

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$60,991.35 from June 1, 2010 through October 17, 2015; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$760.00 from appellant's continuing compensation payments.

On appeal, appellant's representative contends that recovery of the overpayment should be waived and the amount of appellant's Social Security Disability Insurance (SSDI) should be reinstated. She maintains that OWCP failed to fully develop the record and address the issue of whether appellant received dual benefits and whether recovery of the overpayment was against equity and good conscience. The representative also maintains that it violated its procedures because it did not provide appellant with two weeks' notice regarding the offset of his compensation benefits. She asserts that an automatic conversion from SSDI to Social Security Administration (SSA) benefits discriminated against appellant based on age.

FACTUAL HISTORY

On March 11, 2008 appellant, then a 63-year-old physician, filed an occupational disease claim (Form CA-2) alleging that on November 7, 2007 he first realized that his aggravation of major depressive disorder, aggravation of obsessive compulsive disorder, and aggravation of post-traumatic stress disorder (PTSD) were caused by his regularly assigned federal work duties and daily aspects of his job. He stopped work on November 7, 2007.

On September 5, 2008 OWCP accepted the claim for aggravation of major depressive disorder and aggravation of PTSD. It placed appellant on the periodic rolls and paid compensation for total disability beginning October 26, 2008.

Appellant had routinely been required, as a condition of being on the periodic rolls, to submit EN1032 forms. He signed a Form EN1032 on July 8, 2011 indicating that he received monthly disability benefits from the SSA. Appellant continued to submit EN1032 forms dated 2012 to 2015 disclosing the receipt of benefits from SSA due to his disability.

On July 11 and October 11, 2012, and January 22, 2013 OWCP requested that SSA provide a dual benefit calculation.

On October 26, 2015 SSA submitted a form reflecting that appellant had begun receiving SSA retirement effective June 1, 2010. It also showed SSA rates with a Federal Employees Retirement System (FERS) offset and without a FERS offset from June 1, 2010 through December 1, 2014.³ The form revealed that appellant was entitled to SSA disability benefits from May 2008 to May 2010.

By letter dated November 2, 2015, OWCP advised appellant that he had been receiving SSA retirement benefits based on age since June 1, 2010. Effective October 18, 2015, it reduced

³ Appellant reached age 66 on June 2, 2010.

his 28-day compensation payment by \$905.54, the amount of his SSA retirement benefits attributable to his federal service.

The record includes an OWCP worksheet containing a calculation showing that appellant received a \$60,991.35 overpayment of compensation for the period June 1, 2010 to October 17, 2015 due to the failure to offset SSA benefits.

In a November 17, 2015 notice, OWCP advised appellant of its preliminary determination of an overpayment of compensation in the amount of \$60,991.35 for the period June 1, 2010 to October 17, 2015 because he had received a prohibited dual benefit. Appellant had received SSA retirement benefits based on age during this period while simultaneously receiving FECA wage-loss compensation. OWCP explained that it was required by statute to recover the overpaid FECA compensation, reducing FECA compensation benefits by the amount of the SSA retirement benefits attributed to his federal service. It also made a preliminary determination that appellant was not at fault in the creation of the overpayment because he was not aware nor could he have been reasonably expected to know that he had received an incorrect payment. OWCP advised him that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of recovery of the overpayment. Additionally, it informed 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 precoupment hearing. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

By letter dated December 15, 2015, appellant disagreed with the fact and amount of the overpayment and requested waiver of repayment. On October 21, 2015 OWCP received an overpayment action request form from him dated December 15, 2015. Appellant requested that OWCP review the written evidence.

In CA-110 notes dated January 19, 2016, appellant requested a telephone conference instead of a review of the written evidence.

In a March 16, 2016 petition, appellant contended that the monthly offset should not be applied until after his appeal had been heard and determined. He also contended that the overpayment and recovery of the overpayment were against equity and good conscience because he was automatically converted from SSDI to SSA retirement benefits and was subjected to an unsafe work environment.⁴ Appellant also asserted that OWCP failed to notify him in a timely manner about the reduction in his benefits as it had more than five years notice that he received SSA benefits and it violated federal law as it discriminated against him based on his disability. He contended that his financial circumstances were not material to OWCP's determination.

On March 21, 2016 OWCP held a telephone conference with appellant and his representative. The representative reiterated the contentions appellant provided in his March 16, 2016 petition.

⁴ In a June 8, 2016 letter, the employing establishment informed OWCP that appellant had been removed from its payroll effective April 18, 2016, as he wished to retire.

In an April 26, 2016 letter, appellant's representative primarily contended that appellant relinquished a valuable right by relying upon the government to legally and properly administer its laws and procedures and detrimentally relied on Civil Service Retirement System and FERS handbooks for information regarding payment of disability wage-loss compensation and OWCP's responsibility to review the EN1032 forms he had completed since 2010.

By decision dated June 29, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$60,991.35 for the period June 1, 2010 to October 17, 2015 for which he was without fault. It denied waiver of recovery of the overpayment as appellant failed to provide any financial justification for such action. OWCP determined that it would recover the overpayment by deducting \$760.00 per month from his continuing compensation payments commencing July 24, 2016.

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.⁵ 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.⁶

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA retirement 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 or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁷

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.⁸ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant had received SSA benefits, OWCP will obtain information from the 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

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(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 R.C.*, Docket No. 09-2131 (issued April 2, 2010).

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 overpayment.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained an aggravation of major depressive disorder and aggravation of PTSD while in the performance of duty. The record supports that appellant received FECA wage-loss compensation from October 26, 2008 and that he received SSA disability benefits until June 1, 2010 when his disability benefits were converted to SSA retirement benefits. The portion of the SSA benefits he 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.¹⁰ Appellant's FECA compensation was not offset until October 18, 2015. SSA notified OWCP of the applicable SSA rates for that period and their effective dates. Based on these rates, OWCP calculated the dual benefit appellant had received from June 1, 2010 to October 17, 2015, which yielded an overpayment of compensation in the amount of \$60,991.35. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that OWCP properly determined an overpayment of compensation in the amount of \$60,991.35 from June 1, 2010 to October 17, 2015.

Appellant's representative asserted before OWCP and on appeal that an automatic conversion from SSDI to SSA retirement benefits discriminated against appellant based on age. As noted above, FECA benefits must be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.¹¹

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines. These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery of an overpayment 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 this subchapter or would be against equity and good conscience."¹² When a claimant is found to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP

⁹ See *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

¹⁰ 5 U.S.C. § 8116(d)(2); see also *R.C.*, Docket No. 14-1383 (issued December 5, 2014); see also FECA Bulletin No. 97-9 (issued February 3, 1997).

¹¹ 5 U.S.C. § 8116(d).

¹² *Id.* § 8129(b).

may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.¹³

Section 10.438 of OWCP regulations provides that 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. 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.¹⁴

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁵ In a November 17, 2015 preliminary determination of overpayment, it advised appellant of its preliminary determination and instructed him to complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP 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 submit a completed overpayment recovery questionnaire or supporting financial documents and contended that his financial circumstances were immaterial to an OWCP determination. Thus, OWCP did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of FECA or whether recovery would be against equity and good conscience such that it would cause a financial burden.

Consequently, OWCP properly denied waiver of recovery of the overpayment in the amount of \$60,991.35.

On appeal, appellant's representative contends that recovery of the overpayment should be waived and the amount of appellant's SSDI should be reinstated. She further contends that OWCP failed to fully develop the record and address the issue of whether he received dual benefits and whether recovery of the overpayment was against equity and good conscience. Contrary to the representative's contention, OWCP, in its November 17, 2015 notice, specifically requested that appellant complete a Form OWCP-20 along with supporting documents to determine his eligibility for waiver of recovery of the overpayment. Appellant merely responded that his financial circumstances were not material to OWCP's overpayment determination. Moreover, OWCP's June 29, 2016 decision noted that he had not submitted the required

¹³ *M.G.*, Docket No. 14-1917 (issued January 22, 2015).

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Supra* note 12.

financial information and denied waiver of recovery of the overpayment and provided specific appeal rights if he disagreed with OWCP's decision.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation FECA.¹⁶ Section 10.441(a) of the regulations provides:

“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 [appellant's] attention is called to 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 any hardship.”¹⁷

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. When, as in this case, an individual fails to provide requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which provide in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁸ The Board finds that OWCP did not abuse its discretion in following those guidelines in this case by deducting \$760.00 every four weeks, where appellant has not submitted complete financial information.

On appeal, appellant's representative contends that OWCP violated its procedures because it did not give appellant two weeks' notice about the offset of his compensation benefits. OWCP procedures provide that, “[i]f for any reason the decision letter is not released at least two weeks before the next compensation check, the deduction for the overpayment should not be started until the following check cycle, to provide the claimant the required two-week notice for reduction in net compensation.” In this case, the June 29, 2016 overpayment decision set up a repayment schedule of withholding \$760.00 from appellant's compensation checks beginning July 24, 2016 and continuing until the debt had been repaid. OWCP did not violate its procedures as this decision was issued at least two weeks prior to the issuance of appellant's next compensation check on July 24, 2016.

¹⁶ *Id.* at § 10.441(a).

¹⁷ *Id.*

¹⁸ *Robin D. Calhoun*, Docket No. 00-1756 (issued May 21, 2001); *Gail M. Roe*, 47 ECAB 268 (1995).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$60,991.35 from June 1, 2010 through October 17, 2015. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly determined that it would recover the overpayment by deducting \$760.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2017
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