

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

P.B., widow of A.B., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE,
Sacramento, CA, Employer**

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**Docket No. 19-0605
Issued: February 19, 2020**

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 January 22, 2019 appellant filed a timely appeal from an August 6, 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 over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that the employee received an overpayment of compensation in the amount of \$26,623.22 because he concurrently received age-

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the August 6, 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.*

related Social Security Administration (SSA) retirement benefits while also receiving FECA benefits for the period November 1, 2014 through April 28, 2018; and (2) whether OWCP properly found the employee at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 26, 1997 the employee, then a 48-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1), alleging that he injured his right knee at work the previous day, June 25, 1997, while in the performance of duty. OWCP initially accepted right knee contusion and subsequently expanded acceptance of the claim to include L4-5 disc herniation with radiculopathy with corrective surgery. The employee did not return to work after the employment injury, and OWCP paid him wage-loss compensation benefits on the periodic rolls as of August 16, 1999.

By letter dated October 28, 2010, OWCP informed the employee that his FECA benefits would be reduced by receipt of SSA retirement benefits based on age and federal service, if he received SSA age-related benefits after his 62nd birthday.

On April 23, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that the employee was entitled to the following: as of November 2014 \$1,543.00 a month with FERS and \$922.20 without FERS; as of December 2014 \$1,569.20 with FERS and \$937.80 without FERS; as of December 2016 \$1,573.90 with FERS and \$940.60 without FERS; and as of December 2017 \$1,605.30 with FERS and \$959.40 without FERS. A FERS offset calculation worksheet dated May 21, 2018 provided the same numbers and totaled the overpayment at \$26,623.22.

By letter dated May 22, 2018, OWCP notified the employee that, based on information provided by SSA regarding the amount of his SSA age-related retirement benefits which were attributable to federal service, his FECA wage-loss compensation had been adjusted.

On June 19, 2018 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$26,623.22 had been created. It explained that the overpayment occurred because a portion of the employee's SSA age-related retirement benefits that he received from November 1, 2014 through April 28, 2018 was based on earnings while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found the employee at fault and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It explained its calculation of the overpayment and informed the employee of the actions he could take. OWCP afforded the employee 30 days to respond.

The employee subsequently responded to the preliminary overpayment determination, disagreeing that the overpayment occurred.

By decision dated August 6, 2018, OWCP finalized the preliminary determination of a \$26,623.22 overpayment of compensation. It determined that the employee was at fault in the creation of the overpayment and was, thereby precluded from waiver of recovery of the

overpayment. OWCP indicated that the employee should mail a check in the full amount of the overpayment within 30 days, and if he was unable to refund the entire overpayment immediately, to contact OWCP within 30 days so that appropriate arrangements for recovery (such as installment payments) could be made.³

LEGAL PRECEDENT

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 any SSA benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-9 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.⁷

OWCP's procedures in effect prior to September 2018 provided that, once an overpayment was identified, OWCP was responsible for determining whether the claimant was at fault or not at fault, in issuing its preliminary finding, and unless a hearing was requested, OWCP was responsible for issuing a final decision.⁸ These procedures noted that, if the claimant was 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 was 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 was to provide a clearly written statement explaining how the overpayment was created.⁹

³ The record indicates that the employee died on August 13, 2018. Appellant is the administratrix of his estate.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see G.G.*, Docket No. 19-0684 (issued December 23, 2019).

⁷ FECA Bulletin No. 97-09 (February 3, 1997).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a) (May 2004).

⁹ *Id.* at § 6.200.4(a)(2).

ANALYSIS

The Board finds that OWCP improperly determined that the employee received an overpayment of compensation in the amount of \$26,623.22 for the period November 1, 2014 through April 28, 2018.

As noted, OWCP's procedures provide that a CA-2201 form (preliminary finding notice) must be released along with an OWCP-20 form within 30 days of the date the overpayment is identified.¹⁰

In this case, OWCP was first formally placed on notice that the employee was receiving SSA age-related retirement benefits in a form received by OWCP on April 22, 2018, wherein SSA advised OWCP that the employee had concurrently received FECA and SSA age-related retirement benefits based on FERS contributions as of November 2014 and adjusted his compensation payment. However, it did not issue a preliminary notice regarding the overpayment until June 19, 2018. This preliminary notice was therefore not issued within 30 days after the overpayment of compensation was identified.

The Board concludes that OWCP failed to follow its own procedures in issuing its August 6, 2018 final overpayment determination as it did not issue a preliminary notice of overpayment within 30 days of identifying an overpayment based upon the employee's receipt of SSA age-related retirement benefits.¹¹

CONCLUSION

The Board finds that OWCP improperly determined that the employee received an overpayment of compensation in the amount of \$26,623.22 during the period November 1, 2014 through April 28, 2018.

¹⁰ *Id.*

¹¹ *M.I.*, Docket No. 19-0035 (issued November 4, 2019). In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot. *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 19, 2020
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