8, 2014 for which he was at fault as he knew or should have known that he was not entitled to dual benefits. It further noted that appellant had not contested the finding or submitted financial

information and that recovery of the overpayment would be made by withholding \$300.00 from appellant's future compensation benefits.

### **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.<sup>3</sup>

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.<sup>4</sup> 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 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.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the case is not in posture for a decision.

The record supports that appellant received FECA wage-loss compensation beginning on September 12, 1991 and that he received SSA benefits beginning on December 1, 2011. The portion of the SSA benefits appellant earned as a federal employee was part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>6</sup> Appellant's FECA compensation was not offset until February 9, 2014.

The SSA notified OWCP of three possible SSA rates for appellant and their effective dates. Given the discrepancy in the amounts provided by SSA on three different forms covering the same benefit period, OWCP should have further developed the evidence by obtaining

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<sup>3</sup> 5 U.S.C. § 8116(d). *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000(e)(2) (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 B.R.*, Docket No. 16-0567 (issued December 9, 2016); *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

<sup>5</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

<sup>6</sup> *See P.G.*, Docket No. 13-0589 (issued July 9, 2013).

clarification from SSA as to appellant's SSA rate with and without any offset from FERS.<sup>7</sup> The evidence upon which OWCP relies is simply one of three sheets with handwritten numbers. OWCP selected the last set of numbers. However, there is no clear explanation as to what the error was in the prior two sets of numbers or why the last set of numbers is correct. The only explanation in the record is a handwritten note from the preparer of the last form: "Conferred with technical expert. Rates above are correct." The Board finds that this explanation is insufficient to meet OWCP's burden of proof to establish the appropriate SSA rate and the amount of the overpayment. Without accurate information from SSA advising whether appellant was in receipt of retirement benefits based in part on federal service and providing reliable figures of his monthly benefits, the Board is unable to determine whether an overpayment exists and the amount of any overpayment.<sup>8</sup>

The Board will therefore set aside the September 27, 2016 overpayment decision.<sup>9</sup> On remand OWCP shall request that SSA confirm that appellant received SSA retirement benefits based in part on his federal service, resolve the conflicting FERS offset information provided, and provide the effective dates to determine the fact and amount of overpayment.<sup>10</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.

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<sup>7</sup> See *E.H.*, Docket No. 16-1465 (issued December 19, 2016); *K.G.*, Docket No. 16-0553 (issued June 21, 2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

<sup>10</sup> Based on the Board's disposition of whether appellant received an overpayment of compensation, it is premature to address the issues of fault and recovery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this opinion of the Board.

Issued: August 3, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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