

FACTUAL HISTORY

Appellant, a 57-year-old former customer care agent, injured his neck and arm secondary to his work duties.² OWCP initially accepted his occupational disease claim (Form CA-2) for carpal tunnel syndrome, cervical stenosis and cervical radiculopathy. On November 5, 2013 appellant underwent a cervical decompression and fusion. OWCP paid him wage-loss compensation, and placed him on the periodic rolls, effective December 15, 2013. It advised appellant of his obligations regarding receipt of retirement benefits by letters dated December 30, 2013 and January 13, 2014.

On September 3, 2015 appellant called OWCP and indicated that he was retiring, effective December 2, 2015. OWCP advised that he could not collect both retirement and FECA compensation benefits simultaneously, and that an election would be needed.

On December 7, 2015 appellant signed an Office of Personnel Management (OPM) form, electing receipt of retirement benefits in lieu of OWCP benefits, effective that date. The form was received by OWCP on December 14, 2015.

On December 18, 2015 a copy of the election was received from OPM, with a cover letter requesting additional benefits information.

On January 7, 2016 OWCP terminated appellant's compensation benefits, effective December 7, 2015.

OWCP did not respond to the inquiry from OPM. On January 19, 2016 OPM released a second request for compensation information and benefits deductions.

On January 28, 2016 appellant telephoned OWCP, seeking a response to the OPM letter. He indicated that he was frustrated with the lack of action by OWCP. OWCP reviewed the file and completed the OPM form on that date, faxing it to OPM the same day. OPM was advised that an overpayment existed for the period December 7, 2015 through January 9, 2016.

On February 4, 2016 OPM wrote OWCP, advising that payments were initiated on December 7, 2015. It advised that no offset of OPM entitlement could be applied to the debt until OWCP confirmed that due process had been served. OPM advised OWCP that the net monthly annuity was \$2,202.93.

On March 17, 2016 OWCP issued a preliminary overpayment determination in the amount of \$3,561.96 for the period December 7, 2015 through January 9, 2016. It explained that the reason for the overpayment was that appellant had received OWCP compensation benefits during the stated period, after having elected receipt of OPM benefits, effective December 7, 2015. Additionally, OWCP advised that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material. It provided a memorandum which showed that appellant was paid compensation for the period December 7, 2015 to January 9, 2016. The calculation provided by OWCP revealed that he received net

² The record reflects that appellant had a prior shoulder injury under OWCP File No. xxxxxx839.

compensation of \$3,561.96 divided by 34 days, which was equal to a daily rate of \$104.76. OWCP explained that \$3,561.96 was considered to be an overpayment. It explained that, if appellant disagreed with the fact or amount of overpayment, he could submit supporting evidence or argument and request a prerecoupment hearing within 30 days.

On March 28, 2016 appellant requested a prerecoupment hearing, which was scheduled for November 16, 2016. He explained that he was contesting the overpayment because he disagreed that it occurred, he disagreed with the amount, and he believed the overpayment occurred through no fault of his own. Appellant requested waiver of recovery and completed an Overpayment Recovery Questionnaire (Form OWCP-20) on March 31, 2016.³

On June 15, 2016 appellant advised OWCP that he had relocated to Las Vegas, Nevada.

On July 20, 2016 OWCP granted appellant a schedule award for permanent partial impairment of the arms. The initial check totaled \$23,615.33, and began with the first date after termination of compensation, January 10, 2016. A second and final payment of \$2,701.66 completed the award on August 19, 2016. OWCP noted that both payments were electronically deposited to appellant's bank account.

During the November 16, 2016 hearing, appellant testified that he had intended to retire in October 2015, but could not get OWCP to stop his compensation payments. He eventually elected retirement benefits effective December 7, 2015, but his FECA compensation payments continued. Appellant noted repeated contacts with the district office in an attempt to move the process along. He testified that he received his wage-loss compensation by electronic deposit. Appellant further testified that the only income was his retirement benefits, and that his wife received no income of any kind. He noted that he was trying to get his military retirement benefits started. Appellant explained that, with regard to the documentation on the Form OWCP-20, which he had submitted in March, he explained that the debts listed had all been paid with the exception of a debt to the Lending Club. Appellant confirmed his expenses included: monthly rent of \$940.00, monthly utilities of \$200.00; food and clothing totaled \$210.00 monthly; two car payments totaled \$467.00 monthly, and he indicated that he paid \$225.00 monthly for insurance and gasoline. He also reported cash on hand of \$4,152.00. Appellant reported that he had spent essentially all of the \$26,000.00 sent to him in July and August as he had relocated to Nevada, incurring expenses. He also indicated that they had paid off all debts. OWCP requested that appellant provide at least two billing cycles for each income stream and expense claimed, in order that OWCP might accurately establish his ability to repay a debt should a waiver not be granted. It was agreed that the record would remain open for 30 days for the submission of any additional evidence.

By decision dated January 31, 2017, OWCP's hearing representative finalized OWCP's preliminary determination regarding the fact and amount of the overpayment. However, he modified the preliminary determination to find that appellant was without fault in the creation of the overpayment. The hearing representative explained that appellant had no ability to reject the overpaid compensation, as the single payment in question was made by electronic funds transfer.

³ The income and expenses are addressed in the prerecoupment hearing.

He also indicated that appellant demonstrated a reasonable and consistent effort to communicate his retirement to OWCP and to affect a smooth transition to retirement benefits.

With regard to waiver of recovery of the overpayment, the hearing representative noted that appellant reported monthly income of \$2,205.00 from OPM.⁴ He also acknowledged that appellant documented revolving credit minimum payments of \$78.00, established rent of \$940.00, food at clothing at \$210.00, insurance and fuel payments of \$225.00, BMW payment of \$142.00 (as opposed to \$170.00) and a payment of \$297.00 for the Mitsubishi Outlander. The hearing representative determined that total monthly expenses were established at \$1,892.00. In order to determine a fair and equitable payment reschedule, the financial information of appellant was considered. The hearing representative calculated that the net monthly cash flow available for repayment of the overpayment, after deduction of the \$50.00 allowance beyond ordinary living expenses, equaled \$2,205.00-\$1,892.00, minus \$50.00, was equal to \$263.00. He determined that a monthly payment of \$200.00 was reasonable and appropriate in this instance. The hearing representative also advised that appellant received a schedule award exceeding \$26,000.00, and they were received after the notice of overpayment was received. He explained that it was expected that some portion of these payments remained available for both payment of monthly expenses and the overpaid compensation. The hearing representative noted that while appellant paid off debts and used money for relocation expenses, he submitted no evidence of those expenses. Furthermore, there were large, undocumented cash withdrawals on the savings account statements. Regarding appellant's request for waiver of recovery, the hearing representative further noted that appellant continued to receive FECA wage-loss compensation, and had an ability to repay \$200.00 every 28 days from his continuing compensation payments. He found that appellant had the means to make the repayment and waiver was not possible. The hearing representative affirmed the preliminary finding, and modified it with regard to the finding of fault.

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 her federal employment. Section 8129(a)⁵ 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."⁶

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of Social Security Administrations (SSA) benefits based on age or death that are attributable to federal service.⁷ If an employee receives SSA benefits based on federal service, his or her

⁴ The hearing representative noted that appellant received a second deposit in the amount of \$1,024.00, which was unexplained, but may reflect a military retirement payment.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also M.P.*, Docket No. 17-1703 (issued June 26, 2018); *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.

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.⁸ The offset of FECA benefits by SSA benefits attributable to employment under Federal Employees Retirement System (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. SSA 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 the overpayment.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined an overpayment of compensation in the amount of \$3,561.96 for the period December 7, 2015 through January 9, 2016.

Appellant is not entitled to simultaneously receive FECA wage-loss compensation and retirement benefits based on his federal service. The record reflects that appellant signed an OPM form on December 7, 2015 electing retirement benefits in lieu of FECA compensation benefits, effective that date. OPM received a copy of the form on December 18, 2015 and on January 7, 2016, OWCP terminated appellant's compensation benefits. Consequently, OWCP was obliged to offset appellant's FECA wage-loss compensation by the amount of SSA age-related retirement benefits attributable to his federal service.¹⁰

The record reflects that appellant was paid for the period December 7, 2015 to January 9, 2016. OWCP revealed that he received net compensation of \$3,561.96 divided by 34 days, which was equal to a daily rate of \$104.76. It explained that \$3,561.96 was considered to be an overpayment of compensation. The Board finds that the documentation regarding the amount of the overpayment is accurate.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in the creation of creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat

⁸ 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); *see R.C.*, Docket No. 09-2131 (issued April 2, 2010) (OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service).

⁹ *See M.P.*, *supra* note 5; *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

¹⁰ *Id.* at § 8116(d)(2); *id.* at § 10.421(d).

the purpose of FECA or would be against equity and good conscience.¹¹ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.¹³

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁴ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.¹⁵ The information is also used to determine an appropriate repayment schedule, if necessary.¹⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment of compensation.

Regarding appellant's income, it was documented that appellant received monthly income of \$2,205.00 from OPM. OWCP's hearing representative noted a second deposit in the amount of \$1,024.00, but no explanation was provided. Additionally, appellant confirmed that he had no other monthly income during his precoupment hearing. The hearing representative reviewed appellant's expenses and determined that his documented expenses included: revolving credit minimum payments of \$78.00, monthly rent of \$940.00, food and clothing at \$210.00, insurance and fuel payments of \$225.00, a BMW payment of \$142.00 and a payment of \$297.00 for a Mitsubishi Outlander. He determined that total monthly expenses were established at \$1,892.00. The hearing representative calculated that the net monthly cash flow available for repayment of the overpayment, after deduction of the \$50.00 dollar allowance beyond ordinary living expenses,

¹¹ *Id.* at § 8129(b); *id.* at §§ 10.433, 10.434, 10.436, 10.437.

¹² 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

¹³ 20 C.F.R. § 10.437(a), (b).

¹⁴ *Id.* at § 10.438(a).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 10.438(b).

\$2,205.00-\$1,892.00, minus \$50.00, was equal to \$263.00. The Board finds that the monthly payment of \$200.00 was reasonable and appropriate in this instance. Additionally, as noted by the hearing representative, the record reflects that appellant was paid a schedule award exceeding \$26,000.00, and it was received after the notice of overpayment was received. He explained that it was expected that some portion of these payments remained available for both payment of monthly expenses and the overpaid compensation. The hearing representative also found that, while appellant indicated that he paid off debts and used money for relocation expenses, he submitted no evidence of those expenses. He also found large, undocumented cash withdrawals on the savings account statements. The Board finds that in light of appellant's present financial situation, the hearing representative properly denied waiver of recovery of the overpayment.¹⁸

On appeal appellant argues that he contacted OWCP numerous times from August 16 through October 16, 2016 to request the proper election form for OPM and to stop OWCP direct deposit because he wanted to retire on October 16, 2016. However OWCP continued to pay appellant compensation through January 9, 2016. The Board has held that even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁹ Therefore, as explained above, OWCP properly denied waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,561.96 for the period December 7, 2015 through January 9, 2016. The Board also finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁸ *Id.* at § 10.438(b).

¹⁹ *See for example, William E. McCarty*, 54 ECAB 525 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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