

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

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<b>J.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1244</b>
	)	<b>Issued: December 20, 2019</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF PRISONS, Petersburg, VA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On May 17, 2019 appellant filed a timely appeal from an April 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,346.28 for the period April 1 through

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the April 30, 2019 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*

September 15, 2018 because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, and thus, not subject to waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On June 9, 2000 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim (Form CA-1) for injuries to his head, neck, left shoulder, and back as he fell over backwards when a chair he was sitting on broke while in the performance of duty. Appellant stopped work and returned on June 14, 2000. OWCP accepted his claim for head contusion and left shoulder, neck, and thoracic back strains. On August 4, 2000 appellant stopped work again. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning August 4, 2000 and on the periodic rolls effective March 18, 2007.

On March 5, 2018 OWCP received a letter from appellant indicating that he was attaching a copy of his notice of award from SSA and informed OWCP that he would begin to receive age-related retirement benefits in April or May 2018. Appellant submitted an SSA award notice, which notified him that he was entitled to monthly retirement benefits beginning in April 2018.

In a letter dated March 12, 2018, OWCP advised appellant that FECA required that a claimant's continuing compensation benefits be reduced if he or she began to receive SSA retirement benefits based upon his or her age and federal service. It informed him that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation. OWCP also instructed appellant to contact his local office immediately if he had been approved for SSA retirement benefits or was currently receiving SSA retirement benefits, so that it could begin the process of making any necessary adjustments to his compensation benefits.

On March 20 and 29, 2018 OWCP confirmed with appellant that it had received the documentation that he sent regarding his SSA benefits. It informed him that an SSA offset had to be calculated.

On April 10, 2018 OWCP received appellant's completed EN1032 form which had been signed on April 6, 2018. Appellant checked a box marked "yes" indicating that he had received

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<sup>3</sup> Docket No. 02-2106 (issued August 26, 2003); *Order Remanding Case*, Docket No. 09-0446 (issued September 9, 2009); *Order Dismissing Appeal*, Docket No. 11-0009 (issued May 25, 2011).

SSA benefits as part of an annuity for federal service. He noted that he received \$1,265.00 a month.<sup>4</sup>

OWCP continued to pay wage-loss compensation for temporary total disability on the periodic compensation rolls following the disclosures by appellant.

On May 7, 2018 appellant requested information about his dual benefits offset. OWCP informed him that it needed information from SSA before it could determine the appropriate offset.

On July 9, 2018 OWCP received a FERS/SSA dual benefit calculation worksheet from an SSA representative dated May 29, 2018. The SSA representative noted that appellant was entitled to age-related retirement benefits, effective April 1, 2018, which were subject to a FERS/SSA offset. Beginning April 2018, appellant was entitled to monthly SSA rate of \$1,269.90 including FERS and \$304.60 without FERS.

Effective September 16, 2018 OWCP adjusted appellant's compensation to offset the portion of his SSA age-related retirement benefits attributable to his federal service. It completed a FERS offset calculation worksheet and determined that the 28-day FERS offset amount, effective April 1, 2018, was \$891.05 and calculated an overpayment amount for the period April 1 to September 15, 2018 in the amount of \$5,346.28.

In a preliminary overpayment determination dated November 15, 2018, OWCP advised appellant that he had received an overpayment of compensation in the amount of \$5,346.30 because it had failed to reduce his wage-loss compensation benefits for the period April 1 to September 15, 2018 by the portion of his SSA benefits that were attributable to federal service. It calculated the overpayment by subtracting the total amount it should have paid him with the appropriate offset from the amount it paid him without the appropriate offset. OWCP found that for the period April 1 to September 15, 2018, it paid him \$21,621.18, but it should have paid him \$16,274.88 resulting in an overpayment of \$5,346.30. It further notified appellant of its preliminary determination that he was not at fault in the creation of the overpayment of compensation. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. 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 prerecoupment hearing.

On December 11, 2018 appellant requested a prerecoupment hearing before a representative from OWCP's Branch of Hearings and Review and requested waiver of recovery of the overpayment.

In a November 15, 2018 statement, appellant asserted that he had called the employing establishment on five occasions requesting that the amount of his OWCP benefits be reduced after he received notice of his entitlement to age-related SSA retirement benefits. He indicated that the

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<sup>4</sup> On April 12, 2019 OWCP received another completed EN1032 form which had been signed on April 1, 2019. Appellant checked a box marked "yes" indicating that he had received SSA benefits as part of an annuity for federal service.

employing establishment was at fault in the creation of the overpayment because it had not made appropriate adjustments.

A telephone conference was held on March 14, 2019. Appellant testified that he had contacted OWCP repeatedly regarding the appropriate offset for his SSA retirement benefits, but they had not responded for over a year.

On April 22, 2019 OWCP received a completed Form OWCP-20. Appellant reported that he received \$1,300.00 in SSA benefits and \$2,700.00 in “other” benefits for a total monthly income of \$4,000.00. He indicated monthly expenses of \$900.00 for rent/mortgage, \$500.00 for food, \$200.00 for clothing, \$700.00 for utilities, and \$375.00 for “other” expenses. Appellant reported debt monthly payments of \$765.00 and \$375.00 for bank loans and \$965.00 for a trustee payment. He related that he had funds of \$298.00 cash, \$298.00 in his checking account, and \$200,000.00 in the value of other personal property and funds. Appellant contended that he was not at fault in the creation of the overpayment because he began informing the employing establishment/OWCP eight months prior to his receipt of SSA benefits and he had asked them to take out the necessary funds in order to avoid an overpayment.

By decision dated April 30, 2019, an OWCP hearing representative finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$5,346.28 for the period April 1 through September 15, 2018 because he had received FECA and SSA benefits concurrently without an appropriate offset. She found that appellant was at fault in the creation of the overpayment as he had numerous conversations with OWCP where he acknowledged the need for an offset. The hearing representative explained that such acknowledgement showed awareness that appellant knew that an overpayment was taking place and accordingly, he accepted payments that he knew were incorrect. Because appellant was at fault in the creation of the overpayment, it was determined that he was not eligible for waiver of recovery of the overpayment. The hearing representative discussed the financial information submitted and required recovery of the overpayment by deducting \$500.00 every 28 days from his continuing wage-loss compensation payments.

### **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 his or her duty.<sup>5</sup> 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.<sup>6</sup>

Section 10.421(d) of OWCP’s implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

employee's federal service.<sup>7</sup> 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,346.28 for the period April 1 through September 15, 2018.

The record supports that appellant received FECA wage-loss compensation for total disability beginning in August 2000, and that he received SSA age-related retirement benefits beginning in April 2018. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA indicated that appellant received age-related SSA benefits that were attributable to his federal service beginning April 1, 2018. OWCP, however, neglected to offset his FECA benefits until September 16, 2018. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period April 1 through September 15, 2018.

Based on the information provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific amount of his age-related SSA retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rate with FERS and without FERS for the period April 1 through September 15, 2018. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet. No contrary evidence was provided. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$5,346.28, which created an overpayment of compensation in that amount for the period April 1 to September 15, 2018.<sup>10</sup>

### **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

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<sup>7</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>9</sup> *Supra* note 7; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>10</sup> *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

good conscience.<sup>11</sup> No waiver of payment is possible if appellant is at fault in helping to create the overpayment.<sup>12</sup>

Section 10.433(a) of OWCP's regulations provides that OWCP:

“[M]ay consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”<sup>13</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.<sup>14</sup>

When a claimant receives benefits from the SSA as part of an annuity under the Federal Employees Retirement System concurrently with disability/wage loss compensation, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage loss compensation was prohibited.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period April 1 through September 15, 2018.

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<sup>11</sup> 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

<sup>12</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>13</sup> 20 C.F.R. § 10.433(a); *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *see also* 20 C.F.R. § 10.430.

<sup>14</sup> *Id.* at § 10.433(b); *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

<sup>15</sup> *Id.* at Chapter 6.300.4g(4) (September 2018).

As noted above, the Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.<sup>16</sup> The record reflects that appellant contacted OWCP to request information about his dual benefits offset and provided proper notification of his receipt of SSA age-related retirement benefit payments on the annual EN1032 forms prior to the commencement of his SSA benefits.<sup>17</sup> However, OWCP informed him that it required additional information from SSA before it could determine an offset and possible overpayment due to his receipt of SSA benefits. Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, he could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.<sup>18</sup>

As previously noted, to determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.<sup>19</sup> The Board finds that appellant was without other options to avoid a potential FECA overpayment. The Board further finds that appellant's attempts to inform OWCP of his SSA age-related retirement award notice were timely and reasonable.<sup>20</sup> Therefore, based on the circumstances described, OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period April 1 through September 15, 2018.<sup>21</sup>

As appellant was not at fault in the creation of the overpayment for the period April 1 through September 15, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> In March 2018 appellant informed OWCP that he would begin to receive SSA age-related retirement benefits in April 2018. In his April 6, 2018 EN1032, appellant advised OWCP that he was receiving age-related SSA retirement benefits in the amount of \$1,265.00 each month. In subsequent forms, he provided notice to OWCP that he was receiving age-related SSA retirement benefits.

<sup>18</sup> *D.G.*, Docket No. 19-0684 (issued December 24, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset prior to receipt of information for the SSA).

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *Marcia L. Wright*, 37 ECAB 435 (issued March 28, 1986) (the Board found that given the extenuating circumstances of the case, the claimant's actions in reporting her change in status were both timely and reasonable and concluded that the claimant should be found not at fault).

<sup>21</sup> *See E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>22</sup> Due to the Board's finding as to issue 2, issue 3 is rendered moot.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,346.28 for the period April 1 through September 15, 2018 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board further finds that appellant was not at fault in the creation of the overpayment during the above-noted period of compensation and that the case is not in posture for decision with regard to waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for consideration of the issue of waiver as set forth in this decision of the Board.

Issued: December 20, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board