

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

M.D., Appellant)	
)	
and)	Docket No. 19-1500
)	Issued: February 24, 2020
DEPARTMENT OF THE ARMY,)	
LEXINGTONBLUE GRASS ARMY DEPOT,)	
Richmond, KY, Employer)	
)	

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 July 3, 2019 appellant filed a timely appeal from a May 17, 2019 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 appellant received an overpayment of compensation in the amount of \$4,794.68 for the period June 1, 2017 through October 13, 2018 because he

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 17, 2019 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.*

concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset, for which he was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1994 appellant, then a 42-year-old boiler operator, filed an occupational disease claim (Form CA-2) alleging that he sustained carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome. It paid appellant wage-loss compensation for total disability beginning August 31, 1995.

By decisions dated September 12, 2001 and May 7, 2002, OWCP reduced appellant's compensation benefits based on its finding that he had the capacity to work as a telecommunicator.

Appellant appealed to the Board. By decision dated January 29, 2003, the Board reversed OWCP's loss of wage-earning capacity determination, finding that the record contained a conflict in medical opinion regarding his work capacity.⁴

By decision dated June 4, 2013, OWCP terminated appellant's compensation and entitlement to a schedule award effective that date as he refused an offer of suitable employment under 5 U.S.C. § 8106(c)(2).

On June 15, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a September 13, 2013 telephonic hearing, by decision dated November 26, 2013, OWCP's hearing representative affirmed the June 4, 2013 decision.

On December 16, 2013 appellant requested a review of the written record. By decision dated April 23, 2014, OWCP denied his request for a review of the written record as it was made after he had previously received a telephonic hearing.

By decisions dated January 14 and February 9, 2015, OWCP denied appellant's reconsideration requests as untimely filed and insufficient to demonstrate clear evidence of error.

³ Docket No. 02-1754 (issued January 29, 2003); Docket No. 15-0811 (issued August 20, 2015); Docket No. 16-0102 (issued March 11, 2016).

⁴ *Id.*

On February 18, 2015 appellant appealed to the Board. By decision dated August 20, 2015, the Board set aside OWCP's January 14 and February 9, 2015 decisions.⁵ The Board found that appellant had timely requested reconsideration of the November 26, 2013 hearing representative's decision in correspondence received October 31, 2014. The Board remanded the case for OWCP to apply the standard applicable to timely reconsideration requests.

By decision dated September 30, 2015, OWCP denied modification of its November 26, 2013 decision regarding the termination of appellant's compensation for the refusal of suitable work under 5 U.S.C. § 8106(c)(2).

Appellant appealed to the Board. By decision dated March 11, 2016, the Board reversed the September 30, 2015 OWCP decision.⁶ The Board found that the medical evidence of record was insufficient to establish that appellant could work for 10 hours per day for four days a week and that, consequently, OWCP had failed to discharge its burden of proof to support termination of his wage-loss compensation under 5 U.S.C. § 8106(c)(2).

Following the Board's decision, OWCP reinstated appellant's wage-loss compensation.

On October 18, 2018 SSA provided OWCP with a FERS/SSA dual benefit calculation worksheet setting forth appellant's SSA rate with FERS and without FERS from June 2017 through December 2017. With FERS, his SSA rate was \$1,065.70 effective June 2017 and \$1,087.00 effective December 2017. Without FERS, appellant's SSA rate was \$778.50 effective June 2017 and \$794.00 effective December 2017.

OWCP completed a FERS offset calculation form on November 13, 2018. It calculated the amount that it should have offset from appellant's wage-loss compensation from June 1, 2017 through October 13, 2018. OWCP found that, effective June 1, 2017, the monthly offset was \$287.20 (\$1,065.70-\$778.50), or \$265.11 every 28 days and effective December 1, 2017, the monthly offset was \$293.00 (\$1,087.00 - \$794.00), or \$270.46 every 28 days.⁷ It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period June 1, 2017 through October 13, 2018, to find the amount that it overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset \$4,794.68 from his wage-loss compensation.

In a preliminary overpayment determination dated November 13, 2018, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$4,794.68 because it had failed to reduce his wage-loss compensation benefits for the period June 1, 2017 through October 13, 2018 by the FERS portion of his SSA retirement benefits. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified him that, within 30 days of the date of

⁵ *Id.*

⁶ *Id.*

⁷ The 28-day offset amount is calculated by multiplying the monthly FERS offset amount by 12 and then dividing this amount by 13.

the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On November 26, 2018 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. In an accompanying Form OWCP-20, he advised that he had monthly income of \$5,924.00 and provided a list of monthly expenses. Appellant related that he had assets totaling \$50.00. He asserted that he was without fault in creating the overpayment of compensation. Appellant did not submit any supporting financial documentation.

A telephonic hearing was held on April 10, 2019. Appellant related that he had received disability compensation from SSA until June 1, 2017, when he began receiving retirement benefits. OWCP's hearing representative noted that he had not listed the amount that he received from OWCP as part of his monthly income on his overpayment recovery questionnaire.⁸ He advised appellant that he could submit updated financial information regarding his income and expenses with supporting documentation.

By decision dated May 17, 2019, OWCP's hearing representative finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$4,794.68 as he had received wage-loss compensation from OWCP without an appropriate offset for SSA age-related retirement benefits attributable to FERS from June 1, 2017 through October 13, 2018. He further determined that he was without fault in the creation of the overpayment. OWCP's hearing representative found that appellant was not entitled to waiver of recovery of the overpayment as he had not provided complete information regarding his income and expenses. He determined that the overpayment would be recovered by withholding \$200.00 every 28 days from his continuing compensation benefits.

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.⁹ 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.¹⁰

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 employee's federal service.¹¹ FECA Bulletin No. 97-09 states that FECA benefits have to be

⁸ OWCP's hearing representative attempted to go through appellant's monthly income and expenses, but appellant advised that he did not want it reviewed. He requested a copy of the record.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8116.

¹¹ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a \$4,794.68 overpayment of compensation for the period June 1, 2017 through October 13, 2018 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

In its May 17, 2019 decision, OWCP found that an overpayment of compensation was created for the period June 1, 2017 through October 13, 2018. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.¹³ The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to his federal service during the period June 1, 2017 through October 13, 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 documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing June 1, 2017 through October 13, 2018. OWCP provided its calculations for each relevant period based on an SSA worksheet and in its November 13, 2018 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits appellant received for the period June 1, 2017 through October 13, 2018 and finds that an overpayment of compensation in the amount of \$4,794.68 was created.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁵ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁶

¹² FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹³ *Id.*; *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

¹⁴ *A.S.*, Docket No. 19-0171 (issued June 12, 2019).

¹⁵ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁶ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁷ Additionally, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁸

OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁹ Failure to submit the requested information within 30 days of the request will result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The fact that a claimant is without fault in creating an overpayment does not preclude OWCP from recovering the overpayment.²¹ Waiver is only possible if recovery would defeat the purpose of FECA or be against equity and good conscience.²² Appellant, however, did provide the requisite financial documentation to OWCP.²³

In its preliminary determination dated November 13, 2018, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. While appellant submitted a completed overpayment recovery questionnaire, he did not provide the necessary

¹⁷ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

¹⁸ *Id.* at § 10.437(a)(b).

¹⁹ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²⁰ *Id.* at § 10.438(b).

²¹ *See L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

²² 20 C.F.R § 10.436; *J.C.*, Docket No. 19-0122 (issued June 11, 2019).

²³ *Id.* at § 10.438(b); *T.J.*, Docket No. 19-1242 (issued January 13, 2020).

financial documentation supporting his income and expenses. As a result, OWCP did not have the necessary financial information to determine whether waiver of recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²⁴ It was, therefore, required to deny waiver of recovery of the overpayment.²⁵

On appeal appellant contends that he is entitled to waiver of recovery as he was without fault in the creation of the overpayment. However, the fact that he was not at fault does not relieve him from liability for repayment of the overpayment of compensation.²⁶

Appellant also asserts that OWCP's hearing representative failed to advise him to submit additional documentation. As noted, however, he received a preliminary overpayment determination with an overpayment recovery questionnaire advising him of the need for financial information. Further, OWCP's hearing representative informed appellant at the telephonic hearing that he could submit updated financial information and supporting documentation. As he did not do so, OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.411 of OWCP's regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required repayment of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

As discussed, appellant completed the overpayment recovery questionnaire, but did not provide the necessary financial information to support his income and expenses prior to the final May 17, 2019 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁸ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines

²⁴ See *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

²⁵ *Supra* note 21.

²⁶ See *M.G.*, Docket No. 19-0424 (issued July 1, 2019).

²⁷ 20 C.F.R. § 10.441(a); see *G.G.*, Docket No. 19-0684 (issued December 23, 2019).

²⁸ *Id.* at § 10.438.

designed to collect the debt promptly and in full.²⁹ As appellant did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in directing recovery of the \$4,794.68 overpayment at the rate of \$200.00 every 28 days from his continuing compensation payments.³⁰

On appeal appellant asserts that OWCP failed to respond to his request for a copy of the case record. However, on April 11, 2019 OWCP provided his representative with a copy of the imaged record. It also sent the April 11, 2019 correspondence to appellant.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,794.68 for the period June 1, 2017 through October 13, 2018 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset, for which he was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$200.00 from his continuing compensation payments every 28 days.

²⁹ *E.M.*, *supra* note 25; Federal (FECA) Procedure Manual, *supra* note 18 at Chapter 6.500.2 (September 2018).

³⁰ *See E.K.*, Docket No. 18-0587 (issued October 1, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 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