

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

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<b>R.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0334</b>
	)	<b>Issued: August 7, 2020</b>
<b>DEPARTMENT OF THE NAVY, PUGET</b>	)	
<b>SOUND NAVAL SHIPYARD, Bremerton, WA,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 30, 2018 appellant filed a timely appeal from a November 14, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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> Appellant also filed a timely request for oral argument. By order dated March 13, 2019, the Board exercised its discretion and denied his request as would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 19-0334 (issued March 13, 2019).

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

<sup>3</sup> The Board notes that, following the November 14, 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.*

## **ISSUES**

The issues are: (1) whether OWCP has established that appellant received an overpayment of compensation in the amount of \$69,177.66 because he concurrently received Social Security Administration (SSA) retirement benefits and FECA benefits for the period September 1, 2010 through April 28, 2018 without proper offset; (2) whether OWCP has established that appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP has properly required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On September 4, 2001 appellant, then a 56-year-old data entry technician, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2001 he twisted his right knee when his knee caught as he rose from his chair while in the performance of duty. He stopped work on August 29, 2001. OWCP accepted the claim for right knee strain and right knee torn medial meniscus. Appellant underwent authorized right knee arthroscopy on February 11, 2002. OWCP paid him wage-loss compensation on the periodic rolls as of July 14, 2002.

By letter dated July 31, 2002, OWCP explained appellant's entitlement to compensation benefits. In an accompanying EN1049 form, it advised him, that, since he was covered under the Federal Employees Retirement System (FERS), it must deduct at least part of his SSA retirement benefit to which he would be entitled based on age, explaining that a portion of a FERS benefit was included in SSA retirement benefits. Appellant was therefore advised to notify OWCP immediately after filing for or receiving SSA retirement benefits. In a March 24, 2009 letter, the employing establishment noted that his SSA retirement age was 64 and that FECA benefits must be offset for FERS employees receiving SSA benefits. It advised appellant that SSA would calculate the offset using only the contributions made to SSA while he was employed by the federal government. On March 31, 2009 appellant indicated by checkmark that he did not know if his SSA benefits had been calculated using his federal service earnings.

On EN1032 forms signed by appellant on December 24, 2010, September 16, 2011, September 28, 2012, October 5, 2013, September 17, 2014, September 19, 2015, September 26, 2016, and September 27, 2017, he indicated that he was not receiving SSA benefits as part of an annuity for federal service.<sup>4</sup> On the September 27, 2017 form he also indicated that he was receiving SSA retirement benefits.

On December 26, 2017 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. It noted that no action was required for the period August 2002 to August 2010 as disability was involved, but that appellant began receiving retirement benefits effective September 2010. The form indicated that he had received SSA retirement benefits in September 2010 when his rate with FERS was \$1,928.80 and without FERS was \$1,222.00; that beginning in December 2011 his SSA rate with FERS was \$1,998.20 and without FERS was

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<sup>4</sup> The EN1032 forms signed by appellant provided: "Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector." (Emphasis in the original.)

\$1,265.90; that beginning in December 2012 his SSA rate with FERS was \$2,032.10 and without FERS was \$1,287.40; that beginning in December 2013 his SSA rate with FERS was \$2,062.50 and without FERS was \$1,306.70; that beginning in December 2014 his SSA rate with FERS was \$2,097.50 and without FERS was \$1,328.90; that beginning in December 2015 his SSA rate with FERS was \$2,097.50 and without FERS was \$1,328.90; that beginning in December 2016 his SSA rate with FERS was \$2,103.70 and without FERS was \$1,332.80; and that beginning in December 2017 his SSA rate with FERS was \$2,145.70 and without FERS was \$1,359.40.

In a FERS offset calculation form dated May 21, 2018, OWCP documented its calculation of the total overpayment in the amount of \$69,177.66 for the period September 1, 2010 until April 28, 2018.

On June 28, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$69,177.66 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that he received from September 1, 2010 through April 28, 2018 was based on credits earned while working in the Federal Government, and this portion of his SSA benefit was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment as he had not reported receipt of SSA retirement benefits on his EN1032 forms. It provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for appellant's completion. OWCP informed him of the actions he could take and allotted 30 days for him to respond.

On a July 2, 2018 overpayment action request form, appellant requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review. He disagreed with OWCP's finding regarding the fact and amount of overpayment, and requested waiver of recovery of the overpayment. Appellant asserted that OWCP was aware that he was on SSA disability when his claim was first accepted.

On a Form OWCP-20 dated October 10, 2018, appellant noted monthly income of \$1,542.48 from SSA, \$136.42 from other benefits starting in August 2018, and \$2,634.00 in FECA benefits, for a total monthly income of \$4,312.22, and monthly expenses of \$3,547.61, with assets of \$795.00. He attached financial documentation to substantiate his expenses.

A telephonic hearing was held on October 10, 2018.

On his November 8, 2018 EN1032 form, appellant indicated that he was receiving SSA benefits as part of an annuity for federal service and listed the monthly amount.

By decision dated November 14, 2018, OWCP finalized its preliminary determination, finding that an overpayment of compensation in the amount of \$69,177.66 occurred because appellant received FECA benefits and benefits from SSA without the appropriate offset.<sup>5</sup> It further found that he was at fault in the creation of the overpayment because he failed to report his SSA

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<sup>5</sup> The hearing representative incorrectly noted the period of the overpayment as from September 1, 2010 through December 1, 2017. On the FERS offset calculation form, OWCP noted April 28, 2018 as the overpayment end date.

retirement benefits. OWCP required recovery of 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>6</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>7</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.<sup>8</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>9</sup>

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

The Board finds that OWCP has established that appellant received an overpayment of compensation in the amount of \$69,177.66.

In its November 14, 2018 decision, OWCP found that an overpayment of compensation had been created for the period September 1, 2010 through April 28, 2018. The overpayment was based on evidence received from SSA with respect to benefits paid to appellant. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.<sup>10</sup> The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service for the period September 1, 2010 through April 28, 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 SSA age-related retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing September 1, 2010 through April 28, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>9</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>10</sup> *Supra* notes 8 and 9; *see also M.S.*, Docket No. 18-0740 (issued February 4, 2019); *E.K.*, *supra* note 8.

The Board therefore finds that an overpayment of compensation in the amount of \$69,177.66 was created.<sup>11</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 good conscience.<sup>12</sup> No waiver of payment is possible if appellant is at fault in helping to create the overpayment.<sup>13</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>14</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>15</sup>

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, the claimant should be found without fault

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<sup>11</sup> See *E.S.*, Docket No. 18-1293 (issued January 28, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>12</sup> 5 U.S.C. § 8129; see *A.S.*, Docket No. 17-0606 (issued December 21, 2017).

<sup>13</sup> *J.B.*, Docket No. 19-1244 (issued December 20, 2019); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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

<sup>15</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).

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 improperly found appellant at fault in the creation of the overpayment for the period September 1, 2010 through April 28, 2018.

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> 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>17</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>18</sup> The Board finds that appellant was without other options to avoid a potential FECA overpayment. Therefore, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that he was at fault in the creation of the overpayment for the period September 1, 2010 through April 28, 2018.<sup>19</sup>

As appellant was not at fault in the creation of the overpayment for the period September 1, 2010 through April 28, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$69,177.66 because he concurrently received SSA benefits and FECA compensation for the period September 1, 2010 through April 28, 2018 without proper offset. The Board further finds that he

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<sup>16</sup> *Id.* at Chapter 6.300.4g(4) (September 2018).

<sup>17</sup> *See J.B.*, Docket No. 19-1244; *G.G.*, Docket No. 19-0684 (issued December 24, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related retirement 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>18</sup> *Id.* at § 10.433(b); *see also supra* note 15 at Chapter 6.300.4(d) (September 2018).

<sup>19</sup> *See E.H.*, Docket No. 18-1009 (issued January 29, 2019).

was without fault in the creation of the overpayment for the period September 1, 2010 through April 28, 2018.<sup>20</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 7, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> In light of the Board's disposition regarding Issue 2, Issue 3 is rendered moot.