

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

_____)	
H.H., Appellant)	
)	
and)	Docket No. 18-0356
)	Issued: October 24, 2018
)	
ENVIRONMENTAL PROTECTION AGENCY,)	
HEADQUARTERS, Washington, DC, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 11, 2017 appellant, filed a timely appeal from a July 12, 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$47,836.73 for the period June 1, 2008 to May 27, 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence on appeal. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time it issued its final decision. Thus, the Board is precluded from considering this new evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

(3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

OWCP accepted that on June 22, 1995 appellant, then a 48-year-old program analyst, sustained thoracic or lumbosacral neuritis or radiculitis, not otherwise specified, and displacement of lumbar intervertebral disc without myelopathy as a result of lifting a box during an office move at work. It authorized lumbar surgeries performed on October 9, 2009 and September 21 and October 16, 2015. OWCP placed appellant on the periodic rolls and paid compensation for total disability beginning November 4, 2001.

Appellant reached 62 years of age on May 13, 2008. In completed EN1032 forms signed by appellant on July 8, 2002, June 30, 2003, June 17, 2004, June 20, 2005, September 21, 2006, June 26, 2007,³ January 9, 2009, February 5 and 15, 2010, June 27, 2011, June 1, 2012, May 27, 2013, May 30, 2015, and May 30, 2016 he responded "NO" to the question of whether he received benefits from Social Security Administration (SSA) as part of an annuity for federal service during the prior 15 months. By signing the forms, appellant certified that he understood that he "must immediately report to OWCP any improvement in his medical condition, any employment, any change in the status of claimed dependents, any third-party settlement, and any change in income from federally[-]assisted disability or benefit programs." He also certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of his knowledge and belief. In May 8, 2003, May 26, 2004, May 17, 2005, July 19, 2006, June 13, 2007, June 19 and December 30, 2008, June 17, 2009, January 13 and June 10, 2010, June 1, 2011, May 2, 2012, May 7, 2013, May 13, 2014, May 6, 2015, and May 13, 2016 letters accompanying the EN1032 forms, appellant was advised that the information he provided would be used to decide whether he was entitled to continue receiving these benefits or whether his benefits should be adjusted.

In a facsimile transmittal dated June 16, 2016, OWCP requested SSA to provide information regarding any dual benefits appellant may have received.

In a May 19, 2017 Federal Employees Retirement System (FERS) SSA Dual Benefits Calculation Fax Transmittal worksheet, SSA provided appellant's SSA benefit rates with a FERS offset and without a FERS offset for the period June through December 2008.

By letter dated June 1, 2017, OWCP advised appellant that he had been receiving SSA retirement benefits based on age since June 1, 2008. Effective May 28, 2017, it reduced his 28-day compensation payment by \$415.05, the amount of his SSA retirement benefits attributable to his federal service.

³ On the June 26, 2007 Form EN1032 appellant indicated that he received a disability retirement check from the Office of Personnel Management (OPM). However, on September 10, 2007 OPM advised OWCP that appellant's disability payments had been suspended as of April 28, 1998.

The record includes an OWCP worksheet containing a calculation showing that appellant received a \$47,836.73 overpayment of compensation for the period June 1, 2008 to May 27, 2017 due to the failure to offset his SSA benefits.

In a notice dated June 12, 2017, OWCP advised appellant of its preliminary determination that he had received a \$47,836.73 overpayment of compensation for the period June 1, 2008 to May 27, 2017 due to the failure to offset his FECA benefits for SSA benefits he had received. It found appellant at fault in the creation of the overpayment because he accepted payments which he knew or should reasonably have known were incorrect. OWCP advised him that he could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, it informed appellant that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Appellant did not respond within the time allotted.

By decision dated July 12, 2017, OWCP finalized its preliminary determination that appellant received a \$47,836.73 overpayment of compensation for the period June 1, 2008 through May 27, 2017. It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that appellant had not responded to the June 12, 2017 preliminary notice. It informed him that the overpayment would be collected by withholding \$300.00 from his continuing compensation payments, every 28 days, beginning July 22, 2017.

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.⁴

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.”⁵

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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits.⁶

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 SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ 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. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefits 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 compensation payable.⁸

A final decision of OWCP shall contain findings of fact and a statement of reasons.⁹ With respect to overpayment decisions, OWCP must provide clear statements showing how the overpayment was calculated.¹⁰ Its regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, right to submit evidence challenging the fact, amount or finding of fault, and the right to request waiver of the overpayment.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$47,836.73 overpayment of compensation for the period June 1, 2008 through May 27, 2017.¹²

With respect to the fact and amount of this claimed overpayment, the Board finds that OWCP has not provided adequate findings of facts which would allow appellant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹³ It found that appellant received a \$47,836.73 overpayment of compensation because he received

⁶ *Id.* at § 8116(d); *see G.B.*, Docket No. 11-1568 (issued February 15, 2012); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); *see R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁸ *See P.G.*, Docket No. 13-0589 (issued July 9, 2013).

⁹ 20 C.F.R. § 10.126.

¹⁰ *James Tackett*, 54 ECAB 611 (2003); *Sandra K. Neil*, 40 ECAB 924 (1989).

¹¹ *Supra* note 9 at § 10.431.

¹² *J.J.*, Docket No. 14-0785 (issued September 3, 2014).

¹³ *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

SSA/FERS age-related benefits for his federal service, as well as FECA benefits between June 1, 2008 and May 27, 2017 without an appropriate offset. OWCP did not adequately explain how this finding was supported by documents of record. The record does not contain any document from the SSA establishing that appellant was receiving SSA benefits from June 1, 2008 through May 27, 2017. The record contains a FERS SSA Dual Benefits Calculation Fax Transmittal completed on May 19, 2017 by a SSA official. It listed June 2008 through December 2008 for receipt of SSA benefits with a FERS offset and without a FERS offset. The record contains an OWCP worksheet which notes that SSA benefits in the amount of \$47,836.73 were not offset against FECA benefits for the period June 1, 2008 through May 27, 2017. The worksheet provided the monthly benefit received with and without FERS and provided a calculation to determine the 28-day offset amount for the stated period. The calculations contained in the worksheets are not supported by the SSA documents of record because the FERS offset is only verified for the period June through December 2008. The basis for the determination of fact and amount of overpayment has not been adequately explained by OWCP based upon this limited information.

In the case of *J.G.*, the Board remanded the case to OWCP for further development because OWCP had not adequately explained its finding that appellant received dual benefits from FERS and SSA because the finding was not supported by the documents of record.¹⁴ Similarly, in this case, it is unclear as to how OWCP determined that appellant received an overpayment of compensation for the entire period in question as the evidence of record lacks documentation establishing receipt of social security benefits and FECA benefits with and without FERS offset.¹⁵ Neither SSA nor OWCP provided a complete payment history substantiating appellant's receipt of SSA age-related benefits during the purported overpayment period June 1, 2008 through May 27, 2017.¹⁶

The case will be remanded to OWCP for the purpose of obtaining further evidence from SSA for the period June 1, 2008 through May 27, 2017. Thereafter it shall provide adequate findings of fact and statement of reasons, supported by appropriate documents, to support its determination that appellant received a \$47,836.73 overpayment of compensation. On remand, OWCP should obtain a complete payment history from SSA regarding the age-related benefits he reportedly received beginning on June 1, 2008. After OWCP has further developed the case record, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation in the amount of \$47,836.73 for the period June 1, 2008 through May 27, 2017.¹⁷

¹⁴ *Supra* note 12.

¹⁵ *J.G.*, Docket No. 15-1116 (issued February 25, 2016).

¹⁶ *A.P.*, Docket No. 12-122 (issued May 7, 2012).

¹⁷ As the fact and amount of the overpayment are not yet established, it is premature for the Board to address the issues of fault and recovery of the overpayment from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 24, 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