

FACTUAL HISTORY

On April 25, 2007 appellant, then a 57-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained multiple injuries on April 24, 2007 when the guard shack he was sitting in was struck by a trailer. OWCP accepted the claim for contusion face, scalp, and neck, concussion without loss of conscious, and postconcussion syndrome. Appellant stopped work on or about April 24, 2007. He retired on disability, effective June 10, 2010.

OWCP advised appellant of his receipt of compensation on the periodic rolls on October 25, 2007. In an attached Form EN1049 OWCP informed appellant of his obligation to report “any retirement income you receive from any federal agency. This is because a person who receives compensation benefits under FECA is not permitted to receive benefits under the Civil Service Retirement System [(CSRS)] or [Federal Employees Retirement System Act] (FERS).” It explained that, if he was covered under FERS, “OWCP must deduct from your compensation entitlement at least part of any social security [r]etirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in social security [r]etirement benefits. Therefore, advise OWCP immediately upon filing for or receiving social security [r]etirement benefits.”

As previously noted, appellant retired on disability, effective June 10, 2010. By letter dated June 23, 2010, OWCP advised appellant that it had been informed that he was receiving or may be entitled to receive benefits provided by the Office of Personnel Management (OPM) under the CSRS or FERS. Appellant was advised that if he elected FECA benefits, then FECA benefits would be reduced by the Social Security Act (SSA) benefits paid on the basis of age and attributable to his federal service and SSA benefits paid for disability shall also be reduced by the compensation payable. On July 21, 2010 appellant elected FECA benefits effective July 21, 2010.

Appellant completed affidavits of earnings and employment (Form EN1032) annually from May 11, 2010 through July 7, 2017. He signed each form indicating that he was not receiving SSA benefits as part of an annuity for federal service. Appellant reached age 65 on June 19, 2014, converting the SSA disability benefits he received to age-related retirement benefits.

On June 5, 2015 OWCP requested information from the Social Security Administration regarding appellant’s SSA age-related retirement benefits. It forwarded a form entitled FERS and SSA Dual Benefits Calculation, which requested the effective date of his social security benefits, as well as separate calculations of the SSA rate with FERS and without FERS.

On December 4, 2015 SSA provided the requested information, noting the pay rates effective June 2015 and December 2015 as \$2,072.80 with FERS, and \$1,498.90 without FERS.

In a July 6, 2016 memorandum, OWCP calculated, based on the fiscal information provided by SSA, a \$7,397.63 overpayment of compensation was created in appellant's case for the period June 1, 2015 through June 25, 2016.²

By notice dated July 22, 2016, OWCP advised appellant of its preliminary determination that he had received a \$7,397.63 overpayment of compensation because he received FECA benefits simultaneously with FERS retirement payments from June 1, 2015 through June 25, 2016. It provided a calculation of the overpayment, noting that he was without fault in its creation, as he was not aware nor could he reasonably have been expected to know that OWCP had paid compensation incorrectly. OWCP afforded appellant 30 days to contest the fact and amount of overpayment and to provide financial information. This notice was addressed to appellant's last known address. Appellant did not respond.

By decision dated October 17, 2016, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$7,397.63 for the period June 1, 2015 through June 25, 2016 as he had received FERS retirement benefits simultaneously with FECA benefits. It found that he was without fault in the creation of the overpayment. Appellant did not contest the finding of overpayment. As he did not submit financial information as requested, OWCP was unable to determine whether he needed essentially all of his income to meet ordinary and necessary living expenses. Therefore, OWCP determined that collection of the overpayment would not defeat the purpose of FECA. It further found that recovery of the overpayment would not be against equity and good conscience as appellant did not submit evidence of financial hardship, that he relinquished a valuable right, or changed his position for the worse based on his compensation payments. OWCP directed recovery of the overpayment by deducting \$75.00 from his continuing compensation payments.³

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 However, section 8116 of FECA limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of FECA compensation by the amount of any SSA retirement benefits that are attributable to

² OWCP calculated the overpayment as follows: \$3,462.32 for the period June 1 to November 30, 2015; and \$3,935.31 for the period December 1, 2015 to June 25, 2016. Both periods contained a 28-day FERS offset of \$529.75.

³ The amount was less than six percent of his compensation payments.

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116.

federal service of the employee.⁶ FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and provide due process rights.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained contusions of the face, scalp, and neck, a concussion without loss of conscious, postconcussion syndrome, and other persistent mental disorder when he was hit by a trailer while in a guard shack on April 24, 2007. Appellant stopped work on April 24, 2007 and retired on disability effective June 10, 2010. He was enrolled in the FERS retirement plan. Effective July 21, 2010, appellant elected FECA benefits.

Appellant received FECA wage-loss compensation and SSA age-related retirement benefits concurrently from June 1, 2015 to June 25, 2016. OWCP requested, and SSA provided, information regarding his applicable SSA rates and their effective dates. Based on these rates, it determined that appellant received a prohibited dual benefit from June 1, 2015 to June 25, 2016 in the amount of \$7,397.63, because he received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to SSA retirement benefits that are attributable to federal service. Appellant received SSA benefits under the FERS system. As noted, the receipt of concurrent FECA and FERS benefits attributable to federal employment is a prohibited dual benefit.⁹ As he received SSA benefits based on his federal service concurrently with disability compensation from OWCP without an appropriate offset, he received an overpayment of compensation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that it properly determined that he received dual benefits totaling \$7,397.63, creating an overpayment of compensation in that amount. The Board notes that, on appeal, appellant does not contest the fact or amount of the overpayment. Thus, the Board finds that OWCP properly determined the fact and the amount of overpayment as no other probative evidence has been presented.¹⁰

⁶ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁷ *See S.C.*, Docket No. 17-1567 (issued December 22, 2017).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

⁹ *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

¹⁰ *See L.S.*, Docket No. 16-0742 (issued October 14, 2016).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹¹ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹²

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.¹³ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁴

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹⁵ The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under FECA and to OWCP when it is established that the mailing was in the ordinary course of the sender's business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. It is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.¹⁶

¹¹ 5 U.S.C. § 8129.

¹² *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹³ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437.

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹⁶ *L.M.*, Docket No. 16-0144 (issued March 22, 2016).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

OWCP found that appellant was not at fault in creating the overpayment of compensation and considered whether he was entitled to waiver of recovery. It found that as appellant failed to submit any financial information, it could not consider waiver of recovery of the overpayment. OWCP properly found that the overpayment was not subject to waiver pursuant to regulation.¹⁷

On appeal appellant claims that he did not receive OWCP's July 22, 2016 preliminary determination and thus arguably could not have provided his financial information as requested by OWCP. The Board notes that there is no evidence that the July 22, 2016 preliminary determination was returned to OWCP as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.¹⁸ This presumption is commonly referred to as the "mailbox rule."¹⁹ It arises when the record reflects that the notice was properly addressed and duly mailed.²⁰ The current record is devoid of evidence to rebut the presumption that appellant received OWCP's July 22, 2016 preliminary determination in due course. As explained above, he failed to provide his financial information as requested by OWCP. Appellant did not respond to the preliminary determination of overpayment. The Board therefore finds that OWCP properly denied waiver of recovery of the overpayment.

Appellant also argues on appeal that he should not be responsible for an overpayment that should have been previously caught by OWCP. He states that OWCP was informed by SSA a year prior that there was an overpayment of compensation. Although OWCP may have been negligent in making incorrect payments, this does not mitigate an overpayment or waiver finding.²¹ Appellant may always submit relevant evidence and request waiver of recovery of the overpayment as indicated in 20 C.F.R. § 10.438(b).

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 under FECA. Section 10.441(a) of the regulations provide:

"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 his or her attention is called to same. If no refund is made, [OWCP] shall decrease later payments of compensation, taking into

¹⁷ *Id.*

¹⁸ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

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.”²²

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.²³

ANALYSIS -- ISSUE 3

OWCP reduced appellant’s future compensation benefits by \$75.00 per month, taking into account the amount of the compensation, as well as the factors set forth in section 10.441. It found that in the absence of any financial information from him, this method of recovery would minimize any resulting hardship on him. The Board finds that OWCP properly required recovery of the overpayment by deducting \$75.00 from appellant’s ongoing compensation payments.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,397.63 for the period June 1, 2015 through June 25, 2016 for which he was not at fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly directed recovery of the overpayment by withholding \$75.00 every 28 days from appellant’s continuing compensation payments.

²² 20 C.F.R. § 10.441.

²³ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2018
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