

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, INCOMING MAIL
CENTER, Boston, MA, Employer**

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**Docket No. 17-0181
Issued: May 22, 2017**

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 November 3, 2016 appellant filed a timely appeal from a September 7, 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 appellant received an overpayment of compensation in the amount of \$24,623.11 for the period April 1, 2014 to December 12, 2015 because OWCP failed to reduce his compensation benefits by the Federal Employees Retirement System (FERS) offset amount; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly determined that it would recover the overpayment by deducting \$300.00 from continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 9, 2001 appellant, then a 63-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he twisted his right knee and experienced left knee problems due to an April 6, 2001 employment injury. OWCP accepted the claim for right knee strain, a left knee contusion/blunt trauma, and an aggravation of osteoarthritis of the knees.² It paid appellant compensation for intermittent periods of total disability.³

Appellant underwent a total right knee replacement on April 10, 2008 and a total left knee replacement on September 23, 2008. On October 27, 2011 OWCP accepted a recurrence of a medical condition on August 5, 2011. It paid appellant compensation for total disability on the periodic rolls beginning November 20, 2011.

Appellant telephoned OWCP on October 14, 2014 requesting information about electing between FECA and retirement benefits and about offsets for benefits from the Social Security Administration (SSA). In a letter dated October 14, 2014, OWCP advised him that his FERS benefits would be reduced by the amount of SSA benefits he received based on his age and the amount attributable to his federal service. It provided appellant with an election form.

In a Form EN1032 dated March 18, 2015, appellant reported receiving \$1,909.60 in retirement benefits monthly from SSA as part of an annuity for federal service.

SSA, in a FERS/SSA dual benefit calculation form dated October 2, 2015, provided the amount that appellant received in retirement benefits with FERS and also the hypothetical amount that he would have received without FERS. Including federal employment, he was entitled to a monthly payment of \$1,865.00 effective April 1, 2014, \$1,897.00 effective December 1, 2014, and \$1,909.00 effective January 1, 2015. Reducing the amount by deducting those attributable to his federal earnings, he was entitled to a monthly payment rate of \$773.00 effective April 1, 2014, \$786.00 effective December 1, 2014, and \$786.00 effective January 1, 2015.

In a December 22, 2015 fiscal pay rate memorandum, OWCP determined that the monthly FERS offset amount was \$1,092.00 effective April 1, 2014, \$1,111.00 effective December 1, 2014, and \$1,123.00 effective January 1, 2015. It calculated the 28-day FERS offset amount as \$1,008.00 effective April 1, 2014, \$1,025.54 effective December 1, 2014, and \$1,036.62 effective January 1, 2015.

By letter dated December 22, 2015, OWCP advised appellant that it was adjusting his compensation, effective December 13, 2015, to offset the portion of his SSA retirement benefits attributable to his federal service. It informed him that the portion of the SSA benefits he earned

² By decision dated April 29, 2003, OWCP granted appellant a schedule award for 13 percent permanent impairment of the left lower extremity.

³ OWCP previously accepted that appellant sustained internal derangement of the right knee due to a March 16, 1995 employment injury, assigned File No. xxxxxx723.

as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

OWCP, on December 23, 2015, calculated the overpayment by determining the difference between appellant's SSA amount with and without FERS for each period and then multiplying that amount by the number of days in each period. It utilized a 28-day FERS offset amount of \$1,092.00 for the 244 days from April 1 to November 30, 2014 to find an overpayment of \$9,516.00. OWCP applied a 28-day FERS offset of \$1,111.00 for the 31 days from December 1 to 31, 2014 to find an overpayment of \$1,230.04, and a 28-day offset amount of \$1,123.00 for 346 days for the period January 1 to December 12, 2015 to find an overpayment of compensation in the amount of \$13,877.07. It added the overpayment amounts to find a total overpayment of \$24,623.11.

On January 22, 2016 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$24,623.11 as he received compensation benefits for the period April 1, 2014 to December 12, 2015 that had not been reduced by the portion of his SSA benefits attributable to his federal service. It found that the portion of the SSA benefits he received due to his federal service was part of FERS retirement package and thus a prohibited dual benefit. OWCP further made a preliminary determination that appellant was without fault in creating the overpayment. It requested that he 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 precoupment hearing.

Appellant, on February 10, 2016, requested a precoupment hearing. He submitted an overpayment recovery questionnaire providing his monthly income as \$4,876.00 and listing expenses. Appellant indicated that he had \$21,000.00 in a savings account.

In a statement dated June 24, 2016, appellant asserted that he had \$3,073.35 in monthly expenses and \$4,876.82 in monthly income. He enclosed some supporting financial documentation.

At the hearing, held on June 24, 2016, appellant advised that he received retirement benefits from SSA beginning April 1, 2014. He had money in his Thrift Savings Plan (TSP) that he did not know that he had to disclose. Appellant also owned a condominium in Florida as a second home.

In an overpayment recovery questionnaire dated July 11, 2016, appellant advised that he had \$125,000.00 in his TSP, for total liquid assets of \$142,800.00. He also owned a condominium which he rented that was worth about \$65,000.00.

By decision dated September 7, 2016, OWCP's hearing representative determined that appellant received a \$24,623.11 overpayment of compensation for the period April 1, 2014 to December 12, 2015 because OWCP had failed to offset his compensation by the SSA benefits he earned as a result of his federal service. She found that he was without fault in creating the overpayment, but was not entitled to waiver of recovery of the overpayment as his monthly

income of \$4,846.00 exceeded his monthly expenses by more than \$300.00. The hearing representative found that the overpayment should be recovered by deducting \$300.00 from continuing compensation payments.

On appeal appellant argues that he was not at fault in creating the overpayment and that he used a check from SSA to pay credit card debt. He questions his overpayment of \$25,000.00. Appellant maintains that he is unable to pay back \$300.00 per month for 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)(2) 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 federal service.⁶ OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, 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 It obtains 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 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

OWCP accepted that appellant sustained a right knee strain, a left knee contusion, and an aggravation of osteoarthritis of the knees due to the April 6, 2001 work injury. It paid wage-loss compensation on the periodic rolls beginning November 20, 2011.

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(e) (January 1997).

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

Appellant related that he received retirement benefits from SSA beginning April 1, 2014. OWCP paid him wage-loss compensation until December 12, 2015 without an offset for the portion of the SSA benefits due to his federal service. As discussed, a claimant cannot receive both compensation for wage loss and the portion of SSA benefits that are attributable to his federal service for the same period.⁹ Appellant received SSA benefits based on his federal service concurrently with disability compensation from OWCP without an appropriate offset; consequently, appellant received an overpayment of compensation.

The Board finds, however, that the case is not in posture for decision regarding the amount of overpayment. On October 2, 2015 SSA advised that appellant was entitled to a monthly payment with his federal earnings of \$1,865.00 effective April 1, 2014, \$1,897.00 effective December 1, 2014, and \$1,909.00 effective January 1, 2015. Without federal earnings, he was entitled to a monthly payment rate of \$773.00 effective April 1, 2014, \$786.00 effective December 1, 2014, and \$786.00 effective January 1, 2015. Based on these numbers, on December 22, 2014 OWCP calculated the monthly offset amount as \$1,092.00 beginning April 1, 2014, \$1,111.00 beginning December 1, 2014, and \$1,123.00 beginning January 1, 2015. It then determined the 28-day offset amount as \$1,008.00 effective April 1, 2014, \$1,025.54 effective December 1, 2014, and \$1,036.62 effective January 1, 2015.

The Board has found that the offset amount should be calculated on a 28-day basis rather than on a monthly basis.¹⁰ In its overpayment determination, however, OWCP indicated that it was using the 28-day offset amount, but instead utilized the figures for the monthly offset amount in calculating the amount of overpayment. Consequently, the case is not in posture for determination of the amount of the overpayment. On remand, OWCP should recalculate the amount of the overpayment using the 28-day FERS offset amount for each period. After such further development as deemed necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period April 1, 2014 to December 12, 2015 because OWCP failed to reduce his compensation benefits by the FERS offset amount, but that the case is not in posture for decision regarding the amount of the overpayment.¹¹

⁹ See *supra* note 7; see also *L.G.*, Docket No. 16-1360 (issued November 15, 2016).

¹⁰ See *J.B. (J.B.)*, Docket No. 16-0707 (issued November 1, 2016); *C.N.*, Docket No. 16-0134 (issued March 8, 2016).

¹¹ In view of the Board's determination regarding the amount of the overpayment, it is premature to address the issues of waiver and recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 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 opinion of the Board.

Issued: May 22, 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