

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 19-1369
)	Issued: June 30, 2020
DEPARTMENT OF THE AIR FORCE,)	
LANGLEY AIR FORCE BASE, Langley, VA,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 10, 2019 appellant filed a timely appeal from an April 16, 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 to consider the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,211.19, for which he was without fault,

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 16, 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.*

because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2014 through March 2, 2019; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments,

FACTUAL HISTORY

On March 18, 1992 appellant, then a 43-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 1992 he injured his right elbow, wrist, and hand as a result of repetitively lifting a can of paint and a ladder while in the performance of duty. OWCP accepted appellant's claim for aggravation of right wrist strain and carpal tunnel syndrome. Appellant began limited-duty job and stopped work on November 26, 1995 because limited duty was no longer available. OWCP paid appellant compensation on the supplemental rolls, and placed him on the periodic rolls effective December 10, 1995. By decision dated February 2, 1998, it reduced appellant's compensation based on his capacity to earn wages in the constructive position of a customer service representative. Appellant continues to receive compensation benefits based on his loss of wage-earning capacity determination.

On an EN1032 form dated December 22, 2014, appellant did not respond to the question as to whether he was in receipt of SSA benefits. On EN1032 forms dated December 14, 2015 and December 12, 2016, he replied "No" regarding receipt of SSA benefits, and on EN1032 forms dated December 13, 2017 and December 3, 2018, appellant replied "Yes," indicating that he had received SSA benefits as part of an annuity for federal service.

On February 5, 2019 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in November 2014 appellant's SSA rate with FERS was \$1,187.50 and without FERS \$716.60; beginning in December 2014 and December 2015, his rate with FERS was \$1,207.60 and without FERS \$728.70; beginning December 2016, his SSA rate with FERS was \$1,211.20 and without FERS \$730.80; beginning in December 2017, his SSA rate with FERS was \$1,235.40 and without FERS \$745.40; and beginning in December 2018, his SSA rate with FERS was \$1,269.80 and without FERS \$766.20. OWCP prepared a FERS offset calculation worksheet verifying its calculations.

In a letter dated March 13, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA benefit attributable to federal service, his FECA wage-loss compensation had been adjusted.

On March 15, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$25,211.19 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that he received for the period November 1, 2014 through March 2, 2019 was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him not at fault in the creation of the overpayment. It explained its calculation of the overpayment, attached its calculation worksheet, and informed him of the actions he could take. OWCP provided an overpayment action request form and an overpayment recovery

questionnaire (OWCP-20). It requested that he provide documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed, and allotted 30 days for him to respond. OWCP mailed the preliminary overpayment determination to appellant's last known address of record. No response or additional evidence was received regarding the overpayment.

By decision dated April 16, 2019, OWCP finalized its preliminary determination finding that appellant had received an overpayment of compensation in the amount of \$25,211.19 for the period November 1, 2014 through March 2, 2019 because a portion of his SSA age-related retirement benefits was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery. OWCP noted that no response had been received following the preliminary determination. It required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing wage-loss 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 his or her duty.³ 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.⁴ When an overpayment of compensation has been made to an individual because of an error of fact or law, adjustment shall be made under regulations 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 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.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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8129(a).

⁶ 20 C.F.R. § 10.421(d); *see J.S.*, Docket No. 19-0824 (issued October 4, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,211.19 because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period November 1, 2014 through March 2, 2019.

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

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 the SSA rate with FERS and without FERS for specific periods commencing November 1, 2014 through March 2, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its March 1, 2018 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period November 1, 2014 through March 2, 2019 and finds that an overpayment of compensation in the amount of \$25,211.19 was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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 would be against equity and good conscience.¹⁰ Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

⁸ See *D.C.*, Docket No. 19-0118 (issued January 15, 2020).

⁹ See *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *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.

¹¹ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 2

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

As OWCP found, appellant not at fault in the creation of the overpayment. Therefore, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹² Appellant, however, had the responsibility to provide financial information to OWCP,¹³ and he did not do so.

In its preliminary determination dated March 15, 2019, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant, however, did not respond to this request. He did not complete the Form OWCP-20 or submit the financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁴

On appeal appellant alleges that he did not receive notice from OWCP requesting that he provide evidence in support of waiver. The record reflects that the preliminary overpayment determination dated March 15, 2019 explained the importance of providing the completed overpayment questionnaire. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁵ The record supports that OWCP's preliminary determination dated March 15, 2019 was sent to appellant at his address of record and does not indicate that it was returned as undeliverable. Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP's regulations, OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$25,211.19.¹⁶

¹² 5 U.S.C. § 8129.

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.*

¹⁵ See *A.S.*, Docket No. 19-1689 (issued February 21, 2020); *Kenneth E. Harris*, 54 ECAB 502, 505 (2003); *A.C. Clyburn*, 47 ECAB 153 (1995).

¹⁶ See *M.D.*, Docket No. 19-1689 (issued February 21, 2020); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 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 the error is discovered or his or her attention is called to the 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."¹⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁸ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁹ As appellant did not submit the financial information to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in directing recovery of the \$25,211.19 overpayment of compensation at the rate of \$100.00 every 28 days from continuing compensation.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$25,211.19, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, for the period November 1, 2014 through March 2, 2019. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and that it properly required recovery by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

¹⁷ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁸ *Id.* at § 10.438.

¹⁹ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

²⁰ See *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 30, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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