

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

M.A., Appellant)	
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and)	
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DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Los Angeles, CA, Employer)	Docket No. 20-0120 Issued: January 8, 2021
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)	

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 18, 2019 appellant, through counsel, filed a timely appeal from an April 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 12, 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.*

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$24,613.05 because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss benefits, for the period September 1, 2011 through October 13, 2018, without an appropriate offset; (2) whether OWCP established that appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On December 21, 2010 appellant, then a 65-year-old supervisory transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2010 he sustained a left ankle sprain, slipped disc, and left lower back sprain when his foot caught on the edge of a stair while in the performance of duty. He stopped work on that same date. The employing establishment noted that appellant's retirement coverage was under the Federal Employees Retirement System (FERS). OWCP initially accepted the claim for lumbar sprain, and left hip and thigh sprain, and later expanded acceptance of the claim to include left inguinal hernia and aggravation of degenerative lumbar disc disease.

OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls from January 24 through November 18, 2011 and on the periodic rolls from November 20, 2011 through October 20, 2012.

In a letter dated November 29, 2011, OWCP explained appellant's entitlement to compensation benefits. It advised him that, if he was covered under FERS, it must deduct at least part of his SSA retirement benefit to which he would be entitled based on age, explaining that a portion of a FERS benefit was included in SSA retirement benefits. Appellant was therefore advised to notify OWCP immediately after filing for or receiving SSA retirement benefits.

Appellant returned to full-time modified work on October 1, 2012.⁴ He did not receive FECA wage-loss compensation again until February 13, 2013. OWCP paid appellant compensation for loss of wage-earning capacity on the supplemental rolls from February 13 through August 24, 2013 and on the periodic rolls from August 24 through October 19, 2013. Appellant did not receive wage-loss compensation from October 20 until November 22, 2013. His modified work accommodation was withdrawn effective November 20, 2013. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls from November 22 through December 14, 2013 and on the periodic rolls from December 15, 2013 through March 9, 2015.

By decision dated March 10, 2015, OWCP reduced appellant's compensation effective on that date based on his capacity to earn wages as a security guard. It paid him compensation for loss of wage-earning capacity on the supplemental rolls from March 10 through April 4, 2015 and on the periodic rolls from April 5, 2015 through October 13, 2018.

⁴ Appellant received wage-loss compensation from October 1 to 20, 2012, which was determined to be an overpayment of compensation by decision dated December 5, 2012.

In an undated EN1032 form received October 11, 2012 and in EN1032 forms dated September 25, 2014; November 12, 2015; and October 5, 2016, appellant indicated that he was not in receipt of SSA benefits as part of an annuity for federal service.⁵ In EN1032 forms dated October 5, 2017 and October 1, 2018, he indicated that he was not in receipt of SSA benefits as part of an annuity for federal service, but asserted that he was in receipt of monthly SSA payments to which he was entitled after age sixty-five.

On November 2, 2017 OWCP forwarded a FERS/SSA dual benefits calculation form to SSA.

The form as completed by SSA, was received by OWCP on October 26, 2018, and indicated that, with FERS, appellant was entitled to monthly payments of \$960.80 effective September 2011; \$995.30 effective December 2011; \$999.70 effective January 2012; \$1,016.60 effective December 2012; \$1,026.80 effective January 2013; \$1,042.20 effective December 2013; \$1,084.80 effective January 2014; \$1,103.20 effective December 2014 and December 2015; \$1,106.50 effective December 2016; and \$1,128.60 effective December 2017. Without his federal service contribution, he was entitled to a monthly payment rate of \$732.50 effective September 2011; \$758.80 effective December 2011 and January 2012; \$771.60 effective December 2012 and January 2013; \$783.10 effective December 2013 and January 2014; \$796.40 effective December 2014 and December 2015; \$798.70 effective December 2016; and \$814.60 effective December 2017.

In a FERS offset calculation form dated November 2, 2018, OWCP documented its calculation of the total overpayment in the amount of \$24,613.05 for the period September 1, 2011 through October 13, 2018. It determined that, during the 91 days from September 1 to November 30, 2011, appellant received an overpayment in the amount of \$684.90; during the 31 days from December 1 to 31, 2011 an amount of \$241.70; during the 335 days from January 1 to November 30, 2012 an amount of \$2,660.49; during the 31-day period December 1 to 31, 2012 an amount of \$250.38; during the 334-day period January 1 to November 30, 2013 an amount of \$2,810.00; during the 31-day period December 1 to 31, 2013 an amount of \$264.79; during the 334-day period January 1 to November 30, 2014 an amount of \$3,322.02; during the 365-day period December 1, 2014 to November 30, 2015 an amount of \$3,691.71; during the 366-day period December 1, 2015 to November 30, 2016 an amount of \$3,701.83; during the 365-day period December 1, 2016 to November 30, 2017 an amount of \$3,703.75; and during the 317-day period December 1, 2017 to October 13, 2018 an amount of \$3,281.47.

On November 8, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$24,613.05 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that he received from September 1, 2011 through October 13, 2018 included a prohibited FERS component that was not offset from his FECA benefits. OWCP found him at fault in the creation of the overpayment because he had not reported receipt of SSA retirement benefits on his EN1032 forms. It provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for appellant's completion. OWCP informed him of the actions he could take and allotted 30 days for him to respond.

⁵ The EN1032 forms signed by appellant provided: "Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector." (Emphasis in the original).

On a December 7, 2018 overpayment action request form, appellant requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review. He disagreed with OWCP's finding regarding the fact and amount of overpayment, and requested waiver of recovery of the overpayment. Appellant asserted that he had been informed by SSA that he could collect SSA benefits while still employed. He also asserted that he had informed OWCP that he was in receipt of SSA benefits, but did not know that his SSA benefits included a prohibited FERS component.

A telephonic hearing was held on March 7, 2019. Counsel was in attendance.

On a Form OWCP-20 dated April 4, 2019 appellant noted a monthly gross income of \$1,160.00 in SSA benefits for himself, \$1,781.00 in SSA benefits for his spouse, \$2,057.00 in FECA benefits, and \$4,020.00 from his continued employment, for a total of \$9,018.00 in monthly income. He noted \$6,449.00 in monthly expenses and assets of \$25,360.00. Appellant attached financial documentation to substantiate his expenses.

By decision dated April 12, 2019, OWCP's hearing representative finalized the preliminary determination, finding that an overpayment of compensation in the amount of \$24,613.05 occurred because appellant received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. She further found that he was at fault in the creation of the overpayment because he had failed to report his SSA retirement benefits as he had been instructed. The hearing representative required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

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.⁶ 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.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement 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.⁹

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-09 (February 3, 1997).

ANALYSIS -- ISSUE 1

The Board finds that OWCP has established that appellant received an overpayment of compensation.

OWCP found that an overpayment of compensation had been created as of September 1, 2011 based on evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during some periods that he also received FECA wage-loss compensation. OWCP has therefore established fact of overpayment.¹¹

The Board finds however that the amount of overpayment is not in posture for decision.

The Board finds that OWCP improperly calculated appellant's overpayment for the period September 1, 2011 through October 13, 2018. The record establishes that he intermittently returned to work in different positions after his initial period of disability. Following his December 9, 2010 injury, appellant returned to work on October 1, 2012. The record reflects that he did not receive FECA wage-loss compensation from October 1, 2012 to February 13, 2013. OWCP again paid appellant FECA wage-loss compensation based upon his loss of wage-earning capacity as of February 13, 2013. The record reflects that he did not receive FECA wage-loss compensation from October 20 to November 22, 2013. In the FERS offset calculation form dated November 2, 2018, OWCP found that appellant had received an overpayment in the amount of \$24,613.05, seemingly without deducting the periods October 1, 2012 to February 13, 2013 and October 20 to November 22, 2013 when he had not received FECA wage-loss compensation. Consequently, the SSA benefits appellant received during the period were not a prohibited dual benefit and should not have been included in the overpayment calculation.

On remand OWCP shall determine the exact amount of the overpayment of compensation and the correct dates during which the overpayment occurred. It should then issue a new preliminary overpayment determination, with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ *Supra* notes 8 and 9; *see also M.S.*, Docket No. 18-0740 (issued February 4, 2019); *E.K.*, *supra* note 8.

¹¹ *See L.B.*, Docket No. 19-1322 (issued January 27, 2020).

¹² In light of the Board's disposition as to issue 1, the remaining issues are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 8, 2021
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board