

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$10,636.63 for the period June 1, 2011 through July 25, 2015; (2); whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly deducted \$75.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board. The facts of the case outlined in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on December 2, 1994 appellant, then a 66-year-old supervisory field representative, was involved in a work-related motor vehicle accident and sustained a concussion; left upper extremity injuries; contusions of the chest and lower extremities; bilateral knee injuries; a right knee meniscus tear; left ankle strain; cervical, thoracic, and lumbar strains; jaw subluxation; right shoulder tendinitis (consequential injury); and a closed fracture of the left lateral malleolus. Appellant stopped work and did not return. OWCP paid her wage-loss compensation benefits, beginning January 21, 1995.

Appellant was born in May 1949. When she turned 62 years of age in 2011, she was eligible to receive age-related social security retirement benefits. The record indicates that appellant was covered under the Federal Employees Retirement System (FERS) and was subject to Federal Insurance Contributions Act (FICA) withholding.

By letter dated April 1, 2011, OWCP advised appellant of the possibility of a prohibited dual benefit as a result of receiving FECA wage-loss benefits and FERS-based social security retirement benefits. It explained that her FECA benefits would have to be reduced by the amount of any social security retirement benefits attributable to her federal service. OWCP further advised appellant to immediately contact her local district office if and when she was approved for social security retirement benefits. Approximately, two years later, appellant advised OWCP that she was receiving social security benefits. However, she believed that her benefits were based on her private sector employment.

On June 6, 2014 OWCP contacted the Social Security Administration (SSA) inquiring about appellant's age-related SSA retirement benefits beginning on or after May 28, 2011. On July 31, 2014 an SSA representative advised OWCP that appellant was eligible for SSA age-related retirement benefits beginning June 1, 2011. The representative provided a breakdown of appellant's monthly SSA benefits that included contributions from her federal service (w/ FERS), as well as a monthly benefit that excluded her FERS-based contributions (w/o FERS). Beginning June 2011, appellant's total monthly SSA benefit was \$841.10, and the corresponding monthly amount excluding her FERS-based contributions was \$720.20. The representative also provided additional calculations for subsequent periods beginning December 2011 (\$871.30/\$746.00), December 2012 (\$886.10/\$758.70), and December 2013 (\$899.40/\$770.00). Based on the information provided by SSA, appellant's FERS-based contributions accounted for approximately \$126.00 of her total monthly SSA benefits. At the time, OWCP did not take any action to offset her wage-loss compensation based on this information.

On May 28, 2015 OWCP submitted a “Re[-]computation” request to SSA regarding the possibility of a dual benefit.

On July 20, 2015 another SSA representative advised OWCP that appellant was eligible to receive age-related retirement benefits from June 2011 through April 2014. This representative indicated that she was entitled to SSA disability from October 2005 through May 2011 and from May 2014 through April 2015, and during those periods, a FERS offset did not apply. SSA further noted that appellant’s eligibility for SSA age-related retirement benefits resumed in May 2015 and provided calculations showing her total SSA monthly retirement benefits and corresponding monthly benefits excluding her FERS-based contributions. Although the latest full SSA monthly figures for June 2011 through December 2013 were consistent with information previously provided by SSA, the 2011-2013 monthly figures excluding appellant’s FERS-based contributions differed. According to this representative, her monthly retirement benefits with/without FERS were as follows: June 2011 -- \$841.10/\$584.40; December 2011 -- \$871.30/\$605.30; December 2012 -- \$886.10/\$615.60; December 2013 -- \$899.40/\$624.80; and May 2015 -- \$1,385.60/\$942.40. Based on this latest data, the difference between appellant’s monthly SSA retirement benefits with/without FERS-based contributions ranged from \$256.70 in June 2011 to \$443.20 in May 2015.

OWCP subsequently advised appellant that, effective July 26, 2015, her 28-day wage-loss compensation benefits were offset based on the corresponding amount of SSA age-related retirement benefits attributable to her federal service. The new net compensation payment was to be \$1,358.51.

On August 18, 2015 OWCP issued a preliminary overpayment determination in the amount of \$10,636.63 for the period June 1, 2011 through July 25, 2015. It explained that the overpayment was a result of appellant having received FECA wage-loss compensation and FERS-based social security retirement benefits for the same period, which was a prohibited dual benefit. Additionally, OWCP advised that appellant was not at fault in creating the overpayment.

On August 28, 2015 appellant requested review of the written record. She believed that SSA may have included some of her non-FERS, private income that she earned between 1991-1994 when she worked for both the Federal Government and a local school system. Appellant also submitted an overpayment recovery questionnaire (Form OWCP-20) and supporting documentation regarding her monthly income and expenses. She reported total monthly income of \$2,638.51, which included both SSA and FECA benefits. Appellant’s reported monthly expenses also totaled \$2,638.51. She also reported \$261.00 in assets, including cash, checking, and savings accounts.

By decision dated October 22, 2015, an OWCP hearing representative finalized the preliminary determination regarding the fact and amount of the overpayment, as well as its finding that appellant was not at fault. Regarding her request for waiver of recovery, the hearing representative determined that appellant’s monthly income exceeded her monthly expenses by \$91.91, and the surplus was sufficient to warrant recovery of the overpayment. OWCP also

imposed a 28-day repayment of \$75.00 to be deducted for appellant's continuing compensation payments as of November 15, 2015.³ Appellant then appealed to the Board.

In a June 21, 2016 decision and order,⁴ the Board set aside the October 22, 2015 decision, finding that the case was not in posture regarding the amount of the overpayment. The Board found that the portion of monthly SSA benefits attributable to appellant's FERS-based contributions was unclear. The record included two conflicting sets of figures from SSA regarding the FERS offset. The record was not clear as to why OWCP relied on the July 20, 2015 calculations rather than the July 31, 2014 figures. The Board remanded the case to OWCP to seek clarification from SSA regarding the correct amount of the FERS offset, and to obtain a complete payment history from SSA regarding age-related benefits received beginning in June 2011. This development was to be followed by a *de novo* decision.

On remand of the case, OWCP requested that SSA provide clarification regarding appellant's age-related SSA retirement benefits on and after May 28, 2011. SSA responded on September 26, 2016 indicating that, beginning in June 2011, appellant's total monthly SSA benefit was \$841.10, and the corresponding monthly amount excluding her FERS-based contributions was \$584.40. The SSA representative also provided additional calculations for subsequent periods beginning December 2011 (\$871.30/\$605.30), December 2012 (\$886.10/\$615.60), December 2013 (\$899.40/\$624.80). These figures duplicated the information that SSA provided on July 20, 2015. SSA also calculated that, beginning May 2015 through December 2015, appellant's total monthly benefit was \$1,385.60, and the corresponding monthly amount excluding her FERS-based contributions was \$942.40.

In an October 14, 2016 letter, received on October 18, 2016 counsel contended that appellant was entitled to waiver of recovery because her monthly expenses exceeded her income, she had budgeted only \$0.32 a month for food, and her assets were below the \$4,800.00 resource base for an individual as set forth in OWCP's implementing regulation at 20 C.F.R. § 10.436. She argued that OWCP therefore erred by deducting \$75.00 every 28 days from continuing compensation payments beginning in November 2015.

By decision dated October 18, 2016, OWCP finalized the August 18, 2015 preliminary notice of overpayment, finding a \$10,636.63 overpayment of compensation, with a current balance of \$9,830.77 due to deductions of \$75.00 every 28 days from appellant's continuing compensation payments. It found that updated information from SSA received on September 26, 2016 confirmed that the July 20, 2015 figures on which the October 22, 2015 decision was based were correct. Therefore, the October 22, 2015 determination remained unchanged. Additionally, OWCP found that appellant was not at fault in creation of the overpayment. However, the overpayment was not subject to waiver. Relying on the financial documentation

³ Following issuance of the October 22, 2015 decision, appellant submitted October 27 and November 23, 2015 letters alleging that OWCP did not properly consider her monthly expenses. OWCP provided appellant with a copy of the appeal rights accompanying the October 22, 2015 decision. Appellant continued to assert that OWCP erred in calculating her monthly expenses. In a January 14, 2016 letter, OWCP notified appellant that her only right of appeal was to the Board. Appellant subsequently appealed to the Board.

⁴ Docket No. 16-0553 (issued June 21, 2016).

that appellant submitted with the August 28, 2015 overpayment recovery questionnaire (Form OWCP-20), OWCP found that her monthly income exceeded her monthly expenses by \$91.91, and the surplus was sufficient to warrant recovery of the overpayment. It affirmed the recovery of the continued overpayment by deducting \$75.00 from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of Social Security Act benefits attributable to the employee's federal (FERS-based) service.⁶ However, an offset is not required where the employee-beneficiary is covered under the Civil Service Retirement System and his or her SSA age-related benefits are attributable to private sector employment.⁷

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁸ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁹ Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.¹⁰ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹¹ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a precoupment hearing.¹² The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹³ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹⁴

⁵ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ *Id.* at § 8116(d)(2); *id.* at § 10.421(d).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9c (May 2012); and *Dual Benefits*, Chapter 2.1000.4e(2) (January 1997).

⁸ 20 C.F.R. § 10.431(a).

⁹ *Id.* at § 10.431(b).

¹⁰ *Id.* at § 10.431(c).

¹¹ *Id.* at § 10.431(d).

¹² *Id.* at § 10.432.

¹³ *Id.*

¹⁴ *Id.*

OWCP procedures provide that, once an overpayment is identified and calculated, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.¹⁵ These procedures note that, if the claimant is determined to be with fault, Form CA-2201 (preliminary finding notice) must be released within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of (a) fact and amount of overpayment, (b) fault, and (c) waiver. Along with Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was calculated.¹⁶

ANALYSIS -- ISSUE 1

On August 18, 2015 OWCP made preliminary findings that appellant had received an overpayment of compensation in the amount of \$10,636.63 for the period June 1, 2011 through July 25, 2015, as she received concurrent FECA and SSA benefits without offset. On August 28, 2015 appellant requested review of the written record. She submitted a completed overpayment recovery questionnaire (Form OWCP-20) and supporting documentation. By decision dated October 22, 2015, an OWCP hearing representative affirmed the August 18, 2015 preliminary determination, finding a \$10,636.63 overpayment of compensation for the period June 1, 2011 through July 25, 2015. Appellant appealed to the Board. By decision and order issued June 21, 2016, the Board set aside OWCP's October 22, 2015 decision, finding the case not in posture for a decision as there was conflicting evidence regarding the correct amount of the overpayment.

On remand OWCP obtained clarifying information from SSA regarding the amount of the overpayment. By decision dated October 18, 2016, it again finalized the August 18, 2015 preliminary notice of overpayment, finding a \$10,636.36 overpayment of compensation, with a current balance of \$9,830.77. OWCP further found that appellant was without fault and that recovery of the overpayment would continue to be made by deducting \$75.00 every 28 days from appellant's continuing compensation benefits.

The Board finds that OWCP improperly issued the October 18, 2016 overpayment decision. OWCP regulations provide that before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.¹⁷ It must inform the individual of her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, and the right to request a waiver of recovery of the overpayment.¹⁸ OWCP's procedures further provide that a preliminary finding of overpayment must be provided within 30

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (May 2004).

¹⁶ *Id.* at Chapter 2.600.4(a)(1) (May 2004).

¹⁷ 20 C.F.R. § 10.431(a).

¹⁸ *Id.* at § 10.431(d).

days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹⁹

The preliminary notice of findings is essential in overpayment cases because OWCP regulations limit further review of a final decision concerning overpayment to the Board. A claimant is prohibited from requesting a hearing, or reconsideration, following a final overpayment decision.²⁰ The claimant is, therefore, precluded from introducing new evidence to rebut findings made in a final overpayment decision.

The Board notes that OWCP routinely issues a new preliminary determination after an OWCP hearing representative reviews a preliminary overpayment decision and remands the case to OWCP for further findings.²¹

In this case, OWCP had not issued a new preliminary determination advising appellant of its findings following the Board's June 21, 2016 decision. Rather, it simply affirmed the final amount of the overpayment, adjusted due to partial recovery. OWCP has not provided appellant with the right to challenge the amount of overpayment or inform her whether she was entitled to waiver of recovery, thereby infringing upon her due process procedural rights.²² The Board finds that OWCP did not provide her due process and improperly issued the October 18, 2016 overpayment decision.

The due process issue in the present case is similar to that in *K.G.*,²³ where the Board set aside an OWCP August 20, 2007 decision finding that an overpayment of compensation had been created in the amount of \$7,183.80, and that the claimant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.²⁴ The Board remanded the case for further development regarding fact of overpayment, after which OWCP issued a June 3, 2008 decision finalizing the overpayment of \$7,183.80 without issuing a new preliminary determination. As in the present case, the fact and amount of the overpayment had not changed from the initial January 16, 2007 preliminary determination and final August 20, 2007 overpayment decision. However, when the case returned to the Board for the second time on appeal, the Board found that OWCP had erred in not issuing a new preliminary determination. The Board found that the claimant had been denied due process because it had failed to issue a new preliminary determination from which she could request a hearing or review of the evidence. Similarly, in

¹⁹ *Id.*

²⁰ *See* 20 C.F.R. § 10.440(b).

²¹ *See N.N.*, Docket No. 14-0603 (issued July 22, 2014); *J.J.*, Docket No. 13-1905 (issued April 8, 2014); *L.B.*, Docket No. 12-1202 (issued February 6, 2013).

²² 20 C.F.R. §§ 10.431, 10.432.

²³ Docket No. 08-2135 (issued April 16, 2009).

²⁴ On January 16, 2007 OWCP made a preliminary determination that appellant was overpaid in the amount of \$7,183.80 for the period April 10 to July 7, 2007. It found that she was at fault in the creation of the overpayment as she accepted a payment which she knew or should have known to be incorrect.

the case currently before the Board, OWCP has failed to afford appellant due process as she was not issued a new preliminary determination of overpayment according to its procedures.

Likewise in *M.V.*,²⁵ a preliminary determination had been issued on April 3, 2012 and finalized on October 10, 2012 finding an overpayment of compensation in the amount \$20,227.46. On appeal the Board remanded the case for further development of the medical evidence for its schedule award determination and further determined that it was premature to address the overpayment issue as the case was not in posture for determination.²⁶ Per the Board's instructions on remand, OWCP further developed the medical evidence for its schedule award determination and issued a new, final overpayment decision dated December 19, 2013 finding the same \$20,227.46 overpayment amount. On a subsequent appeal, the Board remanded the December 19, 2013 overpayment decision for failing to properly issue a new preliminary determination notifying the claimant of its findings, providing the right to challenge the fact or amount of overpayment, or to submit new information regarding waiver of recovery of the overpayment.²⁷ The Board notes that, as in the current case, the fact and amount of overpayment had not changed from the initial April 3, 2012 preliminary determination and October 10, 2012 final overpayment decision. Yet, the Board nonetheless found that the claimant had not been afforded his procedural rights as OWCP had failed to issue a new preliminary determination.

The Board notes that, in both *M.V.* and *K.G.*, the fact and amount of the overpayment did not change from the preliminary to the final overpayment decision issued on remand.²⁸ However, the Board still determined that procedural rights had been denied without a new preliminary determination prior to its final overpayment decision. As in this case, OWCP failed to issue a new preliminary determination notifying appellant of its new findings, providing her with the right to challenge the fact and adjusted amount of overpayment, or to submit new information regarding waiver of recovery of the overpayment. Consequently, it did not comply with the procedural rights under its regulations.²⁹

Accordingly, the case will be remanded for OWCP to issue a preliminary determination regarding overpayment consistent with its own procedures.

²⁵ *M.V.*, Docket No. 13-798 (issued August 14, 2013).

²⁶ The Board set aside an October 20, 2012 schedule determination finding that the claimant was not entitled to more than 20 percent impairment of the right upper extremity and instructed OWCP to refer him for a new impartial medical specialist for an impairment evaluation. The Board further set aside an October 10, 2012 decision finding that appellant received an overpayment of compensation because he received excess compensation for a schedule award in the amount of \$20,227.46. It determined that it was premature to address the overpayment issue as the case was not in posture for determination regarding the extent of permanent impairment. *Id.*

²⁷ *M.V.*, Docket No.14-1131 (issued November 14, 2014).

²⁸ *Supra* notes 23, 25, and 27.

²⁹ 20 C.F.R. §§ 10.431, 10.432; *see also K.H.*, Docket No. 11-603 (issued September 27, 2011); and *supra* note 23.

ISSUES 2 & 3

As the case is not in posture regarding the threshold issues of fact and amount, it is premature for the Board to address the subsequent issues of waiver and recovery.

CONCLUSION

The Board finds the case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2016 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 8, 2017
Washington, DC

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

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

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