

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

E.M., Appellant)	
)	
and)	Docket No. 17-1987
)	Issued: July 25, 2018
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY & INSPECTION SERVICE,)	
South Holland, IL, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 25, 2017 appellant filed a timely appeal from a September 5, 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 \$58,235.33 for the period March 25, 2013 through December 11, 2016; (2) whether he was at fault in the creation of the overpayment, and thus, not entitled to waiver of recovery of the overpayment; and (3) whether OWCP properly deducted \$1,500.00 every 28 days from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 16, 2011 appellant, then a 64-year-old public health veterinarian, filed a traumatic injury claim (Form CA-1) alleging that, on June 15, 2011, he twisted his right knee and fell on his back going down stairs. He stopped work on June 15, 2011 and returned to work on June 16, 2011. OWCP accepted the claim for a tear of the right medial meniscus, a right knee contusion, and right chondromalacia patellae.

The employing establishment had been accommodating appellant with light-duty work. However, as of February 8, 2013, it was no longer able to continue accommodating appellant under its Alternative Duty Program (ADP).

On March 28, 2013 the employing establishment, on appellant's behalf, submitted a claim for wage-loss compensation (Form CA-7) for the period March 25 through April 5, 2013. The form indicated that appellant had not applied for or received payment under any federal retirement or disability law. Appellant did not sign the form. Instead, the signature line provided the name of an official with the employing establishment. Between April 24 and May 14, 2013, the employing establishment submitted three additional Form CA-7s on appellant's behalf, seeking wage-loss compensation for the combined period April 7 through May 18, 2013. These additional forms were not signed by appellant, but instead listed the name of an employing establishment official. These latter Form CA-7s did not include any information regarding whether appellant applied for or received payment under any federal retirement or disability law.

On May 29, 2013 appellant completed a Form CA-7 requesting wage-loss compensation from May 19 to June 1, 2013. On the Form CA-7 he checked the box marked "No" (section 6c) indicating he had not applied for or received payment under any federal retirement or disability law.

On May 31, 2013 OWCP paid appellant wage-loss compensation for temporary total disability for the period March 25 through May 18, 2013. The disbursement was *via* electronic funds transfer (EFT). The noted reason for the payment was because the employing establishment could no longer accommodate appellant with a full-time, limited-duty position.

Over the next several months, the employing establishment continued to file a series of Form CA-7s on appellant's behalf, and without his signature.² Appellant completed and signed an August 9, 2013 Form CA-7 requesting wage-loss compensation from July 28 to August 10, 2013 and an October 17, 2013 Form CA-7 requesting wage-loss compensation from October 6 to 19, 2013. On these forms, appellant affirmatively represented that he had not applied for or received payment under any federal retirement or disability law.

By letter dated November 21, 2013, OWCP notified appellant that he would receive wage-loss compensation for disability on the periodic rolls effective November 17, 2013. In an attached Form EN1049, it further informed appellant that he had to report any retirement income received from an employing establishment and that he could not receive both FECA benefits and FERS

² The employing establishment completed and signed CA-7 forms dated June through November 2013 on behalf of appellant. It did not respond to the question of whether he received payments under federal retirement or disability law.

retirement benefits without an appropriate offset for SSA retirement benefits. OWCP advised appellant to immediately report if he filed for or received benefits from SSA.

Appellant, on September 19, 2014, signed a Form EN1032 covering the period June 19, 2013 to September 19, 2014.³ He indicated on the form that he received retirement benefits from SSA as part of an annuity for his federal service. Appellant signed EN1032 forms on September 18, 2015 and September 28, 2016, again indicating that he received retirement benefits from SSA based in part on his federal service.

On November 9, 2016 OWCP requested that SSA complete a FERS/SSA Dual Benefit Calculation Form. In a December 7, 2016 response, SSA provided appellant's SSA rate with FERS and his SSA rate without FERS from September 2012 through December 2016. With FERS, appellant's SSA rate was \$1,712.50, effective September 12, 2012, \$1,741.60 effective December 2012, \$1,853.80 effective December 2013, \$1,908.90 effective December 2014 and 2015, and \$1,914.60 effective December 2016. Without FERS, his SSA rate was \$540.50 effective September 12, 2012, \$549.60, effective December 2012, \$557.80 effective December 2013, \$567.20 effective December 2014 and 2015, and \$568.90 effective December 2016.

OWCP calculated the amount of wage-loss compensation appellant should have received with a FERS offset. Effective December 1, 2012, the monthly offset was \$1,192.00 (\$1,741.60 -- 549.60) or \$1,100.31 every 28 days; effective December 1, 2013 the monthly offset was \$1,296.00 (\$1,853.80-557.80) or \$1,196.31 every 28 days; effective December 1, 2014 and 2015, the monthly offset was \$1,341.70 (\$1,908.90 -- 567.20) or \$1,238.49 every 28 days; and effective December 1, 2016, the monthly offset was \$1,345.70 (\$1,914.60 - \$568.90), or \$1,242.18 every 28 days. OWCP divided the 28-day offset amount to find the daily offset amount. It multiplied this amount by the number of days in each period from March 25, 2013 to December 10, 2016 and then added these amounts to find a total overpayment of \$58,235.33.

On January 23, 2017 OWCP notified appellant of its preliminary determination that he received an overpayment of wage-loss compensation in the amount of \$58,235.33 for the period March 25, 2013 to December 11, 2016 because it failed to deduct the portion of the SSA benefits that he received due to his federal employment from his compensation. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment as he indicated on a May 29, 2013 Form CA-7 that he had not applied for and did not receive a payment under federal disability or retirement law even though he began receiving SSA retirement compensation based in part on his federal service in September 2012. OWCP thus found that appellant accepted a payment that he knew or should have known that he was not entitled to receive. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP 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 prerecoumpment hearing.

³ By decision dated September 30, 2014, OWCP reduced appellant's wage-loss compensation based on his refusal to participate with vocational rehabilitation under 5 U.S.C. § 8113(b). On April 29, 2015 it vacated its September 30, 2015 decision as the medical evidence of record was insufficient to show that he could engage in vocational rehabilitation.

Appellant, on February 6, 2017, requested a prerecoupment hearing by teleconference. He contested the finding that an overpayment existed, the amount of any overpayment, and asserted that it occurred through no fault of his own and requested waiver. Appellant maintained that he timely reported his SSA monthly benefits when he turned 66. In a completed overpayment recovery questionnaire, he provided his monthly income as \$7,245.00 listed assets of \$25,946.00. Appellant also listed his expenses.

During the prerecoupment hearing, held by telephone on July 26, 2017, appellant testified that, at the time that he signed the May 29, 2013 CA-7 form, he had not yet applied for retirement benefits. He subsequently clarified that he answered “no” to the question on the CA-7 form regarding whether he received a payment under federal retirement law because he believed that the question referred to SSA disability retirement or federal retirement. Appellant noted that he correctly reported his receipt of SSA benefits on the CA-1032 forms after he received OWCP’s November 21, 2013 letter explaining that he needed to report SSA benefits based on age. He maintained that the amount of his wage-loss compensation from OWCP varied and that he had no way to know whether it was offsetting part of his SSA retirement from 2013 to 2017. Counsel argued that appellant was not fault in creating the overpayment because he correctly completed the required forms based on his understanding at the time. He also asserted that he received the SSA benefits based on age, not retirement status. The hearing representative noted the expenses listed for food and clothing on the overpayment recovery questionnaire appeared high and requested a supplemental statement regarding these expenses. He also requested a copy of the condominium maintenance bill, noting that appellant indicated that he paid \$950.00 for rent or a mortgage, but that he did not have a mortgage on the condominium that he owned.

In a form dated August 15, 2017, appellant listed his monthly expenses as \$3,670.00 and provided supporting financial documentation.

On August 22, 2017 counsel argued that he was not at fault in the creation of the overpayment, noting that English was not his native language. He maintained that the forms did not sufficiently advise him of the duty to report his SSA benefits and that he reported the benefits after OWCP provided him with a detailed explanation of the reporting requirements. Counsel argued that Board case law and OWCP procedures provided that the benefit of the doubt regarding a fault finding should be resolved in favor of the claimant. He further asserted that OWCP should waive recovery of the overpayment.

By decision dated September 5, 2017, OWCP’s hearing representative found that appellant received an overpayment of wage-loss compensation in the amount \$58,235.33 from March 25, 2013 to December 11, 2016 because OWCP failed to offset from his compensation the amount that he received from SSA for retirement benefits based on his federal services. OWCP further found that he was at fault in the creation of the overpayment as he responded that he did not receive and had not applied for any federal retirement benefits, including SSA benefits, on a CA-7 form, and as OWCP notified him on November 21, 2013 of the need to report SSA benefits. The hearing representative considered appellant’s income and expenses and found that it would recover the overpayment by deducting \$1,500.00 per month from his continuing compensation payments.

On appeal appellant contends that he indicated that he was not receiving SSA benefits on the March 28, 2013 Form CA-7 because he believed that it applied to disability, arguing that the

response was insufficient to support a finding of fault. He notes that he reported his SSA benefits on the EN1032 forms.

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁴ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of Social Security Act benefits attributable to the employee's federal service.⁵ However, an offset is not required where the employee-beneficiary is covered under the Civil Service Retirement System (CSRS) and/or the SSA age-related benefits are attributable to private sector employment.⁶

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 the overpayment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a tear of the right medial meniscus, a right knee contusion, and right chondromalacia patellae due to a June 15, 2011 fall. It paid wage-loss compensation for total disability beginning March 25, 2013. Appellant received SSA benefits based in part on his federal service effective September 2012. As noted, the portion of the SSA benefits he earned as part of his FERS retirement package and the receipt of benefits under FECA concurrently constituted a prohibited dual benefit.⁸ 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 deduced from FECA benefits. Based on the information provided by SSA, OWCP determined that he received an overpayment of compensation in the amount of \$58,235.33 for the period March 25, 2013 through December 11, 2016. The Board has reviewed OWCP's calculations of the dual benefits that

⁴ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁵ 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9c (May 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e(2) (January 1997).

⁷ See *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

⁸ See *H.H.*, Docket No. 16-1063 (issued September 15, 2016).

appellant received and finds that it properly determined that he received a \$58,235.33 overpayment of compensation.⁹

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.¹⁰ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹¹ The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits.¹²

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 (3) accepted a payment which the recipient knew or should have known to be incorrect.¹³

When an overpayment has been made to an individual who is entitled to further payments, 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.¹⁴

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment as he accepted payments that he knew or should have known were 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 incorrect.¹⁵

OWCP found that appellant knew or should have known that he received incorrect workers' compensation payments covering the period March 25, 2013 through December 11, 2016. It based its fault determination on appellant having completed a May 29, 2013 Form CA-7,¹⁶ as well as him having received a November 21, 2013 letter informing appellant

⁹ See *L.M.*, Docket No. 16-1035 (issued November 27, 2017).

¹⁰ *Id.* at § 10.433(a).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at § 10.433(a)(1-3).

¹⁴ *Id.* at § 10.441(a).

¹⁵ See *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁶ On the May 29, 2013 Form CA-7, appellant checked the "No" box indicating that he had not applied for or received payment under any federal retirement or disability law.

that he could not receive both FECA benefits and FERS-based retirement benefits without an appropriate offset.

The Board finds that OWCP has not established that appellant was at fault in creating the overpayment covering the period March 25 through November 16, 2013 based on his completion of a May 29, 2013 Form CA-7.¹⁷ Although Form CA-7 requests information about whether a claimant applied for or received payment under any federal retirement or disability law, the form does not otherwise provide any information regarding the potential consequences of receiving FECA wage-loss compensation simultaneously with other federal retirement or disability benefits. The May 29, 2013 Form CA-7, which appellant signed, does not accurately reflect his retirement status. However, the record is devoid of evidence showing that at that time he was otherwise aware that his FERS-based SSA retirement benefits constituted a prohibited dual benefit.¹⁸ As discussed *infra*, OWCP provided appellant detailed information regarding FERS/SSA offset in late November 2013. Regarding the amount of the overpayment covering the period March 25 to November 16, 2013, the Board finds that OWCP has not sufficiently explained how appellant's completion of the May 29, 2013 Form CA-7 put him on notice that the payments he accepted on or after May 29, 2013 were incorrect. Thus, OWCP has not established that for the overpayment covering the period March 25 through November 16, 2013 appellant accepted payments that he knew or should have known were incorrect.¹⁹ Accordingly, OWCP's finding of fault with respect to the above-noted period of compensation shall be set aside.

The Board further finds that appellant was at fault for the creation of the overpayment of compensation from November 17, 2013 through December 11, 2016. By letter dated November 21, 2013, OWCP advised appellant that it was placing him on the periodic compensation rolls. It explained that he would soon receive a first payment of \$2,847.08 (net) for the period November 3 through 16, 2013, and beginning November 17, 2013 he would receive regular payments every 28 days in the amount of \$5,694.16 (net). OWCP's November 21, 2013 letter also included Form EN1049, which informed appellant of his rights and responsibilities as a FECA benefits recipient. On the subject of retirement benefits, the EN1049 advised appellant as follows:

“You must report to the OWCP any retirement income you receive from any Federal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS).

¹⁷ An initial payment of \$11,396.31 (net) covering the period March 25 through May 18, 2013 was disbursed *via* electronic funds transfer (EFT) on May 31, 2013. Appellant continued to receive payments approximately every two weeks (\$2,847.08 -- net), which covered the period May 19 through November 16, 2013. Effective November 17, 2013, OWCP placed appellant on the periodic compensation rolls and began paying wage-loss compensation every 28 days (\$5,694.16 -- net).

¹⁸ See *R.C.*, Docket No. 14-1383 (issued December 5, 2014).

¹⁹ See *Sinclair L. Taylor*, 52 ECAB 227, 231 (2001) (finding that a letter advising appellant to notify OWCP immediately if he received benefits from the Department of Veterans Affairs (DVA) was not sufficient to support a finding that he knew or should have known that he was not entitled to both DVA benefits and FECA wage-loss compensation).

If you are covered under FERS, the OWCP must deduct from your 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. Therefore, advise the OWCP immediately upon filing for or receiving Social Security Retirement benefits.”

Unlike Form CA-7, the above-noted November 21, 2013 correspondence (EN1049) clearly put appellant on notice regarding the importance of accurately reporting his receipt of SSA age-related retirement benefits, and the potential of creating an overpayment when FERS-based SSA benefits are not properly offset.

Payment records indicate that compensation for the period November 3 through November 16, 2013 was paid *via* electronic funds transfer (EFT) on November 22, 2013. Although the EFT post-dated OWCP’s November 21, 2013 correspondence, it is not evident from the record that appellant received the EN1049 prior to accepting payment for the period November 3 - 16, 2013. However, the initial 28-day periodic roll payment for the period beginning November 17, 2013 was disbursed *via* EFT on December 14, 2013. By then, appellant would have received OWCP’s November 21, 2013 correspondence, and thus, he knew or should have known that any additional payments accepted were incorrect.²⁰

Despite having received notice that SSA age-related retirement benefits would reduce his entitlement to FECA compensation, appellant continued to accept full FECA benefits covering the period November 17, 2013 through December 11, 2016.²¹ The Board thus finds that appellant was at fault under the third standard as he accepted compensation that he knew or should have known that he was not entitled to receive and, as such, recovery of the overpayment of compensation for this period cannot be waived.²²

As OWCP has not established that appellant was at fault in the creation of the overpayment covering the period March 25 through November 16, 2013, the case will be remanded to OWCP to consider waiver of recovery of the overpayment for this period.²³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$58,235.33 for the period March 25, 2013 through December 11, 2016. The Board further finds that he was not at fault in the creation of the overpayment covering the period March 25 through November 16, 2013, but with respect to the overpayment of compensation for the period November 17, 2013 through December 11, 2016, appellant was at fault, and thus, he is not entitled to waiver of recovery for this portion of the total

²⁰ There is no record that the November 21, 2013 correspondence was returned to OWCP as undeliverable.

²¹ *See J.C.*, Docket No. 16-1889 (issued May 17, 2017); *R.H.*, Docket No. 15-0563 (issued October 13, 2015).

²² *See S.U.*, Docket No. 17-1281 (issued April 2, 2018).

²³ In view of the Board’s disposition of the issue of fault, it is premature to consider the issue of whether OWCP properly set the rate of recovery of the overpayment.

overpayment. The case will be remanded for OWCP to consider waiver of recovery of the overpayment covering the period March 25 through November 16, 2013.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 25, 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