

concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits for the period August 1, 2016 through March 30, 2019 without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required partial recovery of the overpayment by deducting \$670.49 on June 21, 2019 from appellant's continuing compensation.

FACTUAL HISTORY

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

On May 4, 2010 appellant, then a 59-year-old automotive technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained right shoulder and neck strains when an overhead door fell as he was closing it, jerking his right arm while in the performance of duty. His supervisor noted on the claim form that appellant had Federal Employees Retirement System (FERS) retirement coverage. On January 31, 2011 OWCP accepted appellant's claim for sprains of the neck and right shoulder and upper arm. It paid him wage-loss compensation on the periodic rolls commencing July 3, 2011.

In a letter dated July 22, 2011, OWCP advised appellant that he must report any retirement income he received from SSA because he was not entitled to receive FECA compensation benefits without offset of SSA age-related retirement benefits.⁴

On December 14, 2018 OWCP received a letter from OPM, which indicated that appellant had elected to receive FECA wage-loss compensation benefits in lieu of OPM benefits. OPM requested a reimbursement from OWCP in the amount of \$70,926.00 for the period May 1, 2014 to August 30, 2017. It enclosed a copy of the election form that appellant signed on December 27, 2016 documenting his election of FECA wage-loss compensation as of June 20, 2013.

SSA completed a FERS/SSA dual benefit calculation form on February 11, 2019. The form indicated that, with FERS, appellant was entitled to the following SSA benefit rates: \$2,080.50, effective August 2016, \$2,086.70, effective December 2016, \$2,128.40, effective December 2017, and \$2,187.90, effective December 2018. Without FERS contributions, he was entitled to the following SSA benefit rates: \$953.50, effective August 2016, \$956.30, effective December 2016, \$975.40, effective December 2017, and \$1,002.70, effective December 2018.

³ Docket No. 15-0506 (issued August 12, 2016).

⁴ By decision dated June 19, 2013, OWCP terminated appellant's wage-loss compensation, effective that same date, as he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). By decision dated August 12, 2016, the Board reversed OWCP's termination decision. *See id.* (RD 8/12/2016) On October 5, 2017 OWCP informed appellant that it had reinstated his wage-loss compensation retroactive to June 20, 2013. It again paid appellant compensation benefits on the periodic rolls commencing September 17, 2017 and advised appellant that his FERS benefits would be reduced by the amount of SSA benefits that he received based on his age that were attributable to his federal service.

SSA also noted that appellant had received disability benefits from April 2012 to December 2015, noting that “offset does not apply for that time frame.”

By letter dated April 2, 2019, OWCP advised appellant that it was adjusting his wage-loss compensation on the periodic rolls to offset the portion of his SSA age-related retirement benefits attributable to his federal service. It informed him that the portion of the SSA age-related retirement benefits that he earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of FECA compensation and SSA age-related retirement benefits.

OWCP completed a FERS offset calculation form on April 8, 2019. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$36,697.55. This form indicated: from August 1 through November 30, 2016 appellant received an overpayment in the amount of \$4,532.77; from December 1, 2016 through November 30, 2017, he received an overpayment in the amount of \$13,602.07; from December 1, 2017 through November 30, 2018, he received an overpayment in the amount of \$13,874.01; and from December 1, 2018 through March 30, 2019, he received an overpayment in the amount of \$4,688.70.

On April 11, 2019 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$36,697.55 as it paid him FECA wage-loss compensation benefits for the period August 1, 2016 through March 30, 2019 that had not been reduced by the portion of his SSA age-related retirement benefits attributable to his federal service, and that this portion of his SSA benefit therefore constituted a prohibited dual benefit. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified him 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 precoupment hearing.

On April 17, 2019 appellant requested a decision based on the written evidence by a representative of OWCP’s Branch of Hearings and Review. He contested the overpayment as to its occurrence and amount, and requested waiver of recovery of the overpayment. In an attached letter, appellant asserted that recovery of the overpayment should be waived because he had relied on information provided by OWCP. He also explained that he purchased items based upon his budgeted income, and payment for these items as well as his medical expenses would cause hardship in repaying the overpayment.

In a completed Form OWCP-20 dated April 17, 2019, appellant advised that his monthly income included \$2,588.00 in SSA benefits, \$1,876.26 in benefits from the Department of Veterans Affairs, \$3,776.00 in workers’ compensation benefits, and \$456.06 from his wife’s pension, for a total of \$8,696.32 in monthly income. He advised that his monthly expenses included \$1,416.28 for housing, \$600.00 for food, \$200.00 for clothing, \$850.00 for utilities, and \$500.00 for other expenses. Appellant listed debts being paid by monthly installments in the amounts of \$200.00, \$376.00, \$500.00, \$250.00, \$300.00, \$376.00, and \$100.00 for existing lines of credit; and \$800.00, \$200.00, \$100.00, \$50.00, \$100.00, and \$256.00 for existing credit card

debts. He listed his total monthly payments for expenses and debts as \$7,174.28. Appellant indicated that he had assets in cash on hand, checking accounts, and savings accounts of \$8,590.00.

In a letter dated April 13, 2019, appellant disputed the overpayment, requesting the legal basis for the offset of his compensation. He indicated that he had been informed by SSA that there was no FERS offset.

In an OWCP-20 data worksheet dated May 23, 2019, OWCP determined that, based on appellant's responses to its overpayment recovery questionnaire, his monthly family income totaled \$7,825.79. It noted that it had adjusted his listed FECA benefit for the FERS offset and converted it to a "monthly payment." OWCP determined that appellant's household expenses totaled \$3,697.40 and his monthly liabilities included \$1,150.00 of debt repayment, for a total of \$4,847.40 in monthly expenses. It explained that several monthly debt payments had been converted to monthly minimums and that no documentation had been submitted for the claimed \$500.00 line of credit, as alleged. OWCP determined that appellant's assets totaled \$8,590.00.

By decision dated May 23, 2019, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$36,697.55 because the SSA/FERS offset was not applied to payments for the period August 1, 2016 through March 30, 2019. It further found that he was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, because his monthly income surplus was \$2,978.39, and thus recovery of the overpayment would not be against equity and good conscience. OWCP required repayment of the overpayment by deducting \$670.49 from appellant's continuing compensation benefits beginning June 23, 2019.

On May 31, 2019 appellant completed an election of benefits form (Form CA-1105), electing to receive OPM benefits in lieu of FECA wage-loss compensation, effective July 1, 2019.

On August 29, 2019 OWCP issued a decision superseding its final overpayment decision of May 23, 2019. It determined that appellant had received an overpayment of compensation in the amount of \$36,697.55 because he received SSA age-related retirement benefits for the period August 1, 2016 through March 30, 2019 without an appropriate offset. OWCP further found that he was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, because his monthly income surplus was more than \$50.00, and thus recovery of the overpayment would not be against equity and good conscience. It noted that it had withheld \$670.49 from appellant's June 21, 2019 periodic rolls payment to recover part of this debt, and that he should forward payment for the remaining amount of \$36,027.06 within 30 days, and noted that, if he was unable to refund the entire amount immediately, he should contact OWCP within 30 days so appropriate arrangements for recovery, such as installment payments, could be made.

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.⁵ Section 8116 limits the right of an employee to receive compensation. While an employee

⁵ 5 U.S.C. § 8102(a).

is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

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.⁷ FECA Bulletin No. 97-09 provides 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$36,697.55 for the period August 1, 2016 through March 30, 2019, for which he was not at fault, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits without an appropriate offset.

SSA paid appellant age-related retirement benefits beginning August 1, 2016. OWCP paid him wage-loss compensation until March 30, 2019 without offsetting the portion of the SSA age-related retirement benefits due to his federal service. As discussed, a claimant cannot receive both FECA compensation for wage loss and the portion of SSA age-related retirement benefits that are attributable to his or her federal service for the same period.⁹ Appellant received SSA age-related retirement benefits based on his federal service concurrently with FECA wage-loss compensation benefits without an appropriate offset and thus received an overpayment of compensation.

To determine the amount of the overpayment, OWCP must calculate the portion of the SSA benefits that were attributable to federal service. It received documentation from SSA providing appellant's SSA rate with FERS and without FERS for the period August 1, 2016 through March 30, 2019. OWCP calculated the amount that it should have offset during the relevant period based upon the information provided by SSA by converting the monthly SSA benefit attributable to federal service to a 28-day benefit, which was then subtracted from his FECA benefits, which he received every 28 days. No contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2016 through March 30, 2019 and finds that an overpayment of compensation in the amount of \$36,697.55 was created.¹⁰

⁶ *Id.* at § 8116.

⁷ 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).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *Id.*; *see also L.G.*, Docket No. 19-1274 (issued July 10, 2020).

¹⁰ *See L.G., id.*; *R.B.*, Docket No. 19-0571 (issued June 12, 2020).

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.¹¹ 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.¹²

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹³ Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁴ 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 \$50.00.¹⁵

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁶ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹⁷

ANALYSIS -- ISSUE 2

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

¹¹ 5 U.S.C. § 8129.

¹² 20 C.F.R. § 10.438.

¹³ *Id.* at §§ 10.434-10.437.

¹⁴ *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that 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. *Id.* at Chapter 6.400.4a(2).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.437(b).

¹⁷ *J.B.*, Docket No. 15-1043 (issued August 6, 2015).

As OWCP found appellant not at 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.¹⁸ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the documents of record, he had total current monthly income of \$7,825.79 and total monthly expenses of \$4,847.40, which left \$2,978.39 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.¹⁹

The record also establishes that appellant did not give up a valuable right or change his position for the worse in reliance on the overpaid amount. When a claimant argues that he changed his position for the worse, it must be shown that he made a decision that he would not otherwise have made, but for the receipt of benefits, and that this decision resulted in a loss.²⁰ As noted earlier, conversion of the overpayment into a different form, from which the claimant derived some benefit, is not considered a loss. Accordingly, the money appellant spent for consumer goods is not considered a loss. Appellant did not change his position for the worse. Rather, he simply converted his assets from one form to another.²¹ The Board thus finds that appellant has not submitted evidence in support of his contention that he sustained a loss due to making a decision that he otherwise would not have made if his benefits had been properly paid.

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 of the overpayment.²²

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²³

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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

¹⁸ *Id.* at § 10.436.

¹⁹ *See M.C.*, Docket No. 19-0699 (issued February 12, 2020).

²⁰ *Supra* note 16.

²¹ *Id.*

²² *Supra* note 14.

²³ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

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 hardship.²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required partial recovery of the overpayment by deducting \$670.49 on June 21, 2019 from appellant's continuing compensation.

The record indicates that appellant's monthly income of \$7,825.79 exceeded his current and ordinary monthly expenses of \$4,847.40 by \$2,978.39 per month. OWCP therefore did not abuse its discretion when it deducted \$670.49 from appellant's June 21, 2019 periodic rolls payment in partial recovery of the debt.²⁵ The Board therefore finds that OWCP properly required partial recovery of the overpayment by deducting \$670.49 on June 21, 2019 from appellant's continuing compensation payments at that time.²⁶

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$36,697.55, for which he was not at fault, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period August 1, 2016 through March 30, 2019 without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required partial recovery of the overpayment by deducting \$670.49 on June 21, 2019 from appellant's continuing compensation.

²⁴ *Id.*

²⁵ *See V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁶ As noted above, the Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See supra* note 22. Thus, the Board lacks jurisdiction over the remainder of the recovery of the overpayment, as it was not sought from appellant's continuing compensation under FECA.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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