

concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits during the period February 1, 2017 to March 30, 2019 without appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$225.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On October 26, 1989 appellant, then a 34-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 1989 he twisted his lower back when jumping out of the way of a falling tree while in the performance of duty. OWCP accepted the claim for low back strain. It paid appellant wage-loss compensation on the periodic rolls effective March 10, 1991.

In an EN1032 form dated January 20, 2017, appellant indicated that he received SSA disability benefits in the amount of \$372.00 monthly. In an EN1032 form dated January 25, 2018, he indicated that he received SSA benefits in the amount of \$1,118.00 monthly. In an EN1032 form dated January 13, 2019, appellant indicated that he received SSA benefits in the amount of \$1,117.00 monthly prior to January 3, 2019 and he received benefits of \$1,149.00 monthly after January 3, 2019.

On February 26, 2019 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form.

On March 4, 2019 SSA completed the dual benefits calculation form, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from February 2017 through December 2018. Beginning February 2017, the SSA rate with FERS was \$632.30 and without FERS was \$468.00. Beginning December 2017, the SSA rate with FERS was \$1,118.10 and without FERS was \$477.40. Beginning December 2018, the SSA rate with FERS was \$1,149.30 and without FERS was \$490.70.

On April 9, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from February 1, 2017 through March 30, 2019. The total overpayment was determined to be \$11,956.17. OWCP found that appellant received an overpayment of compensation in the amount of \$1,641.19 for the period February 1, 2017 through November 30, 2017; an overpayment in the amount of \$7,709.52 for the period December 1, 2017 through November 30, 2018; and an overpayment in the amount of \$2,605.45 for the period December 1, 2018 through March 30, 2019.

On April 19, 2019 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$11,957.17 had been created because appellant received SSA age-related retirement benefits based upon his federal service, without appropriate offset at the same time he received FECA benefits. It explained that the overpayment occurred because he relied on misinformation given in writing by OWCP as to the interpretation of FECA or its regulations, there was documentation to substantiate that the misinformation was communicated to him, and there was no evidence in the case file to demonstrate that he knew or should have known the proper course of action to be followed. OWCP found appellant not at fault in the

creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that he provide supporting documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. OWCP afforded him 30 days to respond.

On May 10, 2019 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. He requested waiver of recovery of the overpayment and asserted that he had claimed SSA benefits on his EN1032 forms since 2015 to avoid any overpayments.

In response to the Form OWCP-20, appellant indicated that he had a monthly income of \$1,149.00 and listed total monthly expenses of \$2,078.57. He advised that he had \$20.00 in cash and \$12.00 in a checking account. In an accompanying statement, appellant noted that he owed \$500.00 to his sister to repay a loan. He advised that his water line needed repairing with costs between \$900.00 and \$1,500.00. Appellant further indicated that he had six years left on his Recreational Vehicle (RV) loan and submitted a statement, dated April 23, 2019, showing a monthly payment of \$775.90 and a principal balance of \$46,210.26. He also advised that his rain gutters needed replacing and that he needed between \$4,500.00 and \$5,500.00 for dental work. Appellant submitted a bank statement for the period March 21 through April 18, 2019, which showed an ending balance of \$1,403.02.

A prerecoumment hearing was held on September 10, 2019. At the hearing, appellant testified that his only income was Social Security benefits totaling \$1,149.00 and workers' compensation benefits totaling \$1,245.06. The hearing representative did not question appellant regarding the significant change in his reported Social Security benefits from his January 2017 EN1032 form to his January 2018 EN1032 form. In response to questioning by the hearing representative, appellant confirmed his monthly expenses.

In an undated statement, appellant noted that he believed that he could repay \$250.00 to \$350.00 a month on the overpayment if OWCP did not grant a waiver. He again explained his financial circumstances and submitted extensive documentation of his income and expenses.

By decision dated November 20, 2019, OWCP's hearing representative finalized the preliminary determination finding that appellant had received an overpayment of compensation in the amount of \$11,957.17, for the period February 1, 2017 through March 30, 2019 because OWCP had failed to offset his compensation payments by the portion of his SSA benefits that were attributable to his federal service. She further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. The hearing representative noted that appellant's total monthly income of \$2,497.82 exceeded his necessary total monthly recurring expenses of \$2,150.77 by more than \$50.00. She found that OWCP would recover the overpayment by deducting \$225.00 every 28 days from appellant's continuing compensation payments.

On appeal appellant explained that as of the date of the overpayment, he received SSA benefits based upon his deceased wife's record, as he was entitled to a higher benefit amount based

upon her record. He noted that he had notified OWCP of this change of benefits on his EN1032 forms.

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

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 retirement benefits that are attributable to the employee's federal service.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$11,956.17, for which he was not at fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, based upon his federal service, without appropriate offset for the period February 1, 2017 to March 30, 2019.

As previously noted, OWCP is required to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁷ The record however, does not support a finding that appellant was in receipt of SSA age-related retirement benefits attributable to his own federal service during the period of the overpayment. Before OWCP and on appeal appellant contends that as of the date of the overpayment he began receiving SSA benefits based upon his deceased wife's Social Security record, which entitled him to greater benefits. This allegation is supported by appellant's report of SSA benefits on his EN1032 forms, which reported a substantial increase in SSA benefits in 2018. This allegation is also supported by SSA's March 4, 2019 dual benefits calculation form, which indicated a substantial increase in appellant's SSA rate with FERS from February 2017 to December 2017 and December 2018. OWCP premised its finding of an overpayment solely based

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(d); *see J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019).

⁶ FECA Bulletin No. 97-09 (February 3, 1997); *see also S.M.*, Docket No. 20-0152 (issued August 10, 2020).

⁷ *Supra* note 5.

on a March 4, 2019 dual benefits calculation form from SSA. The Board finds, however, that this form does not establish that appellant was in receipt of SSA age-related retirement benefits attributable to his own federal service.⁸ OWCP's preliminary determination of an overpayment cites to no other documentation to establish that appellant was in receipt of dual benefits from SSA and OWCP. As such, OWCP has failed to establish fact of overpayment.⁹

The Board will therefore reverse the November 20, 2019 overpayment decision.¹⁰

CONCLUSION

The Board finds that OWCP improperly found that appellant received an overpayment of compensation in the amount of \$11,956.17.

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 16, 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

⁸ See *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

⁹ *Id.*

¹⁰ As OWCP has not established fact and amount of the overpayment, the issues of waiver and recovery are moot.