

because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period March 1, 2017 through June 22, 2019, 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 \$300.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On October 9, 2001 appellant then a 52-year-old import specialist, filed a traumatic injury claim (Form CA-1) alleging that he developed post-traumatic stress syndrome while in the performance of duty as a result of the terrorist attack on the World Trade Center on September 11, 2001. OWCP accepted his claim for acute post-traumatic syndrome. Appellant stopped work on September 11, 2001. OWCP paid him wage-loss compensation on the periodic rolls effective June 16, 2002.

On EN1032 forms dated March 22 and May 10, 2017, April 6, 2018, and March 18, 2019, appellant responded "No" indicating that he was not receiving SSA age-related retirement benefits as part of an annuity for federal service. On an EN1032 form dated March 18, 2019, he indicated that he was in receipt of "SSA regular retirement age 65."

On May 29, 2019 OWCP received a completed Federal Employees Retirement System (FERS)/SSA dual benefits calculation form from SSA wherein SSA advised that, effective March 2017, appellant reached normal retirement age and became eligible for SSA age-related retirement benefits. It noted that since appellant's retirement coverage was under FERS, his compensation benefits must be offset by any part of his SSA benefit that was calculated by using his federal employment earnings. SSA calculated SSA age-related retirement benefit rates with FERS offset and without a FERS offset from March 1, 2017 through December 1, 2018. Beginning March 2017, the SSA rate with FERS was \$1,173.00 and without FERS was \$69.00. Beginning December 2017, the SSA rate with FERS was \$1,196.00 and without FERS was \$70.00. Beginning December 2018, the SSA rate with FERS was \$1,229.50 and without FERS was \$72.50.

On June 26, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from March 1, 2017 through December 1, 2018. The total overpayment was determined to be \$31,339.05.

On July 5, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$31,339.05 had been created because appellant received SSA age-related retirement benefits from March 1, 2017 through June 22, 2019 that were partially based on credits earned while working in the Federal Government, which constituted a prohibited dual benefit. It determined that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records which support income and expenses. Additionally, OWCP

further 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 prerecoument hearing.

On August 1, 2019 appellant completed an overpayment action request form and requested a prerecoument hearing. In an attached statement, he noted disagreement that an overpayment occurred and the amount of the overpayment, requesting waiver because he was found to be without fault in the creation of the overpayment.

In a Form OWCP-20 completed on August 1, 2019, appellant reported that his total monthly income included \$1,094.00 from SSA and FECA benefits of \$2,808.38, resulting in total monthly income of \$3,902.38. He reported expenses totaling \$3,892.92. Appellant indicated monthly expenses of \$1,693.77 for rent, \$950.00 for food, \$50.00 for clothing, \$305.38 for utilities, and \$500.00 for other expenses. He also noted monthly credit card debt installment payments totaling \$393.77. Appellant further noted a checking account balance of \$6,541.08. He attached financial information including bank statements, utility bills, and credit card bills. No further documentation regarding income or expenses was received.

On October 22, 2019 appellant attended a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review.³

By decision dated November 26, 2019, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$31,339.05 for the period March 1, 2017 through June 22, 2019, because it failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It 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 be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$300.00 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 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

³ During the hearing appellant testified that his corrected monthly rent expense was \$1,719.18.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

attributable to the employee's federal service.⁶ 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 age-related retirement benefits 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 properly determined that appellant received an overpayment of compensation in the amount of \$31,339.05, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2017 through June 22, 2019, without an appropriate offset.

The record supports that appellant received FECA wage-loss compensation for total disability beginning in June 16, 2002, and that he received SSA age-related retirement benefits beginning March 2017. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service commencing March 1, 2017. Thus, the record establishes that he received an overpayment of FECA wage-loss compensation.⁹

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to appellant's specific SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods March 1, 2017 through June 22, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that he received an overpayment in the amount of \$31,339.05. The Board thus finds that appellant received prohibited dual benefits for the period March 1, 2017 through June 22, 2019 totaling \$31,339.05.

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.¹⁰

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

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ 20 C.F.R. § 10.421(d); *S.M.*, Docket No. 17-1802 (issued August 20, 2018); *supra* note 6; *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8129.

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹¹ 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 \$50.00.¹² Also, 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.¹³ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁴

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵

OWCP's regulations provide 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. The information is also used to determine the repayment schedule, if necessary.¹⁶

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without 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.¹⁷

¹¹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2), (3) (September 2018).

¹² Federal (FECA) Procedure Manual, *id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹³ *See* Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 6.400.4(a)(2) (September 2018).

¹⁴ *Id.* at Chapter 6.400.4(b)(3).

¹⁵ 20 C.F.R. § 10.437(a)(b).

¹⁶ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁷ 5 U.S.C. § 8129.

Evidence in the case record shows that appellant has income totaling \$3,902.38. Form OWCP-20 listed expenses as \$1,719.18 for rent; \$950.00 for food; \$50.00 for clothing; \$305.38 for utilities, \$393.77 for various credit card debt, and \$500.00 for other expenses. Appellant testified that the \$500.00 allocated for other expenses represented cash items, laundry, transportation, going out, and buying books. As these other expenses were not supported by billing statements or receipts and not clearly delineated this amount cannot be considered.

Based upon the information provided on the Form OWCP-20, and evidence received after the hearing, appellant's household income totaled \$3,902.38 while his expenses totaled \$2,868.49. As his monthly income exceeds his monthly expenses by \$1,033.89, appellant does not need substantially all of his monthly income to meet current and ordinary living expenses.

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance on the payment, which created the overpayment.¹⁸ Therefore, OWCP properly denied waiver of recovery of the overpayment.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides in pertinent part: When an overpayment 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 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 any hardship.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

In determining whether appellant could repay the overpayment through \$300.00 deductions from continuing compensation payments, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same

¹⁸ *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁹ 20 C.F.R. § 10.441(a); *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

time liquidating the debt in a reasonably prompt fashion.²⁰ The Board finds that OWCP gave due regard to the financial information provided and found that his monthly income exceeded monthly expenses by \$1,033.89. OWCP further applied its procedures, which require that an appropriate payment amount should be deducted in order to recover the overpayment within three years.²¹ The Board, therefore, finds that OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's compensation payments.

On appeal appellant asserts that he needs substantially all of his monthly income to meet ordinary and necessary living expenses. He indicated that \$400.00 a month for food was not reasonable in New York City as the cost of living was above the national average. Appellant asserted that even if the accepted monthly expense figure of \$2,868.49 was deducted from his monthly income of \$3,902.38 he was left with \$1,034.00, which is not enough to live in New York. As explained, however, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion. OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$31,339.05.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,339.05, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period March 1, 2017 through June 22, 2019, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$300.00 every 28 days from his continuing compensation payments.

²⁰ See *L.F.*, Docket No. 15-0489 (issued May 11, 2015) (the Board affirmed an OWCP hearing representative's denial of waiver of recovery of an overpayment because appellant and his spouse had over \$17,000.00 in their savings account, and as such his assets exceeded the specified resource base).

²¹ *Supra* note 11 at Chapter 6.500.8.c (September 2018). These procedures further note that if no response to the preliminary overpayment determination is received, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full (emphasis added) Chapter 6.500.8.c(1).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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