

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

T.M., Appellant)	
)	
and)	Docket No. 18-1763
)	Issued: October 10, 2019
DEPARTMENT OF DEFENSE, DEFENSE)	
CONTRACT MANAGMENT COMMAND,)	
East Hartford, CT, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 20, 2018 appellant filed a timely appeal from a March 27, 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 to consider 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 \$15,483.59 for the period April 1, 2013 through December 9, 2017; (2) whether it properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether

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.*

OWCP properly directed recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On August 1, 1994 appellant, then a 43-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 1994 he injured his back when putting together a box while in the performance of duty. He stopped work on September 1, 1994. OWCP accepted the claim for lumbago and degeneration of a lumbar or lumbosacral intervertebral disc. (ICD) It initially paid appellant wage-loss compensation on the supplemental rolls. OWCP placed him on the periodic rolls as of January 6, 1998.

In a letter dated March 1, 2013, OWCP notified appellant that he was approaching his 62nd birthday, the minimum age at which he was eligible to receive Social Security Administration (SSA) retirement benefits. It notified him that his continuing FECA compensation benefits must be reduced if he were to begin receiving SSA retirement benefits based upon his age and federal service. OWCP further advised that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery.

In a memorandum of telephone call (Form CA-110) dated March 6, 2013, appellant indicated that he would start receiving monthly SSA age-based benefits of \$600.00 beginning March 23, 2013.

On October 19, 2017 the SSA advised OWCP that appellant had concurrently received FECA benefits and SSA retirement benefits through the Federal Employees Retirement System (FERS) beginning April 2013. It provided the amount that he had 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: \$635.00, effective April 2013; \$645.00 effective December 2013, \$655.90, effective December 2014; \$655.90, effective December 2015; \$657.90, effective December 2016; and \$671.00, effective December 2017.

SSA further advised that without FERS, appellant would have been entitled to a monthly SSA rate of: \$292.20, effective April 2013; \$296.90 effective December 2013, \$301.80, effective December 2014; \$301.80, effective December 2015, \$302.70 effective December 2016; and \$308.80, effective December 2017.

By letter dated December 13, 2017, OWCP advised appellant that it had adjusted his compensation benefits to offset the portion of his SSA retirement benefits attributable to his federal service. It informed him that he would receive net compensation of \$1,761.66 every 28 days.

OWCP completed a FERS offset calculation form on December 13, 2017. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$15,483.59.

In a preliminary determination dated January 18, 2018, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$15,483.59, because it had failed to reduce his wage-loss compensation benefits for the period April 1, 2013 through December 9,

2017 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 and adding these amounts to find a total overpayment of \$15,483.59.

OWCP further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew, or reasonably should have known, was incorrect. It explained that if he was unable to pay the full overpayment amount, he should complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, so that OWCP could determine a fair repayment method. Additionally, OWCP 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 prerecoumment hearing.

By letter dated January 23, 2018, appellant responded to the preliminary determination. He denied that he was aware of the overpayment issue, and explained that he would have corrected the matter had he been aware. Appellant completed the overpayment recovery questionnaire (Form OWCP-20) and advised that he had monthly income of \$2,810.00, and monthly expenses of approximately \$1724.00. He did not provide evidence documenting his expenses.³

By decision dated March 27, 2018, OWCP found that appellant had received an overpayment of wage-loss compensation in the amount of \$15,483.59, for the period April 1, 2013 through December 9, 2017 because his compensation payments were not offset by the portion of his SSA age-related benefits attributable to his federal service. It found that he was at fault in the creation of the overpayment because he accepted wage-loss compensation to which he was not entitled, and determined that it would recover the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

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 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.⁵

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.⁶ 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

³ Appellant also requested a pre-recoumment hearing. However, he contacted OWCP *via* telephone on March 26, 2018, and explained that he mistakenly checked the option for a prerecoumment hearing and did not wish to pursue this option.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

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

is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

Section 404.310 of SSA regulations provides that entitlement to SSA age-based benefits begins at 62 years of age.⁸

OWCP's procedures provide that, once an overpayment is identified, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.⁹ These procedures note that, if the claimant is determined to be with 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 precoupment 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of wage-loss compensation in the amount of \$15,483.59, for the period April 1, 2013 through December 9, 2017.

Beginning April 1, 2013, appellant received age-related retirement benefits from SSA, while he continued to receive FECA wage-loss compensation. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹¹

The Board finds however that OWCP failed to follow its own procedures in issuing the March 27, 2018 overpayment decision.¹² 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.¹³

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ 20 C.F.R. § 404.310.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

¹⁰ *Id.*; *see also P.H.*, Docket No. 18-1539 (issued August 2, 2019).

¹¹ *See supra* note 7; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹² *P.H.*, Docket No. 18-1539 (issued August 2, 2019).

¹³ *Supra* note 10.

OWCP was notified by SSA in a form dated October 19, 2017 that appellant had concurrently received FECA benefits and SSA age-based benefits with a FERS component since April 2013. SSA informed OWCP of the amounts of SSA benefits appellant was entitled to receive with the FERS component, and without, during the period April 1, 2013 through December 9, 2017. However, OWCP did not issue a preliminary notice regarding the overpayment until January 18, 2018. 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.¹⁴

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 \$15,483.59 during the period April 1, 2013 through December 9, 2017.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 10, 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

¹⁴ Based on the Board's disposition of whether an overpayment of compensation was created, the issues of fault, waiver and recovery are moot.