

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

_____)	
T.E., Appellant)	
)	
and)	Docket No. 19-0348
)	Issued: December 11, 2019
DEPARTMENT OF THE NAVY, PEARL)	
HARBOR NAVAL SHIPYARD,)	
Pearl Harbor, HI, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 3, 2018 appellant filed a timely appeal from a November 7, 2018 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

ISSUE

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,471.05 for which he was without fault because he concurrently received Social

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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 additional evidence for the first time on appeal. *Id.*

Security Administration (SSA) retirement benefits while receiving FECA benefits for the period July 1, 2011 through August 18, 2018 without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$218.32 from appellant's continuing compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On March 2, 1989 appellant, then a 43-year-old pipefitter, filed a traumatic injury claim (Form CA-1) alleging that, on March 1, 1989, he injured his lower back when lifting a pipe while in the performance of duty. He claimed wage-loss benefits as of August 17, 1989. OWCP accepted appellant's claim for closed dislocation lumbar vertebra, displacement of lumbar intervertebral disc without myelopathy, hematuria, neurogenic bladder, and lumbar sprain. By decision dated August 19, 1994, it found that his earnings as an insurance adjuster in private industry fairly and reasonably represented his wage-earning capacity. OWCP reduced appellant's wage-loss compensation based upon his wage-earning capacity.

On February 6, 2018 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form. On August 31, 2018 SSA submitted the completed form, which showed SSA benefit rates with a FERS offset and without a FERS offset from June 2011 through December 2017. Beginning June 2011, the SSA rate with FERS was \$1,691.00 and without FERS was \$1,627.00. Beginning December 2011, the SSA rate with FERS was \$1,752.00 and \$1,686.00 without FERS. Beginning January 2012, the SSA rate with FERS was \$1,767.00 and \$1,705.00 without FERS. Beginning December 2012, the SSA rate with FERS was \$1,797.00 and \$1,734.00 without FERS. Beginning January 2013, the SSA rate with FERS was \$1,812.00 and \$1,750.00 without FERS. Beginning December 2013, the SSA rate with FERS was \$1,839.00 and \$1,777.00 without FERS. Beginning January 2014, the SSA rate with FERS was \$1,849.00 and \$1,793.00 without FERS. Beginning December 2014, the SSA rate with FERS was \$1,881.00 and \$1,824.00 without FERS. Beginning January 2015, the SSA rate with FERS was \$1,891.00 and \$1,843.00 without FERS. Beginning December 2015, the SSA rate with FERS was \$1,891.00 and \$1,843.00 without FERS. Beginning January 2016, the SSA rate with FERS was \$1,901.00 and \$1,859.00 without FERS. Beginning June 2016, the SSA rate with FERS was \$1,900.80 and \$1,859.80 without FERS. Beginning December 2016, the SSA rate with FERS was \$1,907.00 and \$1,865.00 without FERS. Beginning December 2017, the SSA rate with FERS was \$1,945.00 and \$1,902.00 without FERS.

A FERS offset calculation worksheet dated September 5, 2018 noted each period of overpayment and provided calculations which resulted in a total overpayment of \$4,471.05 during the period June 1, 2011 through August 18, 2018.

In a letter dated September 6, 2018, OWCP advised appellant that he had been receiving age-based SSA benefits since July 1, 2011. It noted that the portion of SSA benefits earned as a federal employee was part of his age-based benefits, and that the portion of SSA benefits attributed

³ Docket No. 98-1926 (issued April 9, 1999).

to his federal service required an offset of his FECA compensation. OWCP adjusted appellant's FECA benefits to account for his SSA offset, which reduced his FECA compensation payments from \$913.00 to \$873.31.⁴

In a preliminary determination notice dated October 3, 2018, OWCP informed appellant that he received an overpayment of compensation in the amount of \$4,471.05 because the SSA/FERS offset was not applied to payments for the period July 1, 2011 to August 18, 2018. It determined that he was without fault in the creation of the overpayment because he was not aware, nor could he reasonably have been expected to know, that it had paid him compensation incorrectly. OWCP requested that appellant submit a completed Form OWCP-20 to determine a fair repayment method, and advised him that he could request a waiver of recovery of the overpayment. It afforded him 30 days to respond.

No response or additional evidence was received.

By decision dated November 7, 2018, OWCP determined that appellant had received an overpayment of compensation in the amount of \$4,471.05 because the SSA/FERS offset was not applied to payments for the period July 1, 2011 to August 18, 2018. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that no response was received following the preliminary determination. It required recovery of the overpayment by withholding \$213.32 from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his or her federal employment.⁵ Section 8116 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.⁶

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-based benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides 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.⁸

⁴ The amount of the SSA offset was noted as \$39.69.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *see L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997).

Section 404.310 of SSA's regulations provides that entitlement to SSA compensation begins at 62 years.⁹ Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,471.05 because the SSA/FERS offset was not applied to payments for the period July 1, 2011 to August 18, 2018. Appellant has not challenged the fact or amount of overpayment. The record indicates that appellant had been receiving SSA age-based retirement benefits since July 1, 2011, and that a portion of his benefits were attributed to his years of federal service as an employee under the FERS retirement program. A claimant cannot receive both compensation for wage-loss and SSA age-based benefits attributable to federal service of the same period.¹¹ Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. To determine the amount of overpayment, the SSA provided appellant's SSA rate with FERS and without FERS during the applicable period. OWCP determined that the difference of the portion of SSA benefits attributed to appellant's federal service needed to be offset against his OWCP compensation benefits. It found that, since SSA benefits were paid monthly (12 per year) and FECA benefits were paid every 28 days (13 per year), the monthly offset had to be adjusted to a 28-day payment cycle amount. This amount differed for each period beginning on July 1, 2011. OWCP calculated that the lack of offset from July 1, 2011 through August 18, 2018 resulted in an overpayment total of \$4,471.05. The Board has reviewed OWCP's calculations of the offset total that appellant received and finds that it properly determined that he received a \$4,471.05 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹³

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP

⁹ 20 C.F.R. § 404.310.

¹⁰ *Id.* at § 404.409.

¹¹ *Supra* note 7.

¹² 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹³ *T.B.*, *supra* note 7; *see Robert Atchison*, 41 ECAB 83, 87 (1989).

seeks recovery needs substantially all of his or her 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.¹⁴ 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, gives up a valuable right or changes his or her position for the worse.¹⁵

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁶ Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$4,471.05 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP.¹⁹

In its preliminary determination dated October 3, 2018, OWCP clearly explained the importance of providing the completed overpayment questionnaire and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Appellant, however, did not respond nor did he complete a Form OWCP-20 or submit any financial information necessary for OWCP

¹⁴ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.400.4(a)(2) (September 2018).

¹⁵ *Id.* at § 10.437(a)(b).

¹⁶ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁷ *Id.* at § 10.438(b).

¹⁸ *Id.* at § 10.436.

¹⁹ *Id.* at § 10.438.

to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.²⁰

On appeal appellant contends that he did timely submit the requested financial information with a request that the overpayment be waived. The record, however, does not reflect that this information was received prior to the November 7, 2018 final decision.²¹ As noted above, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's 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 the error is discovered or his attention is called to the 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.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$213.32 from appellant's continuing compensation.

As noted, appellant did not complete the Form OWCP-20 nor did he submit financial information as requested prior to the final November 7, 2018 decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²³ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁴ As appellant did not submit information to OWCP as requested, the Board finds that there is no evidence in the record to show that OWCP erred in requiring recovery of the \$4,471.05 overpayment at the rate of \$213.32 from appellant's continuing compensation.²⁵

²⁰ *T.B.*, *supra* note 7; *see S.B.*, Docket No. 16-1795 (issued March 2, 2017).

²¹ *Supra* note 18.

²² 20 C.F.R. § 10.441(a); *T.B.*, *supra* note 7; *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

²³ *Id.* at 10.438.

²⁴ *T.B.*, *supra* note 7; *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.2 (September 2018).

²⁵ *See E.K.*, Docket No. 18-0587 (issued October 1, 2018).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,471.05, for which he was without fault, that OWCP properly denied waiver of recovery of the overpayment, and that it properly required recovery at the rate of \$213.32 from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board