

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

_____)	
K.H., Appellant)	
)	
and)	Docket No. 18-0171
)	Issued: August 2, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
EMERGENCY PREPAREDNESS & RESPONSE)	
FEMA, Washington, DC, Employer)	
_____)	

Appearances:
George P. Ferro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 30, 2017 appellant, through counsel, filed a timely appeal from a September 21, 2017 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 this case.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 September 21, 2017 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 additional 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 \$30,076.20 for the period January 1, 2015 through November 12, 2016; (2) whether OWCP abused its discretion in denying waiver of recovery of the overpayment; and (3) whether OWCP properly determined that the overpayment should be recovered by deducting \$275.00 from each of appellant's continuing compensation payments.

FACTUAL HISTORY

On December 3, 2014 appellant, then a 75-year-old Federal Emergency Management Agency (FEMA) public assistance group supervisor, filed a traumatic injury claim (Form CA-1) alleging that he injured his hip when he tripped on a floor mat and fell, causing him to hit his head on a concrete wall. He stopped work and did not return. OWCP accepted the claim for closed fracture of the neck of his left femur.

On January 15, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) for the period November 26, 2014 through January 15, 2015. On the reverse side of the claim form, the employing establishment indicated that LWOP was allotted for the period January 12 to 15, 2015.

By letter dated May 27, 2015, the employing establishment indicated that appellant was a reservist employee in a temporary duty status and not entitled to LWOP. It reported that he was currently not in a pay status and his last day of pay was December 26, 2014.

In a June 10, 2015 CA-110 telephone memorandum, the employing establishment advised OWCP that appellant was hired as a FEMA temporary reservist and was called, activated, and employed when needed.

In a June 10, 2015 narrative statement, appellant asserted that, to date, he had not received FECA wage-loss compensation benefits. He provided the amounts of his biweekly net pay from May 27, 2014 through January 5, 2015. Appellant reported receiving a payment of \$2,181.56 on December 19, 2014 and \$1,182.33 on January 5, 2015.

By letter dated June 27, 2015, OWCP notified the employing establishment that it had received appellant's Form CA-7 claim for compensation for wage loss beginning November 26, 2014. It requested that the employing establishment provide his leave and earning statements one year prior to November 26, 2014 to establish an accurate pay rate. On June 23, 2015 the employing establishment provided appellant's leave and earning statements.

In a June 29, 2015 OWCP pay rate calculation memorandum, the senior claims examiner reported that appellant was employed as a reservist for FEMA since 2008. The claims examiner provided calculations to determine appellant's weekly pay rate as \$803.67.

In a June 29, 2015 initial payment memorandum, OWCP's claims examiner reported that appellant's compensation period was from January 12, 2015 and continuing based on the June 26, 2015 pay rate calculation memorandum. The claims examiner noted that for traumatic injury claims, continuation of pay (COP) dates, if paid, would run 45 days from November 27, 2014 through January 10, 2015. However, a January 21, 2015 certified Form CA-7 indicated that

LWOP began on January 12, 2015. The claims examiner noted that, in order to avoid an overpayment in the event appellant was incorrectly paid COP on January 11, 2015, disability compensation would be paid beginning January 12, 2015. The payment memorandum requested that OWCP verify the actual COP dates.

A June 30, 2015 supplemental rolls payment worksheet indicated that appellant received disability compensation from January 12 through June 27, 2015 based on a weekly pay rate of \$803.67, amounting to a total compensation of \$14,379.95.

A June 30, 2015 periodic disability payment worksheet indicated that appellant was placed on the periodic rolls and received compensation from June 28 through July 25, 2015 in the amount of \$2,411.01.

By letter dated July 1, 2015, OWCP notified appellant that he would be paid compensation benefits using a weekly gross pay rate of \$803.67. It noted that his first payment ran from January 12 through June 27, 2015 in the amount of \$14,379.95 and his regular payment from June 28 through July 25, 2015 amounted to \$2,411.01.

By letter dated July 1, 2015, OWCP notified the employing establishment that it had received information from its office dated May 27, 2015 which indicated that reservists do not receive COP. It reported that it had obtained conflicting information as appellant had stated that he received pay deposits following his injury on December 4 and 19, 2014, and January 5, 2015. OWCP further noted that review of the January 21, 2015 Form CA-7 indicated that LWOP would start on January 12, 2015, even though it was claimed beginning November 26, 2014. It reported that it processed a LWOP payment beginning January 12, 2015 in order to avoid any overpayments. OWCP requested that the employing establishment advise if COP was paid from November 27, 2014 through January 11, 2015, and if it was not paid for the full 45 days, to provide dates that COP was paid.

On June 22, 2015 appellant filed a Form CA-7 for LWOP from June 8 through 21, 2015. On the reverse side of the form, the employing establishment certified LWOP for those dates.

On June 6, 2016 appellant submitted an affidavit of earnings and employment (CA-1032 form) indicating that in the past 15 months he received a regular retirement check and did not receive a disability retirement check. He answered "no" when asked if he received benefits from the Social Security Administration (SSA) as part of an annuity for federal service.

By letter dated July 25, 2016, appellant notified OWCP that he retired as a full-time employee from FEMA on February 27, 2004. He then returned as a part-time employee later in 2004 on an as needed temporary basis. Appellant reported that he started drawing his annuity after he retired and was awarded FECA benefits after his November 26, 2014 injury. He reported that he could not understand why they wanted to cancel his FECA wage-loss benefits and he was never made aware of not being eligible to collect his regular SSA pension and FECA benefits. Appellant reported that he was permanently disabled and unable to return to work. He noted that if he was only entitled to either FECA benefits of \$2,421.00 or his normal monthly SSA retirement of \$1,466.00, he would choose the \$2,421.00 benefits. Accompanying appellant's statement was a notice of annuity adjustment dated January 2, 2016 indicating that his net monthly payment totaled \$917.35 under the old status and \$917.79 under the new status.

In a September 30, 2016 Federal Employees' Retirement System (FERS)/SSA dual benefits calculations worksheet, OWCP submitted an initial request to SSA regarding appellant's benefits. It noted his date of birth, a January 1, 1960 FERS period, and a computation date of January 12, 2015 to present for the dates FECA benefits were payable. On October 21, 2016 OWCP submitted a second request to SSA.

In November 14, 2016 FERS/SSA Dual Benefits Calculations worksheet, SSA reported that for January 2015, appellant's SSA rate with FERS amounted to \$2,248.70 and SSA rate without FERS totaled \$911.00. For December 2015, the SSA rate with FERS totaled \$2,248.70 and without FERS totaled \$911.00. For December 2016, the SSA rate with FERS totaled \$2,255.40 and without FERS totaled \$913.70.

In a November 25, 2016 FERS offset calculation worksheet, appellant's SSA rate with FERS totaled \$2,248.70 and SSA without FERS totaled \$911.00 with a January 1, 2015 effective date. A monthly FERS offset of \$1,337.70 and a 28 days FERS offset of \$1,234.80 was reported. The overpayment start date was recorded as January 1, 2015 with an end date of November 12, 2016 for a total of 682 days. The worksheet reported that the overpayment amount totaled \$30,076.20.

By notice dated November 23, 2016, OWCP made a preliminary determination that an overpayment of \$30,076.20 had been created for the period January 1, 2015 through November 12, 2016 as appellant was paid dual compensation under FECA and SSA without an appropriate offset. It found that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. OWCP found that appellant became eligible for the FERS/SSA benefits beginning January 1, 2015. It noted that he should have been aware that he was receiving FERS benefits, which was a retirement benefit, and compensation for total disability from OWCP for the same period, as he noted his receipt of FERS on his June 6, 2016 CA-1032 form. The November 14, 2016 FERS/SSA Dual Benefits Calculations worksheet and November 25, 2016 FERS offset calculation worksheet were provided. Appellant was informed of his options if he wished to contest the fact or amount of overpayment or request a waiver of recovery and was provided with an overpayment recovery questionnaire (Form OWCP-20).

By letter dated December 12, 2016, appellant reported that he received a benefit statement on that date with a check in the amount of \$1,186.20. He reported that his normal disability amount as reported was \$2,421.00 per month and according to the statement, deductions were taken out in the amount of \$1,234.80 without any explanation. The accompanying federal employees' compensation benefits statement was provided.

On December 18, 2016 appellant, through counsel, requested a prerecoupment hearing before an OWCP hearing representative. Appellant disagreed with the overpayment and reported that it occurred through no fault of his own.

By letter dated January 10, 2017, OWCP responded to appellant's December 12, 2016 letter and notified him that the \$1,234.80 deduction was made as a FERS offset.

A hearing was held on June 16, 2017 where counsel argued that an overpayment occurred through no fault of appellant. He reported that appellant retired from the employing establishment

in 2004, but returned to work on a part-time basis. Counsel noted that appellant was unaware that he could not receive both his federal retirement benefits and OWCP benefits as he had earned his federal pension based on his length of service. He further argued that appellant provided a letter indicating that he would prefer OWCP benefits over his pension, and argued that repayment would cause a financial hardship.

By letter dated July 26, 2017, appellant reiterated that he was never made aware that he could not collect OWCP benefits as well as his normal monthly federal retirement benefits which he received after 20 years of federal service. He again stated that he would rather receive the \$2,421.00 in monthly workers' compensation benefits over the \$1,466.00 federal retirement benefits.

By decision dated September 21, 2017, an OWCP hearing representative found that an overpayment of \$30,076.20 was created for the period January 1, 2015 through November 12, 2016 because appellant was paid dual compensation under FECA and SSA without an appropriate offset. The hearing representative overturned the preliminary determination's finding of fault, explaining that he was without fault in the creation of the overpayment because it was reasonable that he may not have understood that he was in receipt of dual benefits. She reported that appellant's letters established that he was unclear regarding the benefits he was receiving and attempted to correct the situation by advising OWCP that he wanted to elect FECA benefits if he was required to do so. The hearing representative further found that he failed to submit a Form OWCP-20 overpayment recovery questionnaire or any supporting financial information and that the overpayment was, therefore, not subject to waiver. Based on his current 28-day compensation benefit of \$1,230.50, she determined that appellant could repay the overpayment by deducting \$275.00 every 28 days from his continuing compensation benefits.

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 his duty.⁴ 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.”⁵

Section 8116(d) 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.⁶ If an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

OWCP's procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's 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 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 It does not require an election between FECA and SSA benefits, except when the SSA benefits are attributable to the employee's federal service.⁹

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$30,076.20 overpayment of compensation for the period January 1, 2015 through November 12, 2016.¹⁰

With respect to the fact and amount of overpayment, OWCP relied on information provided by SSA to determine that appellant received SSA/FERS age-related benefits for his federal service as well as FECA benefits beginning January 1, 2015 without an appropriate offset. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹¹ Therefore, fact of overpayment is established.

The Board finds, however, that the record is unclear regarding the amount of overpayment.

SSA reported the effective date of the dual benefit without appropriate offset as January 1, 2015. However, the record presently before the Board does not support that appellant received a dual benefit beginning that date. Appellant's January 15, 2015 Form CA-7 requested LWOP for November 26, 2014 through January 15, 2015. On the reverse side of the claim form, the employing establishment indicated that LWOP was allotted for the period January 12 to 15, 2015. A May 27, 2015 letter from the employing establishment, however, indicated that appellant was not entitled to LWOP and his last date of pay was December 26, 2014. In a June 29, 2015 initial payment memorandum, OWCP's claims examiner reported that appellant would be paid disability compensation beginning January 12, 2015 and continuing, noting that COP would

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

⁹ *Supra* note 7 at Chapter 2.1000.11(b) (February 1995).

¹⁰ *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

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

run from November 27, 2014 through January 10, 2015, but that the January 21, 2015 certified Form CA-7 indicated that LWOP began on January 12, 2015. The payment memorandum requested OWCP verify the actual COP dates and by letter dated July 1, 2015, OWCP advised the employing establishment that it had received conflicting information regarding appellant's COP status and asked if COP was paid for the full 45 days from November 27, 2014 through January 11, 2015, and if not the days that COP was paid. The employing establishment did not respond.

The Board notes that OWCP's June 29, 2015 initial payment memorandum and July 1, 2015 letter indicated that the record was unclear regarding whether appellant received COP from November 27, 2014 through January 11, 2015. OWCP requested clarification regarding the matter, but failed to discharge its burden in developing the evidence as the issue remains unresolved. A June 30, 2015 supplemental rolls payment worksheet reflects that appellant received disability compensation from January 12 through June 27, 2015. OWCP should not have relied on SSA's unverified report to determine that the overpayment began on January 1, 2015.¹² It is unclear how it determined the overpayment began on January 1, 2015.

OWCP did not provide a complete payment history substantiating appellant's receipt of dual SSA age-related and FECA benefits during the purported overpayment period January 1, 2015 through November 12, 2016. The period of the overpayment as determined by OWCP is not supported by the record.¹³

OWCP should determine when appellant's FECA benefits commenced to determine when he received a prohibited dual benefit without appropriate offset. It should then issue a new preliminary overpayment determination, with an appropriate overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After OWCP has further developed the case record, a *de novo* decision shall be issued.¹⁴

CONCLUSION

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

¹² *C.f. A.M.*, Docket No. 16-1260 (issued November 7, 2016).

¹³ In *T.H.*, OWCP found that an overpayment of compensation was created for the period January 1, 2008 through April 2, 2016 for receiving SSA retirement benefits and FECA benefits without an appropriate offset. However, appellant's date of injury for this claim was January 30, 2008. OWCP's records indicated that he received wage-loss compensation on the supplemental rolls as of June 13, 2008. As it failed to explain why it determined that the period of overpayment was from January 1, 2008 through April 2, 2016, the Board remanded the case finding that the fact and amount of overpayment was not established. Docket No. 17-0495 (issued April 19, 2018).

¹⁴ As the case is not in posture for decision regarding the amount of overpayment, the issues of waiver and recovery are moot. *See S.F.*, Docket No. 18-0003 (issued April 19, 2018); *see also R.L.*, Docket No. 11-1251 (issued January 27, 2012).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further action consistent with this decision of the Board.

Issued: August 2, 2018
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