

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

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because he concurrently received FECA benefits and retirement benefits from the Social Security Administration (SSA) without an appropriate offset; and (2) whether OWCP properly determined that it would recover the overpayment by deducting \$500.00 per month from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1989 appellant, then a 43-year-old tool and parts attendant, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder and left knee injury on February 1, 1989 when he was involved in a motor vehicle accident while in the performance of duty. OWCP accepted the claim for cervical, lumbar, knee, and groin strains/sprains. It placed appellant on the periodic rolls effective July 25, 1989. Appellant returned to light-duty work on May 22, 1990. On June 6, 1990 he filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of disability on May 25, 1990. OWCP again placed appellant on the periodic rolls on July 2, 1990. By decision dated March 26, 1992, it terminated appellant's compensation benefits because the weight of the medical evidence established that his disability resulting from the February 1, 1989 employment injury ceased on April 5, 1992. Appellant appealed to the Board.

By decision dated November 7, 1994, the Board remanded the case for further medical development to resolve a conflict in the medical opinion evidence regarding appellant's continuing disability causally related to his February 1, 1989 employment injury. OWCP, by decision dated April 2, 2007, expanded the acceptance of appellant's claim to include major depressive disorder and psychogenic pain. Appellant remained on the periodic rolls.

In a form dated October 14, 2016, SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) for the period August 1, 2008 to November 12, 2016. SSA provided the amount

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the August 3, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

⁴ Docket No. 93-0896 (issued November 7, 1994).

that appellant received in retirement benefits including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including FERS, it indicated that appellant was entitled to a monthly entitlement of \$602.20 effective August 2008; \$637.10 effective December 2008, December 2009, and June 2010; \$733.10 effective June 2011; \$759.40 effective December 2011; \$772.30 effective December 2012; \$783.90 effective December 2013; and \$797.10 effective December 2014 and 2015.

In a November 15, 2016 letter, OWCP adjusted appellant's compensation to offset the portion of his SSA retirement benefits attributable to his federal service. It indicated that following his offset he would receive net compensation of \$2,068.86.

By preliminary determination dated March 9, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$57,434.82 because his compensation benefits had not been reduced, for the period August 1, 2008 to November 12, 2016, by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$57,434.82. It further made a preliminary determination that appellant was with fault in the creation of the overpayment because he knew or should have known that he accepted compensation to which he was not entitled. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 7, 2017 appellant requested a prerecoupment hearing before a hearing representative of OWCP's Branch of Hearings and Review. He requested a waiver of recovery asserting that OWCP was aware of the offset and should have prevented the overpayment of compensation. Appellant further submitted an overpayment recovery questionnaire which listed monthly income of \$3,598.39 for himself and \$1,646.04 for his spouse, for a total monthly income of \$5,244.43. He also listed expenses of \$3,917.25, which included in part \$325.00 for food, \$1,358.86 for utilities and other household expenses, and \$860.63 for car insurance and expenses. Appellant noted that he had assets of \$61,316.53. He also submitted credit card bills in support of his claim.

A telephonic prerecoupment hearing was held on August 3, 2017.

By decision dated August 3, 2017, OWCP found an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because OWCP had failed to offset appellant's compensation payments for the portion of his SSA retirement benefits that were attributable to his federal service. It found that he was with fault in creating the overpayment and denied waiver of recovery of the overpayment as his income exceeded his expenses. OWCP determined that it would recover the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

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.⁵ Section 8129(a) of FECA provides that, 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 SSA benefits based on age or death that are attributable to federal service and that, if an employee received 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.⁷

OWCP 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 the 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 FERS is calculated as follows: Where a claimant had received SSA benefits, OWCP will obtain information from the SSA on the amount of the claimant's SSA 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 the 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 overpayment.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because he concurrently received FECA benefits and retirement benefits from the SSA without an appropriate offset.

In a form dated October 14, 2016, SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through FERS for the period August 1, 2008 to

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁹ *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

November 12, 2016. As noted, appellant cannot receive both wage-loss compensation and federal retirement benefits concurrently.¹⁰ Consequently, he received an overpayment of compensation.

OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$57,434.82. The record includes an overpayment worksheet explaining the overpayment calculation. There is no contrary evidence of record and the Board, accordingly, finds an overpayment of compensation in the amount of \$57,434.82.

LEGAL PRECEDENT -- ISSUE 2

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹¹

Section 10.441(a) of the regulations provides that 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 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.¹²

ANALYSIS – ISSUE 2

The Board finds that OWCP properly determined that it would recover the overpayment by deducting \$500.00 per month from appellant's continuing compensation payments every 28 days.

OWCP gave due regard to the financial information provided by appellant. Appellant's monthly household income totaled \$5,244.43 and his expenses totaled \$3,917.25, equaling a monthly surplus of \$1,327.18 per month. He also noted that he had \$61,316.53 in assets. OWCP thus did not abuse its discretion in requiring recovery by deducting \$500.00 from each of appellant's continuing compensation payments. The Board will affirm OWCP's decision regarding rate of recovery.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because he concurrently received FECA benefits and retirement benefits from the SSA without an appropriate offset. The Board

¹⁰ 5 U.S.C. § 8116(d). See *J.W.*, Docket No. 16-1355 (issued January 10, 2017); see also FECA Bulletin No. 97-9 (February 3, 1997).

¹¹ See *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹² 20 C.F.R. § 10.441(a).

further finds that OWCP properly determined that it would recover the overpayment by deducting \$500.00 per month from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 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