

Administration (SSA) and FECA benefits for the period June 1, 2014 to January 7, 2017; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$600.00 from appellant's compensation payments every 28 days.

FACTUAL HISTORY

On May 10, 2005 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx870 in which he alleged that on May 9, 2005 he sustained injury due to twisting his right knee while handling a mail tray at work. OWCP accepted appellant's claim for right knee strain, right medial meniscus tear, and aggravation of right knee osteoarthritis. Appellant underwent OWCP-approved right knee surgeries on August 19, 2005, May 10, 2006, and May 2, 2011. Under OWCP File No. xxxxxx989, OWCP accepted that appellant sustained left shoulder impingement syndrome due to lifting and moving mail trays at work on July 31, 2007. Appellant underwent OWCP-approved left shoulder surgeries on May 21, 2008 and September 23, 2009. He received wage-loss compensation for time lost from work due to these accepted employment injuries.

Under OWCP File No. xxxxxx529, OWCP accepted that appellant sustained multiple injuries to his right arm, leg, hip, and groin due to tripping and falling into a mail rack at work on May 12, 2012.³ It administratively combined the files for appellant's three claims and designated OWCP File No. xxxxxx870 as the master file. Due to the effects of the May 12, 2012 employment injury, in OWCP File No. xxxxxx529, appellant stopped work for the last time on May 13, 2012. He received total disability compensation on the daily rolls beginning June 30, 2012.

In a December 11, 2012 letter (produced under OWCP File No. xxxxxx529), OWCP advised appellant that he was being placed on the periodic rolls effective December 16, 2012 and that he would automatically receive a compensation check every 28 days for his disability.⁴ It informed him that he must report any retirement income he received from any federal agency as a person who is receiving compensation benefits under FECA were not permitted to receive benefits under the Federal Employees Retirement System (FERS). OWCP further advised appellant that, if he was covered under FERS, it was required to deduct from his compensation any SSA retirement benefits to which he was entitled based on age as a portion of FERS benefits included in SSA retirement benefits. Appellant was informed that he was required to immediately inform OWCP upon filing for or receiving SSA retirement benefits.

OWCP periodically required appellant to complete EN1032 forms which contained extensive language advising him what types of employment activities and earnings that he was required to report for each 15-month period prior to the time he signed each form. The forms contained certification clauses which informed appellant of the consequences of not accurately

³ Appellant underwent OWCP-approved right hip surgeries on February 18, 2013 and October 13, 2014.

⁴ Appellant did, in fact, begin receiving disability compensation on the periodic rolls beginning December 16, 2012.

reporting his employment activities and earnings, such as being subjected to criminal penalties and losing the right to receive workers' compensation.⁵

In an EN1032 form he signed on September 16, 2014, appellant answered "No" in response to a question regarding whether he received SSA benefits as part of an annuity for federal service. The form had advised him that he was required to report any benefits received from the SSA which he received as part of an annuity under FERS, but that he did not need to report any benefits received from the SSA on account of employment in the private sector.⁶ In EN1032 forms with the same instructions, which he completed on September 15, 2015 and October 5, 2016, appellant answered "No" in response to a question regarding whether he received SSA benefits as part of an annuity for federal service.

On November 14, 2016 OWCP contacted SSA to verify whether appellant had been in receipt of SSA benefits based on his age as he had turned 65 years old on September 16, 2015.

On December 12, 2016 OWCP received a FERS/SSA dual benefits calculation form completed by an SSA official on December 7, 2016. The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service beginning June 1, 2014 and continuing through the present time. The document advised that appellant received retirement benefits subject to an SSA/FERS offset from June 2014 through the present time.⁷ SSA delineated the specific amount of age-based SSA retirement benefits that were attributable to federal service and provided the SSA payment rate with FERS, and without FERS, for specific periods commencing in June 2014 and continuing.

In a January 25, 2017 FERS offset calculation based on the SSA documentation (providing the SSA payment rate both with and without FERS), OWCP calculated that for the period June 1 to November 30, 2014 appellant received an overpayment of \$2,316.66, for the period December 1, 2014 to November 30, 2015 he received an overpayment of \$4,704.89, for the period December 1, 2015 to August 31, 2016 he received an overpayment of \$3,544.78, for the period September 1, to November 30, 2016 he received an overpayment of \$1,176.00, and for the period December 1, 2016 to January 7, 2017 he received an overpayment of \$744.13. The total overpayment for the period June 1, 2014 to January 7, 2017 was \$12,486.46.

In a February 7, 2017 notice, OWCP advised appellant of its preliminary determination that he received a \$12,486.46 overpayment of compensation for the period June 1, 2014 to January 7, 2017 because he received SSA retirement benefits based on his age and attributable to

⁵ The certification portion of each EN1032 form indicated that the person signing the form was making the following declaration, "I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs."

⁶ The form also advised appellant that, if he received SSA disability benefits, *i.e.*, benefits not received as part of an annuity for federal service, such benefits should be reported under the "Other Benefits" portion of the form and they might be reduced by SSA due to receipt of FECA benefits.

⁷ The Board notes that the precise date appellant retired from the employing establishment in 2014 is unclear from the record.

his federal service, without an offset being made, while he received FECA compensation benefits. It also made a preliminary determination that he was at fault in the creation of the overpayment because he failed to provide information covering the period of the overpayment which he knew or should have known to be material. OWCP advised appellant that he had the opportunity to submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed him that he could submit additional evidence in writing or at a prerecoumment hearing, but that a prerecoumment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

On March 8, 2017 appellant requested a prerecoumment hearing with a representative of OWCP's Branch of Hearings and Review. On March 10, 2017 OWCP received a Form OWCP-20, signed on March 6, 2017, in which appellant listed monthly income of \$5,187.09, monthly expenses of \$5,296.00, and assets of \$800.00.⁸ Appellant challenged OWCP's preliminary finding of fault in the creation of the \$12,486.46 overpayment and requested waiver of recovery of the overpayment.⁹

During the prerecoumment hearing held on August 31, 2017, counsel argued that appellant did not understand that the SSA benefits he received were the type that needed to be reported on the EN1032 forms he completed. He asserted that appellant did not receive SSA benefits until 2015, although he acknowledged that they were retroactively paid back to 2014.

In an October 25, 2017 decision, OWCP's hearing representative determined that appellant received a \$12,486.46 overpayment of compensation for the period June 1, 2014 to January 7, 2017 because he received SSA retirement benefits based on his age and attributable to his federal service, without an offset being made, while he received FECA compensation benefits. The hearing representative found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment, because he failed to provide information covering the period of the overpayment which he knew or should have known to be material. He discussed the fact that appellant failed to report his SSA benefits attributable to his federal service on several EN1032 forms. The hearing representative required repayment of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days. In so finding, he discussed appellant's financial circumstances and noted that appellant

⁸ Appellant provided an itemized list of his monthly expenses, including \$507.00 for car lease payments, \$656.00 for student loan payments, and \$740.00 for commercial debt payments. He did not provide any documentation in support of his claimed monthly expenses.

⁹ In an EN1032 form he signed on October 16, 2017, appellant answered "No" in response to a question regarding whether he received SSA benefits as part of an annuity for federal service. He wrote "SSA disability" in response to a question regarding whether he received other SSA benefits, *i.e.*, SSA benefits which were not part of an annuity for federal service.

failed to submit documentation supporting several claimed monthly expenses, including those related to car lease payments, student loan payments, and commercial debt payments.¹⁰

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.¹¹ 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.¹²

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.¹³ 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.¹⁴

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.¹⁵ Section 404.409 of SSA regulations provides that for individuals born before January 1, 1938, full retirement age is 65 years.¹⁶

ANALYSIS -- ISSUE 1

OWCP found that an overpayment of compensation was created in the amount of \$12,486.46 for the period June 1, 2014 to January 7, 2017. The overpayment was based on the evidence received from SSA with respect to benefits paid to appellant. The record indicates that, while appellant was receiving compensation for total disability under FECA, he concurrently 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.¹⁷ The

¹⁰ In a May 17, 2017 notice, OWCP advised appellant that it had made a preliminary determination that he received a \$1,388.39 overpayment due to improper deductions from his FECA compensation for life insurance premiums. The record does not contain a final decision of OWCP regarding this matter and it is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

¹¹ 5 U.S.C. § 8102(a).

¹² *Id.* at § 8116.

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

¹⁴ FECA Bulletin No. 97-09 (issued February 3, 1997).

¹⁵ 20 C.F.R. § 404.310.

¹⁶ *Id.* at § 404.409.

¹⁷ *See supra* notes 13 and 14.

information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period June 1, 2014 to January 7, 2017.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing in June 1, 2014 and continuing through January 7, 2014. OWCP provided its calculations for each relevant period based on the SSA worksheet. Appellant has not contested the amount of the \$12,486.46 overpayment and no contrary evidence has been provided to show that OWCP's calculations were incorrect. The Board has reviewed OWCP's calculation of benefits received by appellant for the period June 1, 2014 to January 7, 2017 and finds that an overpayment of compensation in the amount of \$12,486.46 was created.¹⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."²⁰ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.²¹

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

¹⁸ See *G.T.*, Docket No. 15-1314 (issued September 9, 2016).

¹⁹ 5 U.S.C. § 8129(a).

²⁰ *Id.* at § 8129(b).

²¹ *L.J.*, 59 ECAB 264 (2007).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”²²

Section 10.433(b) of OWCP’s regulations provides:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the \$12,486.46 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

OWCP applied the second standard of 20 C.F.R. § 10.433(a) in determining that appellant was at fault in the creation of the \$12,486.46 overpayment. In order for OWCP to establish that he was at fault in creating the overpayment of compensation, it must establish that appellant failed to furnish information which the individual knew or should have known to be material.²⁴

In a December 11, 2012 letter, OWCP informed appellant that he was being placed on the periodic compensation rolls and it advised him that he was required to immediately inform it upon filing for or receiving SSA retirement benefits. Appellant began to receive SSA benefits as part of an annuity for federal service on June 1, 2014. He had regularly completed EN1032 forms which specifically instructed him to report any monies or income or change in monies or income from federally-assisted disability or benefit programs, and any retirement benefits or SSA benefits under FERS. The evidence of record establishes that for the EN1032 forms covering the period June 1, 2014 to January 7, 2017, appellant failed to report his receipt of SSA benefits as part of an annuity for federal service. These EN1032 forms provided information to appellant regarding reporting income or monies from federally-assisted programs such as SSA.

The record reflects that on EN1032 forms dated September 16, 2014, September 15, 2015, October 5, 2016, and October 16, 2017, each of which covered the 15 months prior to the date signed, appellant signed and acknowledged, “I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs.” Each EN1032 informed appellant of the consequences of not accurately reporting his employment activities and earnings, such as being

²² 20 C.F.R. § 10.433(a).

²³ *Id.* at 10.433(b).

²⁴ *See supra* note 22.

subjected to criminal penalties and losing the right to receive workers' compensation. In each of these forms, he reported receiving no SSA benefits as part of an annuity for federal service.

Each of these forms specifically advised appellant of the need to update information or change in monies or income for the periods covered by the forms, and they constitute evidence that appellant was not forthcoming with providing information that was material. Consequently, the evidence of record establishes that appellant failed to furnish information which he knew or should have known to be material for the period June 1, 2014 to January 7, 2017.²⁵ The Board therefore finds that OWCP met its burden of proof to establish that appellant was at fault in the creation of the \$12,486.46 overpayment, thereby precluding waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into 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.”²⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$12,486.46 overpayment by deducting \$600.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. In determining that appellant could repay the overpayment through \$600.00 deductions from continuing compensation payments, OWCP discussed appellant's financial circumstances and noted that appellant failed to submit supporting documentation of several claimed monthly expenses, including those related to car lease payments, student loan payments, and commercial debt payments. Therefore, OWCP properly required repayment of the overpayment by deducting \$600.00 from appellant's compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$12,486.46 overpayment of compensation because he concurrently received SSA and FECA benefits for the

²⁵ See *C.N.*, Docket No. 16-0134 (issued March 8, 2016) (finding that a claimant who failed to report SSA benefits on multiple EN1032 forms was at fault in the creation of an overpayment received during a period covered by the forms).

²⁶ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

period June 1, 2014 to January 7, 2017. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment, and that OWCP properly required repayment of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board