

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

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<b>J.N., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1890</b>
	)	<b>Issued: November 26, 2019</b>
<b>DEPARTMENT OF THE NAVY, NAVAL SEA</b>	)	
<b>SYSTEMS COMMAND, PHILADELPHIA</b>	)	
<b>NAVAL SHIPYARD, PA, Employer</b>	)	
_____	)	

*Appearances:*  
Jeffrey P. Zeelander, Esq., for the appellant<sup>1</sup>  
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 September 13, 2017 appellant, through counsel, filed a timely appeal from an August 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the August 3, 2017 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.*

## **ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because he concurrently received FECA benefits and age-related benefits from the Social Security Administration (SSA) without an appropriate offset; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$500.00 per month from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

This case was previously before the Board.<sup>4</sup> The facts of the case, as set forth in the prior decision, are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1989 appellant, then a 43-year-old tool and parts attendant, filed a notice of traumatic injury (Form CA-1) alleging that he sustained a left shoulder and left knee injury on February 1, 1989 when he was involved in a motor vehicle accident while in the performance of duty. OWCP accepted the claim for cervical, lumbar, knee, and groin strains/sprains. It placed appellant on the periodic rolls effective July 25, 1989. Appellant returned to light-duty work on May 22, 1990. On June 6, 1990 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of disability on May 25, 1990. OWCP again placed appellant on the periodic rolls on July 2, 1990. By decision dated March 26, 1992, it terminated appellant's compensation benefits because the weight of the medical evidence established that his disability resulting from the February 1, 1989 employment injury ceased on April 5, 1992. Appellant appealed to the Board.

By decision dated November 7, 1994, the Board remanded the case for further medical development to resolve the conflict in the medical opinion evidence regarding appellant's continuing disability causally related to his February 1, 1989 employment injury. OWCP, by decision dated April 2, 2007, expanded the acceptance of appellant's claim to include major depressive disorder and psychogenic pain.

In a letter dated May 10, 1990, OWCP informed appellant that he was being placed on the periodic compensation rolls and of his obligations regarding completing an EN1032 form, which required the reporting of retirement income, disability income, and/or compensation benefits he received from any federal agency.

In an EN1032 form dated August 3, 2008, appellant indicated that he was not receiving benefits from the SSA as part of an annuity for his federal service.

In an EN1032 form dated June 17, 2013, appellant indicated that he was receiving benefits from the SSA as part of an annuity for his federal service.

In a form dated October 14, 2016, SSA advised OWCP that appellant had concurrently received FECA benefits and age-related benefits through the Federal Employees Retirement

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<sup>4</sup> Docket No. 93-0896 (issued November 7, 1994).

System (FERS) for the period August 1, 2008 to November 12, 2016. SSA provided the amount that appellant received in retirement benefits including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including FERS, it indicated that appellant was entitled to a monthly entitlement of \$602.20, effective August 2008, \$637.10, effective December 2008, December 2009, and June 2010, \$733.10, effective June 2011, \$759.40, effective December 2011, \$772.30, effective December 2012, \$783.90, effective December 2013, and \$797.10, effective December 2014 and 2015.

In a November 15, 2016 correspondence, OWCP notified appellant that his compensation would be offset by the portion of his SSA age-related benefits attributable to his federal service. It indicated that he would receive net compensation of \$2,068.86 every 28 days effective November 13, 2016.

In a preliminary determination dated March 9, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$57,434.82 because his compensation benefits had not been reduced for the period August 1, 2008 to November 12, 2016, by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$57,434.82. It further made a preliminary determination that appellant was at fault in the creation of the overpayment because he knew or should have known that he accepted compensation to which he was not entitled. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit 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.

On April 7, 2017 appellant requested a precoupment hearing before a hearing representative of OWCP's Branch of Hearings and Review. He requested a waiver of recovery on the basis that OWCP was aware of the offset and should have prevented the overpayment of compensation. Appellant further submitted an overpayment recovery questionnaire which listed monthly income of \$5,244.43 and expenses of \$3,917.25. Appellant noted that he had assets of \$61,316.53. He also submitted credit card bills in support of his claim.

A telephonic precoupment hearing was held on August 3, 2017.

By decision dated August 3, 2017, OWCP found an overpayment of compensation in the amount of \$57,434.82 for the period August 1, 2008 to November 12, 2016 because OWCP had failed to offset appellant's compensation payments for the portion of his age-related SSA benefits that were attributable to his federal service. It found that he was at fault in the creation of the overpayment and denied waiver of recovery of the overpayment as his income exceeded his expenses. OWCP determined that it would recover the overpayment by deducting \$500.00 every 28 days 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 or death of an employee resulting from personal injury sustained while in the

performance of duty.<sup>5</sup> However, section 8116 also 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 it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.<sup>7</sup> 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 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>

Section 404.310 of SSA regulations provides that entitlement to SSA age-based benefits begins at 62 years of age.<sup>9</sup>

OWCP's procedures provide that, once an overpayment is identified, it is responsible for determining whether the claimant was at fault or not at fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.<sup>10</sup> These procedures note that, if the claimant is determined to be at fault, a Form CA-2201 (preliminary finding notice) 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 fault must be clearly stated. A Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issue of: (a) fact and amount of overpayment; (b) fault; and (c) waiver of recovery of the overpayment. Along with the Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was created.<sup>11</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of wage-loss compensation in the amount of \$57,434.82, for the period August 1, 2008 to November 12, 2016 by the portion of his age-related SSA benefits which were attributable to his federal service.

Beginning August 1, 2008, appellant received age-related benefits from SSA, while he continued to receive FECA wage-loss compensation. As noted, a claimant cannot receive

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<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 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>9</sup> 20 C.F.R. § 404.310.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

<sup>11</sup> *Id.*; *see also P.H.*, Docket No. 18-1539 (issued August 2, 2019).

concurrent compensation for wage loss and SSA age-related benefits attributable to federal service for the same period.<sup>12</sup>

The Board finds, however, that OWCP failed to follow its own procedures in issuing the March 9, 2017 preliminary overpayment determination.<sup>13</sup> As noted, OWCP's procedures provide that a Form CA-2201 (preliminary finding notice) must be released along with an OWCP-20 within 30 days of the date the overpayment is identified.<sup>14</sup>

OWCP was notified by SSA in a form received by OWCP on August 19, 2016 that appellant had concurrently received FECA benefits and age-related SSA benefits with a FERS component since August 1, 2008. SSA informed OWCP of the amounts of SSA benefits appellant was entitled to receive with the FERS component, and without, during the period August 1, 2008 through August 12, 2016. However, OWCP did not issue a preliminary notice regarding the overpayment until March 9, 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.<sup>15</sup>

### **CONCLUSION**

The Board finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$57,434.82 during the period August 1, 2008 through November 12, 2016.

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<sup>12</sup> See *supra* note 7; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>13</sup> *P.H.*, Docket No. 18-1539 (issued August 2, 2019).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> Based on the Board's disposition of whether an overpayment of compensation was created, the issues of fault, waiver and recovery are moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 3, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 26, 2019  
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