

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

G.C., Appellant)	
)	
and)	Docket No. 18-1062
)	Issued: December 4, 2018
DEPARTMENT OF DEFENSE, NATIONAL)	
SECURITY AGENCY, Fort Meade, MD,)	
Employer)	
)	

Appearances:
Appellant, pro se
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 May 1, 2018 appellant filed a timely appeal from a November 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,306.43 for the period March 1, 2013 through March 7, 2015; and (2) whether OWCP properly found that he was at fault in the creation of the overpayment and thus not subject to waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board regarding appellant's entitlement to a schedule award.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 4, 1999 appellant, then a 52-year-old security protective officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder, arm, and low back injury on April 3, 1999 opening a broken vehicle gate while in the performance of duty. OWCP accepted the claim for a left elbow strain, left shoulder strain, lumbar strain, and a herniated L5-S1 disc.³ On May 3, 2002 appellant underwent a laminectomy at L5, bilateral foraminotomies at L5-S1, and a left L5-S1 discectomy.

A March 5, 2002 claim for compensation (Form CA-7) indicated that appellant had retirement coverage under the Federal Employees Retirement System (FERS).

In a July 11, 2002 Form CA-1049, OWCP notified appellant that he would receive wage-loss compensation on the periodic rolls beginning April 29, 2002. It informed him that he had to report all retirement or disability income from a federal agency. OWCP advised appellant that if he had FERS retirement it had to deduct from his wage-loss compensation "at least part of any Social Security Retirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in Social Security Retirement benefits." It notified appellant that he must immediately report filing for or receiving benefits from the Social Security Administration (SSA).

By decision dated June 9, 2003, OWCP reduced appellant's wage-loss compensation as his actual earnings as a training instructor effective October 14, 2002 fairly and reasonably represented his wage-earning capacity. It applied the formula set forth in *Albert C. Shadrick*⁴ to find that he had an 87 percent wage-earning capacity and was entitled to \$363.28 in wage-loss compensation ever four weeks. By decision dated June 15, 2004, OWCP denied appellant's request for further merit review of its June 6, 2003 decision under 5 U.S.C. § 8128(a).

Appellant, on an EN1032 form signed on February 4, 2014, indicated that he did not receive SSA benefits as part of an annuity for federal service. On a February 4, 2015 EN1032 form he advised that he received monthly benefits of \$2,300.00 from SSA as part of an annuity for federal service.

² Docket No. 08-1803 (issued February 12, 2009). By decision dated February 12, 2009, the Board set aside an April 21, 2008 OWCP decision finding that appellant had no more than 10 percent permanent impairment of the left upper extremity and 5 percent permanent impairment of the left lower extremity. The Board found that an unresolved conflict in medical opinion existed and remanded the case to OWCP for referral for a second impartial medical examination regarding the extent of any permanent impairment. As the issue on current appeal is unrelated to the schedule award issue, the Board will not review facts relevant to the schedule award issue.

³ By decision dated December 3, 1999, OWCP denied appellant's traumatic injury claim. However, an OWCP hearing representative reversed the December 3, 1999 decision on March 21, 2000.

⁴ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

On February 19, 2015 OWCP requested that SSA complete a FERS/SSA Dual Benefit Calculation Form. In a February 24, 2015 response, SSA provided appellant's SSA rate with FERS and his SSA rate without FERS from March 2013 to December 2014. With FERS, his SSA rate was \$2,239.60 effective March 2013, \$2,273.10 effective December 2013, \$2,316.30 effective January 2014, and \$2,355.60 effective December 2014. Without FERS, appellant's SSA rate was \$1,652.40 effective March 2013, \$1,677.10 effective December 2013, \$1,699.40 effective January 2014, and \$1,728.30 effective December 2014.

OWCP found that appellant was not entitled to wage-loss compensation based on his loss of wage-earning capacity (LWEC) effective March 8, 2015 as his offset from SSA due to his federal service was greater than the amount of his 28-day wage-loss compensation under FECA.

By letter dated March 10, 2015, OWCP informed appellant that it was offsetting the portion of his SSA benefits attributable to his federal service from his wage-loss compensation. It advised that the monthly offset for his SSA benefits was \$627.30, which it adjusted to \$579.05 based on a 28-day payment cycle. OWCP notified appellant that as the amount to be offset exceeded \$471.00, the amount of his 28-day wage-loss compensation based on its LWEC determination, it was terminating his wage-loss compensation as of March 8, 2015.

OWCP completed a FERS offset calculation form on January 15, 2016. It calculated the amount that it should have offset from appellant's wage-loss compensation from March 1, 2013 through December 1, 2014. OWCP found that, effective March 1, 2013, the monthly offset was \$587.20 ($\$2,239.60 - \$1,652.40$), or \$542.03 every 28 days; effective December 1, 2013, the monthly offset was \$596.00 ($\$2,273.10 - \$1,677.10$), or \$550.15 every 28 days; effective January 1, 2014, the monthly offset was \$616.90 ($\$2,316.30 - \$1,699.40$), or \$569.45 every 28 days; and effective December 1, 2014, the monthly offset was \$627.30 ($\$2,355.60 - \$1,728.30$), or \$579.05 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from March 1, 2013 to December 1, 2014, and then added these amounts to find that it should have offset \$14,731.28 from appellant's wage-loss compensation.

On March 10, 2017 OWCP advised appellant of its preliminary determination that he received an overpayment of wage-loss compensation in the amount of \$12,306.43 for the period March 1, 2013 through March 7, 2015 because it failed to offset the portion of the SSA benefits that he received due to his federal service from his workers' compensation benefits. It found that the amount to be offset was greater than the wage-loss compensation that he received based on his LWEC during that period, and thus determined that he was not entitled to wage-loss compensation for that period. OWCP found that the total wage-loss compensation that appellant received from March 1, 2013 through March 7, 2015, \$12,306.43, constituted an overpayment of compensation. It further notified him of its preliminary determination that he was at fault in the creation of the overpayment as he accepted a payment that he knew or should have known was incorrect. OWCP based its fault determination on appellant's receipt of its June 11, 2002 letter explaining that a portion of his FERS benefits was included in his SSA benefits and must be offset and his completion of a February 4, 2015 CA-1032 indicating that he received benefits from SSA as part of an annuity for federal service. OWCP requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it informed

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 precoupment hearing.

Appellant, on April 7, 2017, requested a precoupment hearing before an OWCP hearing representative. He contended that he was without fault in the creation of the overpayment. On an overpayment recovery questionnaire (Form OWCP-20), appellant provided his monthly income as \$4,635.34 and listed his monthly expenses. He also indicated that he had assets of \$358,419.97. In an accompanying statement, appellant asserted that he was unaware that he had received an overpayment of compensation, noting that SSA forms indicated that he could work and still receive SSA benefits. He related that he supported grandchildren and also helped a daughter with health issues. Appellant advised that he was not informed that his SSA benefits were related to the wage-loss compensation that OWCP paid him based on his loss of night differential. He requested waiver of the overpayment of compensation.

During the hearing, held on August 21, 2017, appellant related that he retired on September 30, 2015. He contended that he did not know that his payment was incorrect as he was not sent any paperwork notifying him that he could not receive his FECA compensation and SSA benefits. Appellant requested waiver of recovery of the overpayment as he needed the money to help his children and grandchildren. He asserted that he received FECA benefits due to lost night differential, which he believed was unrelated to his receipt of SSA benefits.

Subsequent to the hearing, appellant submitted financial documentation.⁵ In a September 15, 2017 statement, he maintained that he was unaware that he needed to inform OWCP that he was receiving SSA benefits and that he did not receive forms advising him of the requirement. Appellant indicated that he received OWCP payments because he moved from the night shift to the day shift at work.

By decision dated November 7, 2017, OWCP's hearing representative found that appellant received a \$12,306.43 overpayment of wage-loss compensation from March 1, 2013 to March 7, 2015 as OWCP failed to offset the portion of his SSA benefits attributable to his federal service from the wage-loss compensation that it paid him based on its LWEC determination. She found that he was at fault in the creation of the overpayment of wage-loss compensation as he accepted a payment that he knew or should have known was incorrect. The hearing representative determined that appellant should submit \$200.00 per month to repay the overpayment of wage-loss compensation.

On appeal appellant asserts that, after his injury, the employing establishment moved him from the night shift to day shift and that he consequently received wage-loss compensation from OWCP for lost night differential. OWCP did not inform him of the overpayment of compensation until two years after SSA notified OWCP of the overpayment of compensation.

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

⁵ Members of appellant's family also submitted letters confirming that he provided financial assistance.

performance of his duty.⁶ 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.”⁷

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.⁸ Section 8116(a) 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.⁹

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.¹⁰ FECA Bulletin No. 97-09 states 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.¹¹

Section 404.310 of SSA regulations provides that entitlement to SSA benefits begins at 62 years.¹² Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$12,306.43 for the period March 1, 2013 through March 7, 2015.

OWCP accepted that appellant sustained left elbow and shoulder strains, a lumbar strain, and a herniated L5-S1 disc due to an April 3, 1999 work injury. A March 5, 2002 CA-7 form indicated that he had retirement coverage under FERS.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8116(a).

¹⁰ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

¹¹ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also G.K.*, Docket No. 18-0243 (issued August 17, 2018).

¹² 20 C.F.R. § 404.310.

¹³ *Id.* at § 404.409.

By decision dated June 9, 2003, OWCP reduced appellant's wage-loss compensation as his actual earnings as a training instructor effective October 14, 2002 fairly and reasonably represented his wage-earning capacity. Using the *Shadrick* formula, it found that he had an 87 percent wage-earning capacity and that he was entitled to wage-loss compensation of \$363.28 every 28 days. Appellant also received age-related retirement benefits from SSA from March 1, 2013 through March 7, 2015. As noted, the portion of the SSA benefits he earned as part of his FERS retirement package received concurrently with FECA benefits constituted a prohibited dual benefit.¹⁴ Appellant, consequently, received an overpayment of compensation.

SSA provided appellant's SSA rate with FERS and his hypothetical SSA rate without FERS. The difference between the amounts must be deducted from FECA benefits. Based on the information provided by SSA, OWCP determined that the amount to be offset exceeded the total amount of wage-loss compensation that it paid him based on its determination of his LWEC. It thus found that the entire amount of wage-loss compensation paid during the period, \$12,306.43, constituted an overpayment of compensation. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received dual benefits totaling \$12,306.43, creating an overpayment of compensation in that amount.¹⁵

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) provides: "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 FECA or would be against equity and good conscience."¹⁶ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁷ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.¹⁸

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that 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.¹⁹

¹⁴ See *G.K.*, *supra* note 11.

¹⁵ See *L.M.*, Docket No. 16-1035 (issued November 27, 2017).

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *Id.* at § 10.433(b); see also *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment as he accepted a payment that he knew or should have known was incorrect. It must thus establish that, at the time he received the compensation in question, he knew or should have known that the payment was inaccurate.²⁰

The Board finds that appellant was at fault in the creation of the \$12,306.43 overpayment of compensation. On July 11, 2002 OWCP provided him with a Form CA-1049 which advised him that it was placing him on the periodic rolls and that he had to report any retirement or disability income from a federal agency. It notified appellant that a recipient of compensation under FECA covered under FERS was not permitted to receive age-related retirement benefits from SSA without an appropriate offset.²¹ Moreover, EN1032 forms dated February 4, 2014 and 2015 asked whether he received SSA retirement benefits as part of an annuity under FERS. Appellant indicated on the February 4, 2014 CA-1032 form that he did not receive an annuity from SSA for federal service. In the February 4, 2015 EN1032 form, he advised that he received \$2,300.00 monthly from SSA as part of an annuity for federal service. By signing the forms, appellant certified that all statements made in response to the questions on the form were true, complete, and correct to the best of his knowledge and belief.²²

Despite being given notice that receipt of SSA benefits would reduce his entitlement to FECA compensation, appellant continued to accept full wage-loss compensation from OWCP without an appropriate offset from March 1, 2013 through March 7, 2015.²³ The Board, therefore, finds appellant at fault under the third standard, as he accepted compensation which he knew or should have known that he was not entitled to receive.²⁴ Consequently, recovery of the overpayment of compensation in the amount of \$12,306.43 may not be waived.²⁵

On appeal appellant requests waiver, maintaining that he did not know that he had received inaccurate compensation and questioning whether a reasonable person would be aware of OWCP regulations. As discussed above, however, OWCP notified him that he was not entitled to receive federal retirement benefits simultaneously with FECA benefits without it affecting his wage-loss compensation. The Board, therefore, concludes that OWCP properly determined that appellant

²⁰ See *G.D.*, Docket No. 18-0510 (issued August 6, 2018); *E.M.*, Docket No. 17-1987 (issued July 25, 2018).

²¹ See *B.R.*, Docket No. 16-0567 (issued December 9, 2016) (finding that a Form CA-1049 informing a claimant that a recipient of FECA compensation was not permitted to receive benefits under other federal programs, including the Civil Service Retirement program, together with other evidence, supported a finding of fault when she accepted SSA benefits and FERS compensation without an appropriate offset).

²² See *G.D.*, *supra* note 20.

²³ See *J.G.*, Docket No. 17-0400 (issued January 12, 2018).

²⁴ See *T.M.*, Docket No. 17-1482 (issued May 4, 2018).

²⁵ See *J.C.*, Docket No. 16-1889 (issued May 17, 2017).

was at fault in the creation of the overpayment and that waiver of recovery of the overpayment is therefore precluded.²⁶

Appellant also argues that OWCP delayed notifying him of the overpayment. To the extent that he is arguing that OWCP made the mistake and that he should not be considered at fault, the fact that OWCP may have been negligent in issuing the compensation checks does not mitigate the fault determination.²⁷

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$12,306.43 for the period March 1, 2013 through March 7, 2015. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment and thus not subject to waiver of recovery.

²⁶ With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *See R.E.*, Docket No. 18-1625 (issued July 18, 2018). As appellant was no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act. *Id.*

²⁷ *See D.M.*, *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 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