

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

R.R., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, AIR)
EDUCATION & TRAINING COMMAND,)
ALTUS AIR FORCE BASE, OK, Employer)

Docket No. 19-0104
Issued: March 9, 2020

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 18, 2018 appellant filed a timely appeal from a September 4, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated December 10, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0104 (issued December 10, 2019).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the September 4, 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,670.12 for which he was not at fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits while receiving FECA wage-loss benefits for the period February 1, 2016 to March 31, 2018; and (2) whether it properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 20, 1997 appellant, then a 47-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a head and neck injury when a rail swung down and hit his head while in the performance of duty. OWCP accepted the claim for concussion, cervical and lumbar sprains, brachial neuritis or radiculitis, displacement of the lumbar intervertebral disc without myelopathy, and cervical intervertebral disc disorder with myelopathy.

Appellant stopped work on June 20, 1997. On February 16, 1999 he returned to limited-duty work for four hours per day, but stopped work again on February 18, 1999. On June 11, 1999 appellant accepted a job offer as a technical order clerk with the employing establishment at four hours per day. On August 18, 2000 OWCP reduced appellant's wage-loss compensation based upon his wage-earning capacity. Appellant continued to work and received wage-loss compensation on the periodic rolls.

In February 2012, appellant became eligible to receive SSA age-related retirement benefits.

In EN1032 forms dated February 20, 2016, February 23, 2017, and February 19, 2018, appellant indicated that he had not received SSA benefits as part of an annuity for federal service.

On March 21, 2018 OWCP provided SSA with a Federal Employees' Retirement System (FERS)/SSA dual benefits calculation form. On April 6, 2018 SSA submitted the completed form, which indicated SSA benefit rates with a FERS offset and without a FERS offset from February 2016 through December 2017. The SSA representative noted that appellant was entitled to disability benefits from February 2001 through January 2016. Beginning February 2016, the SSA rate with FERS was \$1,920.00 and without FERS was \$1,168.40. Beginning December 2016, the SSA rate with FERS was \$1,925.70 and without FERS was \$1,171.90. Beginning December 2017, the SSA rate with FERS was \$1,964.20 and without FERS was \$1,195.30.

A FERS offset calculation worksheet dated April 17, 2018 noted each period of overpayment and provided calculations, which resulted in a total overpayment of \$19,670.12 during the period February 1, 2016 through March 31, 2018.

In a preliminary determination notice dated April 27, 2018, OWCP informed appellant that he received an overpayment of compensation in the amount of \$19,670.12 because the SSA/FERS offset was not applied to payments for the period February 1, 2016 through March 31, 2018. It determined that he was without fault in the creation of the overpayment, because he was not aware, nor could he reasonably have been expected to know, that it had paid him compensation incorrectly. OWCP requested that appellant submit a completed Form OWCP-20 to determine a fair repayment method, and advised him that he could request a waiver of recovery of the

overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. It further notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On May 5, 2018 appellant requested a prerecoupment hearing before OWCP's Branch of Hearings and Review, contesting that the overpayment occurred through no fault of his own and requested waiver. During the hearing, appellant testified regarding his income and expenses. He reported the income he received from SSA benefits, Army Reserve retirement benefits, Veterans Administration disability benefits, as well as his wife's SSA benefits and Railroad Administration benefits. Appellant also listed specific expense amounts for his monthly mortgage, food, clothing, utilities, telephone, internet, automobile loan, automobile maintenance, automobile insurance, medical expense, Dish TV, lawn care, and credit cards.

OWCP's hearing representative held the record open for 30 days for the submission of documentation of appellant's assets, income, and expenses.

By decision dated September 4, 2018, OWCP's hearing representative finalized OWCP's determination that appellant had received an overpayment of compensation in the amount of \$19,670.12 because the SSA/FERS offset was not applied to payments for the period February 1, 2016 through March 31, 2018. She further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative noted that no response was received following the preliminary determination. She required recovery of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability 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 SSA benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-09 provides that FECA compensation have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

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 determined that appellant received an overpayment of compensation in the amount of \$19,670.12 as he concurrently received SSA age-related benefits while receiving FECA wage-loss compensation for the period February 1, 2016 through March 31, 2018.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA accurately indicated that appellant had received SSA age-related benefits that were attributable to his own federal service from February 1, 2016 through March 31, 2018. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.⁹

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. The Board finds that OWCP properly determined the amount of the overpayment. To determine the amount of overpayment, the SSA provided appellant's SSA rate with FERS and without FERS during the applicable period. OWCP determined that the difference of the portion of SSA age-related retirement benefits attributed to appellant's federal service needed to be offset against his OWCP compensation benefits. It found that, since SSA age-related retirement benefits were paid monthly (12 per year) and FECA benefits were paid every 28 days (13 per year), the monthly offset had to be adjusted to a 28-day payment cycle amount. This amount differed for each period beginning February 1, 2016. OWCP calculated that the lack of offset from February 1, 2016 to March 31, 2018 resulted in an overpayment in the amount of \$19,670.12.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$19,670.12, thus creating an overpayment of compensation in that amount, for the period February 1, 2016 through March 31, 2018.

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

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

⁸ *Supra* note 6. *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8129.

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

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$19,670.12 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, 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 the appropriate financial information and documentation to OWCP.¹³

In its preliminary determination dated April 27, 2019, OWCP clearly explained the importance of providing the completed overpayment questionnaire and financial information, 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 if he failed to furnish the requested financial information within 30 days. While appellant testified at the hearing regarding his income and expenses, he did not complete a Form OWCP-20 nor did he submit any supporting financial documentation 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 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.¹⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$19,670.12 for which he was not at fault, as he concurrently received SSA age-related benefits while receiving FECA wage-loss benefits for the period February 1, 2016 to March 31, 2018. The Board also finds that OWCP properly denied waiver of recovery of the overpayment.

¹¹ 20 C.F.R. § 10.438.

¹² *Id.* at § 10.436.

¹³ *Id.* at § 10.438.

¹⁴ *See T.E.*, Docket No. 19-0348 (issued December 11, 2019).

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 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