

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$28,949.55 because he concurrently received Social Security Administration (SSA) age-related retirement benefits while also receiving FECA wage-loss compensation benefits for the period October 1, 2010 through March 4, 2017, without appropriate offset; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment; and (3) whether OWCP properly required waiver of recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On October 20, 2008 appellant, then a 64-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2008 he injured his right shoulder when drilling holes in wall studs while in the performance of duty. OWCP accepted his claim for a right rotator cuff tear. It paid appellant wage-loss compensation on the periodic rolls, effective July 5, 2009, and informed him of the possibility of a prohibited dual benefit upon receipt of SSA age-related retirement benefits.⁴ OWCP also informed him annually, commencing October 1, 2009, that he had to report benefits he received from SSA which were received as part of an annuity under FERS on an enclosed Form CA-1032. In his responses dated October 6, 2009, October 4, 2010, October 5, 2011, October 5, 2012, October 5, 2013, October 16, 2014, and October 27, 2016 he denied receipt of SSA benefits.

OWCP later expanded the acceptance of appellant's claim to include the additional conditions of sprain of the right shoulder, upper arm, and rotator cuff.⁵ By decision dated June 20, 2016, it expanded the acceptance of his claim to include the additional condition of aggravation of glenohumeral arthritis, right shoulder.

On February 2, 2017 SSA advised OWCP that appellant had concurrently received FECA compensation and SSA age-related retirement benefits through the Federal Employees Retirement System (FERS) for the period October 1, 2010 through March 4, 2017. It provided the amount that he received in retirement benefits including the amount earned with FERS and the amount that he would have received without FERS. Including FERS, SSA indicated that appellant was entitled to a monthly pay rate of \$1,376.70 with FERS and \$1,022.30 without FERS effective October 1 and December 1, 2010; \$1,426.30 with FERS and \$1,059.10 without FERS effective December 1, 2011; \$1,450.50 with FERS and \$1,077.10 without FERS effective December 1, 2012; \$1,472.20 with FERS and \$1,093.20 without FERS effective December 1, 2013; \$1,497.20

⁴ By decision dated October 8, 2009, OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$634.96 because he concurrently received FECA compensation and SSA benefits without an appropriate offset for the period August 1 to September 26, 2009. Appellant repaid the \$634.96 overpayment in full *via* personal check dated November 4, 2009.

⁵ By decision dated March 26, 2015, OWCP terminated appellant's wage-loss compensation, finding that the medical evidence of record established that he no longer had disability causally related to his accepted injury. Appellant requested reconsideration and, by decision dated June 16, 2016, OWCP vacated its prior decision and reopened the claim for reconsideration of the merits.

with FERS and \$1,111.70 without FERS effective December 1, 2014 and December 1, 2015; and \$1,501.60 with FERS and \$1,115.00 without FERS effective December 1, 2016.

By preliminary determination dated March 20, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$28,949.55 because it had failed to reduce his compensation benefits for the period October 1, 2010 through March 4, 2017 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 each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$28,949.55. It further determined that appellant was with fault in the creation of the overpayment because he was aware, or reasonably should have been aware, that he accepted compensation to which he was not entitled. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it 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 prerecoumment hearing.

In a March 22, 2017 letter, OWCP provided notice that it had adjusted appellant's compensation to offset the portion of his SSA age-related retirement benefits attributable to his federal service. It indicated that he would receive net compensation in the amount of \$1,115.00 every 28 days.

On April 21, 2017 appellant, through counsel, requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. Appellant disagreed with the fact and amount of the overpayment. He also requested waiver of recovery of the overpayment because he believed the overpayment occurred through no fault of his own. Appellant submitted a Form OWCP-20 which listed monthly income of \$1,812.00 for himself and his spouse and \$2,537.68 in FECA compensation, for total monthly income of \$4,349.68. He also listed expenses of \$4,472.79, which included, in part, \$94.67 for rent or mortgage, \$601.26 for food, \$247.45 for clothing, \$646.20 for utilities, \$2,008.79 for other household expenses, and \$874.42 in debts. Appellant noted that he had assets of \$14,691.25. He also submitted a number of financial statements and credit card bills in support of his claim.

A telephonic prerecoumment hearing was held on October 13, 2017. Appellant reiterated his request for waiver of recovery of the overpayment and indicated that, on that date, his checking account had a balance of approximately \$8,000.00 and his debts totaled approximately \$6,900.00, which equaled an average monthly debt repayment amount of approximately \$200.00. OWCP's hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, counsel submitted a November 10, 2017 statement asserting that appellant was without fault in the creation of the overpayment and was therefore entitled to waiver of recovery of the overpayment. Counsel submitted additional financial documentation in support of waiver.

By decision dated January 2, 2018, OWCP's hearing representative found an overpayment of compensation in the amount of \$28,949.55 for the period October 1, 2010 through March 4, 2017 because OWCP failed to offset appellant's compensation payments for the portion of his SSA age-related retirement benefits that were attributable to his federal service. She found that appellant was with fault in the creation of the overpayment because he knew, or reasonably should

have known, that he was not entitled to receive SSA benefits and FECA wage-loss compensation benefits concurrently without appropriate offset. The hearing representative calculated that appellant's monthly income was \$4,349.68 and his monthly expenses totaled \$4,472.79,⁶ which yielded a monthly deficit of \$123.11. OWCP's hearing representative found that because appellant had not itemized some expenses, the amount of the surplus equaled \$551.31 per month. She therefore required recovery of the overpayment by deducting \$200.00 every 28 days from his continuing 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 duty.⁷ 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.⁸

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.⁹ FECA Bulletin No. 97-09 provides that compensation 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.¹⁰

OWCP's procedures provide that, once an overpayment is identified, it is responsible for finding whether the claimant was with fault or without fault, issuing a preliminary determination, and unless a hearing is requested, OWCP is responsible for issuing a final decision.¹¹ These procedures note that, if the claimant is determined to be without fault, a Form CA-2202 (preliminary finding notice) must be released (along with a Form OWCP-20) within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of without fault must be clearly provided. A Form CA-2202 informs the claimant of the right to submit evidence and the right to a prerecoumpment hearing on the issues of: (a) fact and amount of the overpayment; and (b) waiver of recovery of the overpayment. Along with the Form CA-2202, OWCP should provide a clearly written statement explaining how the overpayment was created.¹²

⁶ The Board notes that OWCP calculated appellant's total expenses as \$4,472.49 instead of \$4,472.79, which is a harmless error.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

¹⁰ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(2) (May 2004).

¹² *Id.*; *see also P.H.*, Docket No. 18-1539 (issued August 2, 2019).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$28,949.55 because he concurrently received SSA age-related retirement benefits while also receiving FECA wage-loss compensation benefits for the period October 1, 2010 through March 4, 2017, without appropriate offset.

OWCP accepted that appellant sustained a right rotator cuff tear, sprain of right shoulder and upper arm, and an aggravation of right glenohumeral arthritis at work on September 25, 2008. It placed appellant on the periodic compensation rolls effective July 5, 2009 and informed him of a potential prohibited dual benefit upon receipt of SSA age-related retirement benefits. In a form dated February 2, 2017, SSA advised OWCP that appellant had concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits through FERS for the period October 1, 2010 through March 4, 2017. Appellant cannot receive both wage-loss compensation and federal retirement benefits concurrently.¹³ Consequently, he received an overpayment of compensation.

OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$28,949.55. The record includes an overpayment worksheet explaining the overpayment calculations. There is no contrary evidence of record and the Board, accordingly, finds that there was an overpayment of compensation in the amount of \$28,949.55 for the period October 1, 2010 through March 4, 2017.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment of 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 be against equity and good conscience.”¹⁴ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹⁵

Section 10.433(a) of OWCP’s regulations provides that OWCP:

“[M]ay consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which

¹³ 5 U.S.C. § 8116(d). *See J.W.*, Docket No. 16-1355 (issued January 10, 2017); *see also* FECA Bulletin No. 97-9 (February 3, 1997).

¹⁴ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹⁵ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

may affect entitlement to or the amount of benefit. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)¹⁶

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁷

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.¹⁸

OWCP's procedures in effect at the time of the January 2, 2018 decision provided that in situations where an equally valid argument could be made both for "without fault" and "with fault," the benefit of the doubt should go to the claimant, and a finding of without fault should be made consistent with the nature of FECA as social legislation designed to benefit entitled employees.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period October 1, 2010 through March 4, 2017.

As noted above, the Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA age-related retirement benefits as part of an annuity and wage-loss compensation under FECA, resulting in an overpayment, the claimant should be found not at fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.²⁰ Because of the complex nature of SSA benefits administration,

¹⁶ 20 C.F.R. § 10.433(a); *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *see also* 20 C.F.R. § 10.430.

¹⁷ *Id.* at § 10.433(b); *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

¹⁸ *Id.* at Chapter 6.300.4g(4) (September 2018).

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Fault Determinations*, Chapter 6.200.5 (June 2009).

²⁰ *Id.*

appellant could not have been expected to be able to calculate the amount of an offset. Therefore, he could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.²¹

As previously noted, to determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²² Therefore, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period October 1, 2010 through March 4, 2017.

As appellant was not at fault in the creation of the overpayment for the period October 1, 2010 through March 4, 2017, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.²³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$28,949.55 because he concurrently received SSA age-related retirement benefits while also receiving FECA wage-loss compensation for the period October 1, 2010 through March 4, 2017, without appropriate offset. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

²¹ *D.G.*, Docket No. 19-0684 (issued December 24, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related retirement benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset.).

²² *Supra* note 17.

²³ In light of the Board's finding with regard to Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: September 3, 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