

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

S.H., Appellant)	
)	
and)	Docket No. 20-1189
)	Issued: January 27, 2021
DEPARTMENT OF THE AIR FORCE, U.S. AIR)	
FORCE ACADEMY, Colorado Springs, CO,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 20, 2020 appellant filed a timely appeal from a May 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ Appellant submitted a timely requested for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted because she submitted all the evidence requested and OWCP did not review it. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,264.26, for which she was not at fault, because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits for the period December 1, 2018 through March 28, 2020 without an 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 \$319.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 20, 1991 appellant, then a 38-year-old real property clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bronchitis, sinus infections, and chest pain due to factors of her federal employment. On August 20, 1991 OWCP accepted the claim for temporary exacerbation of allergic rhinitis. It later expanded the acceptance of the claim to include aggravation of reactive airway disease, aggravation of vocal cord dysfunction, other chronic sinusitis, recurrent candidal vulvovaginitis, recurrent urinary tract infection, myalgia and myositis, right shoulder sprain, esophagitis, chronic recurrent ear infections, bilateral chronic serous otitis media, other chest pain, and benign paroxysmal positional vertigo. OWCP paid appellant wage-loss compensation on the periodic rolls, beginning June 26, 1991.

On an EN1032 form dated December 18, 2017, appellant indicated that she received monthly SSA disability benefits in the amount of \$693.00. On an EN1032 form dated December 11, 2018, she indicated that she received SSA disability benefits in the amount of \$841.00.

On March 8, 2019 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form.

On March 18, 2019 SSA returned the dual benefits calculation form uncompleted, noting that SSA disability insurance benefits were involved.

In an August 19, 2019 letter, an injury compensation management adviser reviewed the case record on behalf of the employing establishment and advised OWCP that appellant was receiving SSA disability benefits, which would soon be converted to SSA age-related retirement

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 7, 2020 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.*

benefits. The adviser noted that appellant would reach the normal retirement age of 66 on December 23, 2018.

In an EN1032 form dated December 19, 2019, appellant indicated that she received monthly SSA age-related retirement benefits in the amount of \$865.00.

OWCP again provided SSA with FERS/SSA dual benefits calculation forms on August 29 and December 10, 2019 and January 14, 2020.

In dual benefits calculation forms, dated September 3 and December 18, 2019 and February 11, 2020, SSA noted that appellant was only receiving SSA disability benefits and indicated that “no offset applied.”

On February 25, 2020 OWCP again provided SSA with a FERS/SSA dual benefits calculation form.

On March 10, 2020 SSA completed the dual benefits calculation form, which indicated appellant’s SSA benefit rates with a FERS offset and without a FERS offset from December 2018 through December 2019. Beginning December 2018, the SSA rate with FERS was \$1,369.00 and without FERS was \$790.70. Beginning December 2019, the SSA rate with FERS was \$1,391.00 and without FERS was \$803.30.

On April 2, 2020 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant’s SSA offset overpayment from December 1, 2018 through March 28, 2020. It found that she received an overpayment of compensation in the amount of \$6,958.66 for the period December 1, 2018 through November 30, 2019 and an overpayment in the amount of \$2,305.59 for the period December 1, 2019 through March 28, 2020. The total overpayment was determined to be \$9,264.26.

In a letter dated April 2, 2020, OWCP notified appellant that, based on information provided by SSA regarding the amount of her age-related retirement benefits which were attributable to federal service, her FECA wage-loss compensation had been adjusted.

On April 2, 2020 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$9,264.26 had been created because appellant received SSA age-related retirement benefits based upon her federal service, without appropriate offset at the same time she received FECA benefits for the period December 1, 2018 through March 28, 2020. It explained that the overpayment occurred because her compensation was not reduced by the FERS/FECA amount. 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 she provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated May 7, 2020, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$9,264.26, for the period December 1, 2018 through March 28, 2020, because it had failed to offset her compensation

payments by the portion of her SSA age-related retirement benefits that were attributable to federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$319.00 every 28 days from appellant's 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 his or her 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 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.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$9,264.26, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period December 1, 2018 through March 28, 2020 without an appropriate offset.

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.⁸ On September 3 and December 18, 2019, and February 11, 2020, SSA noted in FERS/SSA Dual Benefit Calculation Forms that appellant was only receiving SSA disability benefits that she was entitled to and indicated that no offset applied. However, on March 10, 2020 SSA completed a FERS/SSA Dual Benefit Calculation Form and reported that appellant had

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 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).

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also S.M.*, Docket No. 20-0152 (issued August 10, 2020).

⁸ *Supra* note 6.

received SSA age-related retirement benefits subject to SSA/FERS offset from December 2018 through March 10, 2019, the date of the response.

The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.⁹ With respect to the period and amount of the overpayment, the Board finds that OWCP has not adequately explained how the overpayment was determined in light of the discrepancies in the evidence provided by SSA as to when appellant began receiving SSA age-related retirement benefits.¹⁰ As such, the Board is unable to verify the fact and amount of the overpayment of compensation in the amount of \$9,264.26.¹¹

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$9,264.26, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period December 1, 2018 through March 28, 2020 without an appropriate offset.

⁹ See *R.E.*, Docket No. 19-1583 (issued May 27, 2020); *J.M.*, Docket No. 18-1505 (issued June 21, 2019); *Teresa A. Ripley*, 56 ECAB 528 (2005).

¹⁰ See *R.E.*, *id.*; *E.T.*, Docket No. 19-1046 (issued December 31, 2019).

¹¹ As OWCP has not established fact and amount of the overpayment, the issues of waiver and recovery of the overpayment are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 27, 2021
Washington, DC

Alec J. Koromilas, 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