

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,135.01 because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA compensation for the periods August 1, 2009 through December 31, 2011, and February 1, 2013 through March 31, 2018; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$627.85 from appellant's continuing FECA compensation payments every 28 days.

FACTUAL HISTORY

On February 24, 1989 appellant, then a 42-year-old metal tank sealer, filed a traumatic injury claim (Form CA-1), alleging that on February 23, 1989 he injured his low back when climbing between bays while in the performance of duty. OWCP initially accepted the claim for lumbosacral strain and then expanded acceptance of the claim to include displacement of lumbar intervertebral disc without myelopathy, and sprain of the lumbosacral joint/ligament. It paid appellant wage-loss benefits on the periodic rolls as of July 18, 1991.

In EN1032 forms signed January 18, 2010, January 13, 2011, January 21, 2014, February 2, 2015, January 20, 2016, January 20, 2017, and January 23, 2018, appellant reported that he was not receiving SSA age-related retirement benefits as part of an annuity for federal service under FERS.

On April 21, 2016 and February 20, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The forms indicated that: beginning in August 2009, appellant's SSA rate with FERS was \$789.90 and without FERS was \$668.40; beginning in December 2011, his SSA rate with FERS was \$818.40 and without FERS was \$692.40; beginning in December 2012, his SSA rate with FERS was \$832.40 and without FERS was \$704.20; beginning in January 2013, his SSA rate with FERS was \$1,140.70 and without FERS was \$927.40; beginning in December 2013, his SSA rate with FERS was \$1,157.80 and without FERS was \$941.30; and beginning in December 2014, his SSA rate with FERS was \$1,177.40 and without FERS was \$957.30; beginning in December 2016, his SSA rate with FERS was \$1,180.90 and without FERS was \$960.20; and beginning in December 2017, his SSA rate with FERS was \$1,204.50 and without FERS was \$979.40.

In a letter dated January 29, 2019, OWCP explained how appellant's SSA offset was calculated. It explained that on April 21, 2016 and February 20, 2019, it received a FERS/SSA dual benefit computation which calculated his SSA rate, with and without any offset from FERS, for the period August 1, 2009 through December 1, 2017. OWCP noted that the portion of appellant's SSA age-related retirement benefits attributable to his federal employment were not deducted from his FECA wage-loss compensation. It explained that it had adjusted the FERS offset for the period August 1, 2009 through December 1, 2017, and that appellant would be provided a separate notice with appeal rights related to the overpayment.

On February 14, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation had been made in the amount of \$17,135.01. It explained that the overpayment occurred because the SSA age-related retirement benefits appellant received from August 1, 2009 to December 31, 2011, and from February 1, 2013 to March 31, 2019, were based on credits earned while working for the Federal Government, and this portion of his SSA benefit was a prohibited dual benefit. From August 2009 through December 2011, appellant's SSA disability benefits were converted to retirement benefits because retirement benefits were payable at a higher rate. When appellant turned 65 years old in January 2012, the SSA benefits returned to disability benefits, until January 2013 when appellant reached full retirement age at which time his SAA benefits changed from disability to retirement benefits.

OWCP found appellant at fault in the creation of the overpayment because he submitted EN1032 forms that specifically denied receipt of any SSA benefits. Appellant was provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for his completion.³ OWCP explained its calculation of the overpayment, informed appellant of the actions he could take, and allotted him 30 days to respond.

In a letter dated February 26, 2019, appellant indicated that he was going to accept the preliminary overpayment determination. He did not complete a Form OWCP-20, or submit any financial information.

By decision dated April 16, 2019, OWCP finalized the preliminary determination of a \$17,135.01 overpayment of compensation. It determined that appellant was at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$627.85 every 28 days from appellant's continuing FECA 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 his or her 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 OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the

³ OWCP requested that appellant attach supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported the income and expenses listed.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

employee's federal service.⁶ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement 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

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$17,135.01 because he concurrently received SSA age-related retirement benefits and FECA compensation for the periods August 1, 2009 through December 31, 2011, and February 1, 2013 through March 31, 2018.

Appellant has not challenged the fact or amount of the overpayment. The record indicates that appellant was receiving compensation for disability under FECA while he also was receiving SSA age-related retirement benefits during the applicable time periods. A claimant cannot receive both compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same time period.⁸ Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the SSA provided appellant's SSA rate with FERS and without FERS during the applicable time periods, noting the SSA benefits that were age related and those that were disability related. Based on the information provided by SSA, OWCP calculated that an overpayment of compensation in the amount of \$17,135.01 had occurred during the applicable time periods. The Board has reviewed OWCP's calculation of the dual benefits that appellant received and finds that it properly determined that he received a \$17,135.01 overpayment of compensation.

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

⁶ 20 C.F.R. § 10.421(d); *see B.M.*, Docket No. 19-0158 (issued July 11, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

⁸ *See supra* note 6.

conscience.⁹ No waiver of payment is possible if appellant is at fault in helping to create the overpayment.¹⁰

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).”¹¹

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.¹²

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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly found appellant at fault in the creation of the overpayment for the periods August 1, 2009 through December 31, 2011 and February 1, 2013 through March 31, 2018.

⁹ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹⁰ *J.B.*, Docket No. 19-1244 (issued December 20, 2019); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹¹ 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.

¹² *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).

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.¹³ 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.¹⁴

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.¹⁵ The Board finds that appellant was without other options to avoid a potential FECA overpayment. 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 periods August 1, 2009 through December 31, 2011 and February 1, 2013 through March 31, 2018.¹⁶

As appellant was not at fault in the creation of the overpayment for the periods August 1, 2009 through December 31, 2011 and February 1, 2013 through March 31, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$17,135.01 because he concurrently received SSA benefits and FECA compensation for the periods August 1, 2009 through December 31, 2011, and February 1, 2013 through March 31, 2018. The Board further finds that appellant was without fault in the creation of the overpayment during the above-noted periods.

¹³ Federal (FECA) Procedure Manual, *id.* at Chapter 6.300.4g(4) (September 2018).

¹⁴ 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).

¹⁵ 20 C.F.R. § 10.433(b); see also Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.300.4(d) (September 2018).

¹⁶ See *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁷ In light of the Board's disposition with regard to Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 5, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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