

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

R.H., Appellant)
)
and) **Docket No. 17-1423**
) **Issued: November 8, 2017**
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Seattle, WA, Employer)
)

Appearances:

Stephanie Leet, 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 June 15, 2017 appellant filed a timely appeal from a December 27, 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 the claim.

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 \$26,741.75 for the period October 1, 2007 to December 12, 2015; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly deducted \$240.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

OWCP accepted that on July 7, 2004 appellant, then a 65-year-old lead security screener, sustained a lumbar strain, cervical-thoracic strain, and lumbar radiculopathy. On February 22, 2005 appellant claimed a recurrence of disability (Form CA-2a) beginning January 1, 2005. He stopped work on February 20, 2005. OWCP expanded the claim to accept an L4-5 disc herniation. It paid appellant wage-loss compensation for total disability beginning February 20, 2005.

On August 29, 2005 appellant underwent L4 and L5 laminectomy, facetectomy, and foraminotomy. He did not return to work.³ OWCP placed appellant's case on the periodic rolls effective February 19, 2006. Appellant submitted annual affidavits of earnings and employment (Form EN1032) from June 12, 2006 to October 31, 2014, noting that he did not receive any income from the Social Security Administration (SSA).⁴

In a Form CA-1049 letter dated November 13, 2014, OWCP notified appellant that he must report any retirement income "from any Federal agency," as a FECA compensationner was not permitted to "receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS)." Additionally, if appellant was covered under FERS, OWCP must deduct from his "compensation entitlement at least part of any social security retirement benefits to which [he was] entitled based on age. This is because a portion of FERS benefits is included in social security retirement benefits." Appellant must therefore "advise OWCP immediately upon filing for or receiving social security retirement benefits."

On April 28, 2015 OWCP requested that SSA specify the amount of monthly benefits paid to appellant with and without the FERS offset attributable to appellant's federal service.

In a Form EN1032 dated May 20, 2015, appellant noted that he did not receive SSA income, but did receive a required minimum annuity distribution of \$30.00 a month.

³ To assess the nature and extent of the accepted injuries and appellant's work capacity, on November 19, 2007, OWCP obtained a second opinion from Dr. Richard E. Hall, a Board-certified orthopedic surgeon, who found appellant able to perform full-time light-duty work.

⁴ In a December 2, 2013 decision, OWCP reduced appellant's wage-loss compensation finding that the evidence established appellant's ability to perform the selected position of family caseworker. On August 28, 2014 an OWCP hearing representative reversed the December 2, 2013 decision. OWCP retroactively reinstated appellant's compensation benefits.

On September 8, 2015 OWCP again requested that SSA specify the amount of any monthly benefits paid to appellant with and without the FERS offset attributable to his federal service.

The SSA responded on September 10, 2015 with compensation entitlement amounts for appellant, as follows: beginning October 2007, \$732.00 with FERS and \$497.00 without; beginning December 2007, \$748.00 with FERS and \$508.00 without; beginning January 2008, \$782.00 with FERS and \$531.00 without; beginning December 2008, \$827.00 with FERS and \$562.00 without; beginning December 2011, \$857.00 with FERS and \$582.00 without; beginning December 2012, \$872.00 with FERS and \$592.00 without; beginning December 2013, \$884.90 with FERS and \$601.00 without; beginning December 2014, \$899.90 with FERS and \$611.10 without; and beginning January 2015, \$900.10 with FERS and \$611.10 without.

Beginning December 13, 2015, OWCP adjusted appellant's compensation to reflect a FERS/SSA benefit offset. It noted that his current SSA rate with FERS was \$900.10 and without FERS was \$611.10, which yielded a monthly offset of \$289.00. This amount, when converted to OWCP's 28-day payment cycle, was \$266.77.

In a January 8, 2016 worksheet, OWCP calculated that appellant had been overpaid \$26,456.13 from October 1, 2007 to December 12, 2015 as OWCP had failed to offset FERS retirement benefits from ongoing FECA benefits. It offered a different calculation in a January 15, 2016 worksheet, finding that appellant had been overpaid by \$26,741.75 from October 1, 2007 to January 1, 2015.

By notice dated January 15, 2016, OWCP advised appellant of its preliminary determination that he had received a \$26,741.75 overpayment of compensation for the period October 1, 2007 to December 12, 2015 because the FERS offset was not deducted from his FECA wage-loss compensation benefits. It found that he was without fault in creating the overpayment. OWCP requested that appellant provide information regarding his income, assets, and expenses. Appellant did not respond.

By decision dated February 17, 2016, OWCP finalized the January 15, 2016 notice, finding an overpayment in the amount of \$26,741.75 for the period October 1, 2007 to December 12, 2005. Although appellant was found to be without fault in the creation of the overpayment, it found that waiver of recovery of the overpayment could not be considered as he had failed to provide the requested financial information. OWCP directed that appellant repay the overpayment by deduction of \$340.00 from each of the continuing periodic rolls compensation payments.

Appellant, through counsel, timely requested a prerecoupment hearing. She submitted a completed overpayment recovery questionnaire (Form OWCP-20), listing total monthly household income of \$2,246.18. Appellant noted that he received \$901.00 a month in SSA benefits, and his wife received \$1,298.00 a month in SSA benefits. He also received \$77.18 a month from a retirement annuity, \$35.91 in interest from a Thrift Savings Plan (TSP) account, and \$41.27 a month from an investment account. Appellant listed \$3,005.00 in monthly household expenses, including \$1,200.00 for rent or mortgage, \$400.00 for food, \$400.00 for clothing, \$430.00 for utilities, and \$575.00 for miscellaneous household expenses. In a

February 12, 2015 letter accompanying the Form OWCP-20, counsel contended that OWCP miscalculated the overpayment, and that appellant could not repay the debt due to severe financial hardship.

In a March 4, 2016 letter, OWCP notified appellant that it had vacated the February 17, 2016 final overpayment decision as his request for a prerecoupment hearing was timely received on February 17, 2016.

Appellant completed a Form EN1032 on May 12, 2016, noting that he did not receive SSA benefits as part of an annuity for federal service.

At the prerecoupment hearing, held on October 14, 2016, counsel contended that, in calculating the overpayment, OWCP should have only included quarters in which appellant was federally employed, and not his years of private-sector employment at a higher rate of pay. Appellant submitted detailed financial documentation supporting the income and expenses noted on the Form OWCP-20. In a November 11, 2016 letter, counsel reiterated that appellant could not repay the debt due to severe financial hardship.

In a December 27, 2016 decision, an OWCP hearing representative finalized the January 15, 2016 notice, finding a \$26,741.75 overpayment of compensation for the period October 1, 2007 to December 12, 2015. Appellant was found to be without fault in the creation of the overpayment. Based on the financial information submitted the hearing representative found that waiver of recovery of the overpayment was not warranted. Appellant was to repay the overpayment by deduction of \$240.00 from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of FECA provides, 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)(2) of FECA⁷ provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d)(2).

under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that --”

* * *

“(2) in the case of benefits received on account of age or death under [T]itle [2] of the [SSA], compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title...”⁸

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation for the period October 1, 2007 to December 12, 2015. Appellant received FECA compensation benefits without an appropriate FERS offset, creating a prohibited dual benefit.¹⁰ However, the case is not in posture for a decision regarding the amount of the overpayment.

OWCP offered two sets of overpayment calculations, each with a different result. On January 8, 2016 it noted a \$26,456.13 overpayment from October 1, 2007 to December 12, 2015, but on January 15, 2016, OWCP found a \$26,741.75 overpayment of compensation for the same period. It utilized the second calculation in its December 27, 2016 decision. Although it provided a table of FECA and SSA benefit payments supporting the \$26,741.75 result in the preliminary notice of overpayment, OWCP did not explain why the January 8, 2016 calculation was in error. Therefore, the case will be remanded to OWCP for recalculation of the overpayment, to be followed by a *de novo* decision.

On appeal counsel contests the amount of the overpayment. As stated, the case will be remanded for OWCP to clarify the amount of the overpayment.¹¹

⁸ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e)(2) (February 1995) (the portion of SSA benefits earned as a federal employee as part of a FERS retirement package and the receipt of FECA benefits concurrently is a prohibited dual benefit). *B.L.*, Docket No. 13-1422 (issued June 2, 2014); *A.H.*, Docket No. 12-1402 (issued December 13, 2012).

⁹ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a). See also *P.M.*, Docket No. 14-1832 (issued January 20, 2015).

¹⁰ *Id.*

¹¹ As the case is not in posture for a decision regarding the amount of overpayment, it is premature for the Board to address the subsequent issues of waiver and rate of recovery.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation. However, the case is not in posture for a decision with regard to the amount of the overpayment. The case will be remanded to OWCP for recalculation of the overpayment. The issues of waiver of recovery and rate of recovery are moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2016 is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: November 8, 2017
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