

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

G.G., Appellant)

and)

DEPARTMENT OF THE NAVY, MARINE)
CORPS AIR GROUND COMBAT CENTER,)
Twenty Nine Palms, CA, Employer)

Docket No. 19-0684
Issued: December 23, 2019

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 7, 2019 appellant filed a timely appeal from August 31 and October 26, 2018 merit decisions 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 appellant received an overpayment of compensation in the amount of \$9,371.23 for the period December 12, 2015 through October 14, 2017, for which he

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 26, 2018 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 additional evidence for the first time on appeal. *Id.*

was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-based retirement benefits; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$283.50 from appellant's continuing compensation payments; (4) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,397.71 because he was paid sick leave by his employing establishment and concurrently received FECA wage-loss compensation for the period October 19 through December 11, 2015; (5) whether it properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (6) whether OWCP properly directed recovery of the overpayment by deducting \$450.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On August 26, 2013 appellant, then a 69-year-old engineering technician, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to both his shoulders and lower back when his vehicle hit a concrete light pole while in the performance of duty. On October 10, 2013 OWCP accepted his claim for lumbar sprain, left shoulder sprain, and left trapezius sprain. On September 14, 2015 it expanded acceptance of appellant's claim to include lumbosacral spondylolysis, and on April 27, 2017 it accepted lumbar degenerative disc disease, left rotator cuff/labral tear, left rotator cuff syndrome, and left shoulder impingement syndrome. OWCP paid appellant wage-loss compensation for intermittent periods of disability on the supplemental rolls beginning March 28, 2014, and on the periodic rolls effective January 10, 2016.

In a telephone call log note dated April 7, 2016, OWCP acknowledged that appellant received a dual compensation payment for the period October 19 through December 11, 2015 as he had received paid sick leave during this period and subsequently received FECA wage-loss compensation for the same period.

In a Federal Employees Retirement System (FERS) Dual Benefits Calculation transmittal received on October 23, 2017, the SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through FERS beginning December 2015. It provided the amount that he received in retirement benefits, including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including FERS, appellant was entitled to a monthly SSA rate of \$2,062.50 effective December 2015, \$2,077.10 effective January 2016, and \$2,083.30 effective December 2016. SSA further advised that, without FERS, appellant would have been entitled to a monthly SSA rate of \$1,654.90 effective December 2015, \$1,654.90 effective January 2016, and \$1,659.80 effective December 2016.

On October 25, 2017 OWCP calculated the FERS offset, and determined the 28-day FERS offset amount for the days in each period, which it added to find a total overpayment of \$9,371.23.

In a preliminary determination dated October 26, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$9,371.23 because it had failed to reduce his wage-loss compensation benefits for the period December 12, 2015 through October 14, 2017 by the portion of his SSA benefits that were attributable to federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without

FERS for each period and adding these amounts to find a total of \$9,371.23. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment “because the claimant was not aware nor could the claimant reasonably have been expected to know that OWCP had paid compensation incorrectly.” It requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and provide supporting financial documentation. OWCP informed him that, in order for it to consider the question of waiver of recovery of the overpayment or to determine a reasonable method for repayment, he must provide a completed Form OWCP-20, and attach 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 precoupment hearing.

In a separate preliminary determination dated October 30, 2017, OWCP notified appellant that he received an overpayment of compensation in the amount of \$7,397.71 because he was paid sick leave by his employing establishment and FECA disability wage-loss compensation concurrently for the period October 19 through December 11, 2015. It further advised him that he was at fault in the creation of the overpayment because he was aware, or reasonably should have been aware, that he could not receive paid sick leave from his employing establishment and OWCP for the same period.

In an overpayment action request form dated November 26, 2017, regarding OWCP’s October 30, 2017 preliminary overpayment determination, appellant requested a precoupment hearing on the issues of fault and a possible waiver of recovery of the overpayment.

In an overpayment action request form received by OWCP on November 30, 2017, regarding the October 26, 2017 preliminary overpayment determination relative to SSA benefits, appellant indicated that he disagreed that the overpayment occurred, and he requested waiver of recovery as he believed that any overpayment occurred through no fault of his own. However, he did not state whether he wanted OWCP to review the waiver request and overpayment amount or the Branch of Hearings and Review. Appellant submitted a Form OWCP-20 along with his incomplete request. He noted a total monthly income of \$2,285.00, (without including his FECA benefits), he did not relate cash on hand, checking or savings account balance, current value of stocks and bonds, or value of other personal property and other funds. Appellant also noted monthly expenses of \$1,002.54 for mortgage payments, \$800.00 a month for food, and \$150.00 for clothing. He submitted documentation from his credit unions, which documented checking and saving account balance at Navy Federal Credit Union in the amount of \$5,275.43 and available balance at the Pacific Marine Credit Union in the amount of \$7,060.01. Appellant submitted documentation regarding credit cards, as well as utility bills, tax bills and tax returns as documentation of various monthly expenses.³

In a letter dated December 21, 2017, OWCP informed appellant that the October 26, 2017 action request form was incomplete, and that he contact the Branch of Hearings and Review for assistance on how he wished to proceed. No response was received.

³ A representative of OWCP’s Branch of Hearings and Review reviewed and issued a final overpayment decision on appellant’s October 30, 2017 preliminary overpayment determination, but did not address the October 26, 2017 preliminary overpayment determination.

On June 18, 2018 a telephonic prerecoupment hearing was held regarding the October 30, 2017 preliminary overpayment determination.

By decision dated August 31, 2018, OWCP's hearing representative finalized the October 30, 2017 preliminary overpayment determination finding that OWCP properly found an overpayment of compensation in the amount of \$7,397.71 for the period October 19 through December 11, 2015, that appellant was at fault in the creation of the overpayment, and that OWCP should deduct \$450.00 every 28 days from continuing compensation payments until the overpayment was paid in full.⁴

By decision dated October 26, 2018, OWCP finalized the October 26, 2017 preliminary determination that appellant had received an overpayment of compensation in the amount of \$9,371.23 for the period December 12, 2015 through October 14, 2017 because it failed to offset his compensation payments by the portion of his SSA benefits that were attributable to federal service. It determined that he was without fault in the creation of the overpayment "because [he] could not have known the amount of offset to be applied to [his] wage[-]loss compensation payments." OWCP denied waiver of recovery of the overpayment, however, because he provided insufficient financial documentation of the need for a waiver. In the accompanying overpayment memorandum, it explained that "[d]ue to the complexity in benefits administration, you could not have reasonably known that an improper payment occurred. Specifically, you were not expected to be able to calculate the amount of the offset." OWCP found that it would recover the overpayment by deducting \$283.50 every 28 days from appellant's continuing wage-loss compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁵ 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 his or her duty.⁶ 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.⁷

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-based benefits that are attributable to the employee's federal service.⁸ 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

⁴ The hearing representative did not address the October 26, 2017 preliminary determination regarding the \$9,371.23 overpayment of compensation for the period December 12, 2015 through October 14, 2017.

⁵ *Supra* note 1.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8116.

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

federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,371.23 for the period December 12, 2015 through October 14, 2017, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-based retirement benefits without an appropriate offset.

In its October 26, 2018 decision, OWCP found that appellant had received an overpayment of compensation in the amount of \$9,371.23 for the period December 12, 2015 through October 14, 2017. The overpayment was based on the evidence received from SSA with respect to age-based benefits paid to appellant. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable for federal service for the same period.¹⁰ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period December 12, 2015 through October 14, 2017. 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. OWCP received documentation from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS, for specific periods with effective dates commencing December 12, 2015 through October 14, 2017. In its October 26, 2017 preliminary determination, OWCP provided its detailed calculations for each relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 12, 2015 through October 14, 2017 and finds that an overpayment of compensation in the amount of \$9,371.23 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience."¹² Section 10.438 of OWCP's regulations provides 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.

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹⁰ *J.T.*, Docket No. 18-1791 (issued May 17, 2019); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹¹ *See L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹² 5 U.S.C. § 8129.

Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

OWCP found appellant without fault in the creation of the overpayment because he could not have known the amount of offset to be applied to his wage-loss compensation payments. However, waiver of recovery of the overpayment 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.¹⁴ Appellant had the responsibility to provide the appropriate financial information to OWCP.¹⁵

In its preliminary determination dated October 26, 2017, OWCP clearly explained to appellant the importance of providing the completed overpayment questionnaire and supporting financial information. It advised him that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. Appellant submitted a partially completed Form OWCP-20, in which he did not list his full income or assets, and he submitted a brief outline of his expenses, without complete accompanying financial documentation. As a result, OWCP did not have the necessary financial information to properly determine whether 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 financial information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$ 9,371.23.¹⁶

Appellant has submitted no evidence that he had relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt.¹⁷ Consequently, as he did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides in pertinent part: When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.* at § 10.436.

¹⁵ *Id.* at § 10.438.

¹⁶ *R.Q.*, Docket No. 18-0964 (issued October 8, 2019); *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹⁷ *See V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹⁸ *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *see S.B.*, Docket No. 16-1795 (issued March 2, 2017).

OWCP the amount of the overpayment as the error is discovered or his or her 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.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$283.50 every 28 days from appellant's continuing compensation payments.

The record reflects that appellant continues to receive wage-loss compensation under FECA. When, as in this case, an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines which provide in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²⁰ The Board finds that OWCP did not abuse its discretion in following those guidelines in this case, where appellant had not submitted complete financial information, by deducting \$283.50 every 28 days from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 4

Section 8116(a) of FECA provides that, while an employee is receiving compensation the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.²¹ The Board determined that if an employee receives sick leave from the employing establishment at the same time he is being paid compensation, this will cause an overpayment.²²

OWCP's procedures prior to September 2018 provided that, once an overpayment is identified, it is responsible for determining whether the claimant was at fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.²³ These procedures note that, if the claimant is determined to be without fault, a preliminary finding notice (Form CA-2202) must be released (along with a Form OWCP-20) within 30 days of the date the overpayment is identified. Both, the reason that the overpayment occurred and the reason for the finding of without fault must be clearly stated. A Form CA-2202 informs the claimant of the right to submit evidence and the right to a precoupment hearing on

¹⁹ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

²⁰ *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *E.Z.*, Docket No. 17-0447 (issued June 19, 2017).

²¹ *Supra* note 6.

²² *T.R.*, Docket No. 15-1374 (issued September 16, 2016); *E.V.*, Docket No. 10-1284 (issued February 3, 2011).

²³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(2) (May 2004).

the issue of: (a) fact and amount of overpayment; and (b) waiver. Along with the Form CA-2202, OWCP should provide a clearly written statement explaining how the overpayment was created.

ANALYSIS -- ISSUE 4

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$7,397.71 from October 19 through December 11, 2015.

On December 18, 2015 OWCP issued appellant a net compensation payment in the amount of \$7,397.71 for the period October 19 through December 11, 2015 for total disability. During this period, appellant received sick leave pay from the employing establishment. As noted, a claimant cannot receive concurrent compensation for wage loss due to disability and any other salary, pay, or remuneration of any type from the United States, except in limited specified instances.²⁴

However, the Board finds that OWCP failed to follow its own procedures in issuing the August 31, 2018 overpayment decision.²⁵ As noted, OWCP's procedures prior to September 2018 provided that a preliminary finding notice (Form CA-2202) must be released along with an OWCP-20 within 30 days of the date the overpayment is identified.²⁶

On April 7, 2016 OWCP acknowledged that appellant had received dual payments of compensation for disability and sick leave for the period October 19 through December 11, 2015. However, it did not issue a preliminary notice regarding the overpayment until October 30, 2017. This preliminary notice was therefore not issued within 30 days after the overpayment was identified.

The Board concludes that OWCP did not follow its own procedures and did not issue a preliminary notice of overpayment within 30 days of identifying an overpayment based upon appellant's receipt of SSA age-based benefits.²⁷ Therefore, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$7,397.71 because he was paid sick leave by his employing establishment and concurrently received FECA wage-loss compensation for the period October 19 through December 11, 2015.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,371.23, for which he was without fault, because he

²⁴ *Supra* note 6.

²⁵ *P.H.*, Docket No. 18-1806 (issued October 10, 2019).

²⁶ *Id.*

²⁷ Based on the Board's disposition of whether an overpayment of compensation was created in the amount of \$7,397.71 for the period October 19 through December 11, 2015, the issues of fault, waiver, and recovery of that overpayment are moot.

concurrently received FECA wage-loss compensation and SSA age-based retirement benefits without an appropriate offset for the period December 12, 2015 through October 14, 2017. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and that OWCP properly required recovery of the overpayment by deducting \$283.50 every 28 days from appellant's continuing compensation payments. Lastly, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$7,397.71 because he was paid sick leave by his employing establishment and concurrently received FECA wage-loss compensation for the period October 19 through December 11, 2015.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed and the August 31, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 23, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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