

benefits for the period November 16, 2006 through January 6, 2018; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and thus, was not eligible for waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$350.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On June 19, 1991 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right knee when his foot slipped between the edge of a mail cage and a loading platform while in the performance of duty. On August 2, 1991 OWCP accepted his claim under File No. xxxxxx486 for sprain of the right knee. On August 27, 1991 appellant underwent arthroscopy of the right knee, partial medial meniscectomy, and chondroplasty. By decision dated June 1, 1993, OWCP granted him a schedule award for 38 percent permanent impairment of his right lower extremity. On May 16, 2000 it expanded acceptance of appellant's claim to include post-traumatic degenerative joint disease of the right knee.

On November 27, 2000 appellant filed a traumatic injury claim (Form CA-1) alleging that, on that date, as he was pushing a truck onto a scale it stopped abruptly causing his left knee to twist while in the performance of duty. On December 14, 2000 OWCP accepted this claim under File No. xxxxxx888 for left knee strain. It expanded acceptance of this claim to include bilateral degenerative joint disease. OWCP administratively combined appellant's claims on May 15, 2002.³ Appellant underwent bilateral total knee arthroscopies.

On May 2, 2002 appellant returned to light-duty work six hours a day. By decision dated March 11, 2003, OWCP determined that the position of modified mail handler, fairly and reasonably represented his wage-earning capacity. It reduced appellant's compensation to reflect his loss of wage-earning capacity (LWEC). By decision dated July 2, 2003, OWCP granted him a schedule award for 50 percent permanent impairment of his left lower extremity. By decision dated September 29, 2003, it granted appellant a schedule award for an additional 12 percent permanent impairment of his right lower extremity. The period of the schedule award was June 15, 2003 through November 15, 2006.

On August 21, 2006 appellant informed OWCP that he was receiving Federal Employees Retirement System (FERS) and SSA benefits. In a letter dated September 21, 2006, OWCP informed appellant that when his schedule award ended on November 15, 2006 he would need to elect either Civil Service retirement benefits or FECA benefits of \$717.00 every 28 days. On October 6, 2006 appellant elected to receive FECA benefits effective November 15, 2006. In a letter dated November 16, 2006, OWCP informed him that when his schedule award ended on November 15, 2006, he would return to his former compensation rate based on his March 11, 2003 LWEC. It listed appellant's continuing compensation payments beginning December 23, 2006 as \$510.76. OWCP informed him that FECA required his wage-loss compensation benefits to be reduced if he began receiving SSA retirement benefits based on his age and federal service. It

³ OWCP administratively combined OWCP File Nos. xxxxxx304, xxxxxx547, xxxxxx608, and xxxxxx888 with the present claim. OWCP File No. xxxxxx486 serves as the master file.

notified appellant of his obligation to report receipt of such retirement benefits to avoid an overpayment of compensation.

On September 14, 2007 appellant completed an EN1032 form, requiring him to report any benefits received from SSA received as part of an annuity under FERS. It further directed him not to report benefits received from SSA on account of employment in the private sector. Appellant responded “No” to the query of whether he received benefits from SSA as part of an annuity for federal service during the prior 15 months. He added a note on the form indicating that, “I receive regular Social Security benefits.” In EN1032 forms signed by appellant on September 5, 2008; September 16, 2011, and September 15, 2016, he did not respond to the query of whether he received benefits from SSA as part of an annuity for federal service during the prior 15 months. In completed EN1032 forms signed by him on September 4, 2009, September 17, 2010, September 23, 2011, September 7, 2012, September 11, 2013, September 12, 2014, September 14, 2015, and September 22, 2017, he responded “No” to the query of whether he received benefits from SSA as part of an annuity for federal service during the prior 15 months. By signing the forms, appellant certified that he understood that he “must immediately report to OWCP any improvement in his medical condition, any employment, any change in the status of claimed dependents, any third-party settlement, and any change in income from federally[-]assisted disability or benefit programs.” He also certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of his knowledge and belief. In the letters accompanying the EN1032 forms, appellant was advised that the information he provided would be used to decide whether he was entitled to continue receiving these benefits or whether his benefits should be adjusted.

On October 23, November 2, and December 18, 2017 OWCP provided SSA with a form for calculation of dual benefits. SSA responded on January 19, 2018 and indicated that beginning October 2005 appellant’s SSA rate, including his federal employment under FERS, was \$1,191.20 per month. The rate that he was entitled to without his federal employment was \$797.40. By December 2017 these rates increased to \$1,542.10 and \$1,032.30 respectively.

In a letter dated February 8, 2018, OWCP informed appellant that he had been receiving a prohibited dual benefit resulting in an overpayment of federal benefits. It noted that the portion of SSA benefits earned as a federal employee was part of his retirement and that the receipt of wage-loss compensation under FECA and federal retirement was prohibited. OWCP adjusted appellant’s FECA benefits to account for his SSA offset of \$470.58 which reduced his FECA wage-loss compensation payments from the gross amount of \$881.00 to \$410.42.

In a preliminary determination dated March 22, 2018, OWCP advised appellant that he had received a \$68,670.27 overpayment of compensation for the period October 1, 2005 through January 6, 2018 because it failed to offset his FECA benefits by the portion of SSA benefits he had received. It found appellant at fault in the creation of the overpayment because he accepted payments which he knew or should reasonably have known were incorrect. OWCP advised him that he could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, it informed appellant that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On April 4, 2018 appellant requested a waiver and a prerecoupment hearing with OWCP's Branch of Hearings and Review. He disagreed that the overpayment had occurred, disagreed with the amount of the overpayment, and requested waiver. Appellant asserted that he had paid into SSA for 42 years and only worked for the Federal Government for 12½ years. He further alleged that he had not commenced receiving FECA wage-loss compensation benefits concurrently with his SSA benefits until November 16, 2006, rather than October 1, 2005, as found by OWCP.

Appellant completed a Form OWCP-20 on March 30, 2018. He listed his monthly SSA benefits as \$1,408.00 with combined household benefits of \$2,703.00. Appellant noted that his disabled son also received supplemental income of \$334.00. He listed his pension income from his armed services retirement variously as \$3,213.00 and \$3,152.84, Veterans Affairs (VA) disability as \$3,494.91, and FECA benefits of \$410.42 for a total monthly income of between \$8,466.17 and \$8,525.42. Appellant noted his wife's SSA benefits were \$859.00 and included his son's benefits of \$436.00 to reach total monthly income of \$10,156.11. He listed his dependents as his wife and his 50-year-old disabled son. Appellant listed housing expenses of \$705.95, food expenses of \$900.00, clothing expenses of \$400.00, utilities of \$1,005.00, and other expenses of \$4,304.71. He provided a list of other debts paid by monthly installments of \$3,474.00 and total monthly expenses of \$9,747.05. Appellant indicated that he had funds on hand in the amount of \$1,482.00. He provided a detailed list of his monthly expenses.

On September 13, 2018 appellant testified at an oral hearing before an OWCP hearing representative regarding the error in the period of the overpayment. He asserted that the overpayment should not begin until his schedule award had ended on November 15, 2006. Appellant also contested OWCP's finding of fault noting that OWCP was aware of his SSA benefits and that he believed the Form EN1032s were requesting information regarding SSA disability benefits rather than SSA retirement benefits. He testified regarding the monetary support he provided his disabled adult son who also received SSA disability. Appellant noted that he had agreed to pay his grandson's car loan before receiving the overpayment. OWCP's hearing representative requested copies of two months of household bills as well as documentation from SSA attesting to his son's disability and incapacity to self-support. He afforded appellant 30 days for response.

On September 25, 2018 appellant provided additional financial information supporting his minimum monthly payments on 32 credit cards and other monthly expenses. He included a statement from SSA regarding his disabled adult son's benefits. Appellant included within his expenses payments for his disabled adult son's television, internet, and telephone in the amount of \$216.00, his water bill of \$90.00, his electric bill of \$230.00, as well as five credit cards in his son's name with minimum payments totaling \$272.25. He also included \$183.00 for his grandson's car payment.

By decision dated November 29, 2018, OWCP's hearing representative found that OWCP properly determined that appellant had received an overpayment of compensation for which he was at fault as he had received dual benefits from SSA and OWCP and therefore, was not entitled to waiver of recovery. However, he modified its preliminary determination of overpayment finding that appellant had received an overpayment of compensation in the amount \$63,148.71 for the period November 16, 2006 through January 6, 2018. The hearing representative determined that appellant had sufficient income for recovery of the overpayment. He determined that

appellant's disabled adult son was not a dependent and reduced appellant's expenses for his support. The hearing representative further reduced appellant's expenses by the amount of his grandson's car payment as he had not accepted appellant's argument that this was payment for services rendered. He determined that appellant and his wife had monthly income of \$9,320.00 and monthly expenses of \$4,570.33. The hearing representative determined that monthly repayment of \$1,000.00 was appropriate, but that as the vast majority of appellant's monthly income was not from FECA benefits, a two-part repayment scheme was necessary with recovery of \$350.00 from appellant's continuing FECA benefits and a remaining amount of \$620.83 submitted by appellant through a monthly check.

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 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.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-9 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.⁷

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years of age.⁸ Section 404.409 of SSA regulations provides that for individuals born before January 1, 1938, full retirement age is 65 years.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$63,148.71 for the period November 16, 2006 through January 6, 2018.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

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 *Id.* at § 404.409.

The record indicates that, while appellant was receiving wage-loss compensation under FECA, he concurrently received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to 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 November 16, 2006 through January 6, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. SSA provided its rate with FERS, and without FERS, for specific periods commencing November 16, 2006 through January 6, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet. Appellant has not contested the amount of the \$63,148.71, overpayment and no contrary evidence has been provided to establish that OWCP's calculations were incorrect. The Board has reviewed OWCP's calculation of benefits received by appellant for the period November 16, 2006 through January 6, 2018 and finds that an overpayment of compensation in the amount of \$63,148.71 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹² The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹³ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹⁴

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

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

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

¹⁰ See *supra* notes 8 and 9.

¹¹ See *S.O. supra* note 6; *G.T.*, Docket No. 15-1314 (issued September 9, 2016).

¹² 5 U.S.C. § 8129(a).

¹³ *Id.* at § 8129(b).

¹⁴ See *S.O.*, and *L.J.*, *supra* note 6

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

(3) Accepted a payment which he or she knew or should have known to be incorrect.”¹⁵

Section 10.433(b) of OWCP’s regulations provides:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.”¹⁶

OWCP’s procedures also provide that if:

“The claimant receives benefits from the Social Security Administration (SSA) as part of an annuity under the Federal Employees’ Retirement System concurrently with disability/wage loss compensation. See 5 U.S.C. 8116 (d) (2). In such cases, 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.”¹⁷ (Emphasis in the original.)

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not established that appellant was at fault in the creation of the \$63,148.71 overpayment for the period November 16, 2006 through January 6, 2018. OWCP found him at fault because he accepted a payment which he knew or should have known was incorrect.

On August 21, 2006 appellant informed OWCP that he was receiving retirement benefits and SSA retirement benefits. In a November 16, 2006 letter, OWCP informed appellant that he was being placed on the periodic compensation rolls and it advised him that he was required to immediately inform it upon filing for or receiving SSA retirement benefits. Appellant completed an EN1032 form on September 14, 2007. This form specifically instructed him to report any SSA benefits he received as part of annuity under FERS. It instructed appellant not to report benefits received from SSA on account of employment in the private sector. Appellant responded “No” to the question of whether he received benefits from SSA as part of an annuity for federal service during the prior 15 months. He also noted, “I receive regular Social Security benefits.” Appellant has further noted that he was unaware that he was receiving SSA benefits as a part of an annuity

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at 10.433(b).

¹⁷ *Supra* note 15.

for federal service as he had paid into SSA for 42 years and only worked for the Federal Government for 12½ years.

OWCP's procedures now provide that when "a claimant receives benefits from the Social Security Administration (SSA) as part of an annuity under the Federal Employees' Retirement System concurrently with disability/wage loss compensation. *See* 5 U.S.C. § 8116(d)(2). In such cases, 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."¹⁸

The record as submitted to the Board does not contain evidence that the claimant was aware that his receipt of full SSA benefits concurrent with his FECA compensation was a prohibited dual benefit. Therefore, pursuant to OWCP's procedures as set forth at Chapter 6.0300.4.g.(4)(a), the Board finds that OWCP has not met its burden to establish that appellant accepted payments which he knew or should have known were incorrect.

As appellant was without fault in the creation of the \$63,148.71 overpayment, and the case shall be remanded for consideration of waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$63,148.71 overpayment of compensation for the period November 16, 2006 through January 6, 2018. The Board further finds that he was without fault in the creation of the overpayment of compensation.

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.0300.4.g.(4)(a) (September 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 3, 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