

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 17-0495
)	Issued: April 19, 2018
)	
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer)	
_____)	

Appearances:
Cary J. Silberman, 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 January 4, 2017 appellant, through counsel, filed a timely appeal from a November 9, 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.³

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.*

³ The record provided to the Board includes evidence received after OWCP's November 9, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$57,781.12 for the period January 1, 2008 through April 2, 2016 for which he was not at fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$600.00 per month from appellant's continuing compensation.

FACTUAL HISTORY

On January 31, 2008 appellant, then a 71-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on January 30, 2008, he sustained a right hand injury while cleaning a moving conveyor belt. He stopped work on January 30, 2008. Due to the crush injury sustained, appellant underwent right hand surgery on January 31, 2009. OWCP accepted the claim for open wound of right hand, injury to right digital nerve, multiple wounds of right arm, and right hand contusion. It paid appellant wage-loss compensation on the supplemental rolls commencing June 13, 2008 and on the periodic rolls as of May 10, 2009.

On December 3, 2010 OWCP referred appellant for vocational rehabilitation services. The vocational rehabilitation counselor eventually developed a rehabilitation plan and identified suitable positions within appellant's vocational abilities and work restrictions. By decision dated December 15, 2011, OWCP reduced appellant's compensation effective December 18, 2011 as the position of an information clerk was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity.

In EN1032 forms dated February 17, 2010, February 11, 2011, February 16, 2012, February 21, 2013, and February 25, 2014, appellant denied receipt of retirement benefits from the Office of Personnel Management (OPM) or any other federal disability or retirement system, except for benefits under FECA, during the past 15 months. In his February 19, 2015 and March 3, 2016 EN1032 forms, appellant acknowledged having received a retirement check from a federal retirement system during the past 15 months.

On March 23, 2016 OWCP forwarded a Federal Employees Retirement System (FERS)/Social Security System (SSA) dual benefits calculation form to SSA. SSA returned the form on April 20, 2016, noting that appellant received SSA retirement benefits beginning January 2008. It provided OWCP with appellant's SSA rate with FERS and SSA rate without FERS from January 2008 onward.

On April 26, 2016 OWCP made a preliminary determination that a \$57,781.12 overpayment of compensation had been created for the period January 1, 2008 to April 2, 2016 as appellant was paid prohibited dual benefits, because he received FECA compensation benefits and SSA retirement benefits without an appropriate offset. It indicated that it appeared appellant was in receipt of SSA benefits based on his age, even though he had responded on his annual CA-1032 forms that he was not in receipt of SSA retirement benefits. OWCP found that appellant was without fault in the matter, as he could not reasonably have been expected to know that he was

paid compensation incorrectly. It provided him with a detailed memorandum which showed how the overpayment during the period January 1, 2008 through April 2, 2016 was calculated.⁴

OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. It notified him that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP further informed appellant to contact the district office if he had any questions or required assistance in responding to the letter. If a reply was not received within 30 days, it would issue a final decision based on the information of record.⁵

On May 2, 2016 appellant requested a precoupment hearing before an OWCP hearing representative on the issues of fault and waiver of recovery of the overpayment. He advised that he needed his benefits as he was not working. Appellant did not submit the Form OWCP-20 with information regarding his finances.

A hearing was held on August 25, 2016.⁶ At the hearing counsel stated that appellant had been receiving social security retirement benefits since 2001 when he turned 65 years of age. Appellant was never told that he could not receive both benefits. Counsel also noted that appellant's benefits had already been reduced through vocational rehabilitation. He argued that appellant could not afford to repay the overpayment as a result of his age and that he could not work due to side effects of his medication.

Appellant and counsel stated that they did not remember receiving the OWCP-20 form. The hearing representative advised appellant that an OWCP-20 form would be resent to him and that he would need to provide his financial evidence to determine whether he could repay the debt.

On August 26, 2016 an OWCP-20 form was mailed to appellant. A completed OWCP-20 form or information pertaining to appellant's finances was not received.

By decision dated November 9, 2016, OWCP finalized the preliminary determination of a \$57,781.12 overpayment of compensation for which appellant was without fault. It denied waiver as appellant failed to provide the necessary financial evidence with regard to his assets, income and expenses to establish that he was unable to repay the debt or that recovery of the debt would be against equity and good conscience. OWCP further found that \$600.00 should be deducted from appellant's continuing compensation until the overpayment was repaid. The hearing representative took into account the fact that appellant received monthly OWCP benefits and SSA benefits.

⁴ The monthly FERS offset was calculated by subtracting SSA without FERS by SSA with FERS. The monthly SSA FERS offset was then multiplied by 12 times a year and divided by 13, as OWCP payments were paid 13 times a year. The amount was then divided by 28 days FERS offset and multiplied by the number of days in the year dual benefits had been received.

⁵ A copy of the preliminary determination was also sent to appellant's counsel at his North Third Street address in San Jose, CA.

⁶ Notification of the oral hearing request and as well of the August 25, 2016 transcript of proceedings were also sent to appellant's counsel at his North Third Street address in San Jose, CA. However, the documentation was returned to sender as being unable to forward.

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.⁷ Section 8116 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.⁸

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁹ FECA Bulletin No. 97-9 provides that 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.¹⁰

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years of age.¹¹ Section 404.409 of SSA regulations provides that for individuals born before January 1, 1938, full retirement age is 65 years of age.¹²

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision as to whether appellant received an overpayment of compensation in the amount of \$57,781.12.

The record indicates that, while appellant was receiving compensation for total disability under FECA, he also received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹³

OWCP found that an overpayment of compensation was created for the period January 1, 2008 through April 2, 2016. However, appellant's date of injury for this claim was January 30, 2008. OWCP's records indicate that appellant received wage-loss compensation on the supplemental rolls as of June 13, 2008. OWCP failed to explain why it determined that the period of overpayment was from January 1, 2008 through April 2, 2016.

As fact and amount of overpayment, have not been properly established, the Board will set aside the overpayment amount of \$57,781.12 and remand the case to OWCP for recalculation of

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

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

¹⁰ FECA Bulletin No. 97-9 (issued February 3, 1997).

¹¹ 20 C.F.R. § 404.310.

¹² *Id.* at § 404.409.

¹³ *Supra* notes 9 and 10.

the amount of overpayment.¹⁴ Upon remand, OWCP should also consider appellant's monthly income and expenses and assets based on current financial information in order to determine whether waiver of recovery is appropriate.¹⁵ Following any further development as may be necessary, OWCP shall issue a *de novo* decision regarding the issues of fact and amount of overpayment, waiver, and recovery.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 19, 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

¹⁴ The Board notes that the total overpayment amount in an excel worksheet may differ by a few cents from a manual calculation because of rounding off.

¹⁵ In light of the disposition of the first issue, the remaining issues are not in posture for decision. The Board notes that on appeal, appellant asserts that he should not have to repay the overpayment as he was not at fault in creating the overpayment. The Board has held that, although a claimant was without fault in the matter of the overpayment, 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 As noted, on remand, OWCP would consider appellant's monthly income and expenses and assets based on current financial information in order to determine whether waiver is appropriate.