

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

_____)	
L.G., Appellant)	
)	
and)	Docket No. 19-1274
)	Issued: July 10, 2020
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Cleveland, OH,)	
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 May 20, 2019 appellant filed a timely appeal from a December 13, 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.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$93,038.08, for which he was without fault, because he concurrently received FECA benefits and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset for the period February 1, 2012 to April 27, 2018; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery

¹ 5 U.S.C. § 8101 *et seq.*

of the overpayment by deducting \$550.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

OWCP accepted that on September 9, 2008 appellant, then a 58-year-old chief engineer, sustained acute lumbar strain and sprain, left forearm abrasion and, left hip contusion, precipitation of left knee lateral meniscus tear, closed L1 and L3 compression fractures without spinal cord injury, and aggravation of lumbar intervertebral disc degeneration and spondylosis when he fell from a ladder while in the performance of duty. Appellant stopped work on September 25, 2008. On April 23, 2009 he underwent OWCP-authorized left knee arthroscopy with debridement of the posterior lateral meniscal tear and chondroplasty of the patellofemoral groove inferior facet medial facet patella with synovectomy. OWCP paid appellant wage-loss compensation for temporary total disability on the supplemental rolls as of December 9, 2008 and on the periodic rolls as of June 24, 2009.

By decision dated December 2, 2014, OWCP reduced appellant's wage-loss compensation effective that day, finding that he had the capacity to earn wages of \$586.20 per week in the constructed position of full-time bench jeweler repairer.

In a December 12, 2017 letter, OWCP requested that appellant complete an attached Form EN1032, which required the reporting of retirement income, disability income, and/or compensation benefits he received from any federal agency.

Appellant indicated in an EN1032 form signed on January 3, 2018 that he was receiving "regular" benefits from SSA.

On April 2, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in February 2012 appellant's SSA rate with FERS was \$1,549.00 and without FERS was \$671.00, beginning in December 2012 his SSA rate with FERS was \$1,576.00 and without FERS was \$683.00, beginning in December 2013 his SSA rate with FERS was \$1,599.00 and without FERS was \$693.00, beginning in December 2014 his SSA rate with FERS was \$1,626.00 and without FERS was \$705.00, beginning in January and December 2015 his SSA rate with FERS was \$2,145.00 and without FERS was \$936.00, beginning in January 2016 his SSA rate with FERS was again \$2,145.00 and without FERS was \$949.00, beginning in December 2016 his SSA rate with FERS was \$2,151.00 and without FERS was \$952.00, and beginning in December 2017 his SSA rate with FERS was \$2,194.00 and without FERS was \$971.00.

In an April 25, 2018 letter, OWCP notified appellant that his compensation would be offset by the portion of his SSA age-related retirement benefits attributable to his federal service. It indicated that he would receive net compensation of \$2,235.18 every 28 days effective April 28, 2018.

In a preliminary determination dated October 23, 2018, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$93,038.08 because his wage-loss compensation benefits had not been reduced for the period February 1, 2012 through April 27,

2018 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$93,038.08. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment and requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. It allotted 30 days for him to respond.

On November 26, 2018 appellant requested a decision based on the written evidence regarding waiver of recovery of the overpayment. He maintained that he had communicated with OWCP at every step and was not aware of the overpayment. Appellant further maintained that he was unable to repay the overpayment amount. On a completed Form OWCP-20 dated November 20, 2018, he listed his total monthly income of \$4,394.00 (\$2,194.00, SSA benefits; and \$2,200.00, FECA benefits), total monthly expenses of \$4,450.00² (\$350.00, rent or mortgage; \$1,200.00, food; \$200.00, clothing; \$700.00, utilities; and \$2,000.00, miscellaneous), and total assets of \$86,121.00 (\$26,000.00, checking; \$9,121.00, savings; and \$51,000.00, individual retirement account). Appellant did not submit any supporting financial documentation.

By decision dated December 13, 2018, OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$93,038.08 for the period February 1, 2012 through April 27, 2018, for which he was without fault, because his FECA compensation payments were not offset by the portion of his SSA age-related retirement benefits attributable to his federal service. It determined that he was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was denied as his monthly income exceeded his adjusted monthly expenses by \$556.40. OWCP required recovery of the overpayment by deducting \$550.00 every 28 days from appellant's continuing compensation payments until the debt was paid in full.

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.³ However, section 8116 also 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.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations

² The Board notes that it appears that appellant inadvertently calculated \$5,000.00 rather than \$4,450.00 in total monthly expenses.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁶ FECA Bulletin No. 97-09 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

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of wage-loss compensation in the amount of \$93,038.08, for which he was without fault, because he concurrently received FECA benefits and SSA age-related retirement benefits without an appropriate offset for the period February 1, 2012 to April 27, 2018.

In its December 13, 2018 decision, OWCP found that an overpayment of compensation was created for the period February 1, 2012 through April 27, 2018. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning February 1, 2012. OWCP, however, neglected to offset his FECA benefits until April 27, 2018. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period February 1, 2012 through April 27, 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 SSA age-related retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rate with FERS and without FERS for the period February 1, 2012 through April 27, 2018. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet. No contrary evidence was provided.

⁵ *Id.* at § 8129(a).

⁶ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

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

⁸ 5 U.S.C. § 8116(d)(2); *see R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

The Board has reviewed OWCP's calculation of benefits received by appellant for the period February 1, 2012 through April 27, 2018 and finds that an overpayment of compensation in the amount of \$93,038.08 was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA states: "Adjustment or recovery [of an overpayment] 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."¹⁰

Recovery of an overpayment will defeat the purpose of FECA when 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.¹¹ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹² Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.¹³ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁴

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.¹⁵ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get

⁹ *C.M., id.; R.D., id.; L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 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).

¹² *Id.* at Chapter 6.400.4.a(3); *R.D.*, *supra* note 8; *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹³ *See supra* note 11 at Chapter 6.400.4.a(2) (September 2018).

¹⁴ *Id.* at Chapter 6.400.4.b(3).

¹⁵ *Supra* note 11 at § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁶

OWCP's 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.¹⁷

ANALYSIS -- ISSUE 2

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

Although OWCP determined that appellant was not at fault in the creation of the overpayment, he has not established that recovery of the overpayment would defeat the purpose of FECA because his assets exceed the resource base of \$10,300.00 for an individual with one dependent as provided in OWCP's procedures.¹⁸ The supporting financial information of record documents that he had assets totaling \$86,121.00. It was therefore unnecessary for OWCP to consider whether his monthly income exceeds his monthly ordinary and necessary expenses by more than \$50.00.¹⁹ Appellant did not establish that he was entitled to waiver on the basis of defeating the purpose of FECA.²⁰ There is also no evidence to support that appellant gave up a valuable right or changed his position for the worse, in reliance on his FECA compensation. Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.²¹

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.²²

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that, 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 the error is discovered or his or her attention is called to the same.

¹⁶ *Supra* note 11 at Chapter 6.400.4c(3) (September 2018).

¹⁷ *Supra* note 11 at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁸ *See supra* note 13.

¹⁹ *See supra* note 12.

²⁰ *See R.D.*, *supra* note 8; *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

²¹ *See R.D.*, *supra* note 8; *R.C.*, *id.*; *M.A.*, *supra* note 12; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

²² *Id.*

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.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$550.00 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring repayment of the overpayment by deducting \$550.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship on appellant. Therefore, OWCP properly required recovery of the overpayment by deducting \$550.00 from appellant's compensation payments, every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of 93,038.08, for which he was without fault, because he concurrently received FECA benefits and SSA age-related retirement benefits without an appropriate offset for the period February 1, 2012 through April 27, 2018. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$550.00 every 28 days from his continuing compensation payments.

²³ 20 C.F.R. § 10.441(a); *R.C.*, *supra* note 20; *C.M.*, *supra* note 8; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 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