

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

)	
J.C., Appellant)	
)	
and)	Docket No. 19-0911
)	Issued: March 25, 2021
DEPARTMENT OF DEFENSE, DOVER AIR)	
FORCE BASE COMMISSARY, DOVER AIR)	
FORCE BASE, DE, 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 March 26, 2019 appellant filed a timely appeal from a November 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$9,427.70 because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period September 10, 2015 through February 3, 2018 without an appropriate offset; (2) whether OWCP properly found appellant at fault in the creation of the overpayment of compensation thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the

¹ 5 U.S.C. § 8101 *et seq.*

overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On December 11, 1992 appellant, then a 43-year-old meat cutter, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back while in the performance of duty. OWCP accepted the claim for lumbosacral strain and L5 sUBLUXATION. It initially paid appellant intermittent wage-loss compensation.² Commencing December 12, 1993, OWCP paid wage-loss compensation on the periodic rolls. Appellant continues to receive FECA compensation.

By decision dated May 31, 1996, OWCP found that the constructed position of administrative clerk fairly and reasonably represented his wage-earning capacity and reduced his compensation benefits consistent with its determination.³

In a letter dated August 1, 2011, OWCP advised appellant that section 8116(d)(2) of FECA required that a claimant's continuing compensation benefits be reduced if he or she began receiving SSA retirement benefits based upon his or her age and federal service. It noted that he was approaching his 62nd birthday, the minimum age at which he would be eligible to receive SSA retirement benefits, and informed him that failure to report receipt of SSA retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery. OWCP advised appellant that, if he had been approved for SSA retirement benefits or was currently receiving SSA retirement benefits, to contact his local district office immediately so that necessary adjustments to his compensation benefits could be made.

On January 17, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in September and December 2015, appellant's SSA rate with FERS was \$1,095.80 and without FERS \$774.30; beginning in December 2016, his rate with FERS was \$1,099.00 and without FERS \$776.50; and beginning December 2017, his SSA rate with FERS was \$1,120.90 and without FERS \$792.10.

By letter dated February 16, 2018, OWCP informed appellant that, pursuant to section 10.421(d) of its regulations, he had been receiving a prohibited dual benefit because a portion of SSA benefits earned as a federal employee was part of his retirement and that the receipt of wage-loss compensation under FECA and federal retirement was prohibited. It indicated that it had reduced his wage-loss compensation effective February 4, 2018. OWCP prepared a FERS offset calculation worksheet verifying its calculations.

On March 1, 2018 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$9,427.70 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related benefits that he

² Appellant filed a notice of recurrence (Form CA-2a) on March 29, 1993 for a March 23, 1993 recurrence.

³ This decision was affirmed by an OWCP hearing representative on October 3, 1996, and in a June 27, 1997 decision, OWCP denied modification. On March 19, 1998 OWCP granted appellant a schedule award for 16 percent permanent impairment of the right leg.

received for the period September 10, 2015 through February 3, 2018 were based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment and explained its calculation of the overpayment. It informed appellant of the actions he could take, and provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20). OWCP requested that he provide documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed, and afforded him 30 days to respond.

On an overpayment action request form dated April 4, 2018, appellant requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review. He noted his disagreement with OWCP's finding of the fact and amount of the overpayment, finding of fault in the creation of the overpayment, and requested waiver of recovery of the overpayment.

During the telephonic hearing held on September 13, 2018, the hearing representative informed appellant that he needed to submit an overpayment recovery questionnaire and documentation supporting his expenses.

On November 19, 2018 appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20). This indicated that he had \$1,760.00 in household monthly income, monthly household expenses of \$1,983.00 to \$2,283.00, and assets of \$5,490.48.⁴ Appellant wrote that he thought he was entitled to the FECA compensation he received, that he did not understand the deduction for FERS, and that he had no memory that it was explained to him so that, therefore, he was not at fault. He attached financial information including FECA benefit statements, mortgage, credit card, and loan statements, car insurance invoices, medical and utility bills, and correspondence from SSA regarding his SSA benefits.

By decision dated November 29, 2018, OWCP's hearing representative finalized the preliminary overpayment determination. She found that an overpayment of compensation in the amount of \$9,427.70 had been created because appellant received a prohibited dual benefit from SSA while he concurrently received FECA compensation. The hearing representative referenced section 8116(a) of FECA and found appellant at fault in the creation of the overpayment, and required recovery by deducting \$300.00 from appellant's continuing compensation per 28-day compensation period.

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.⁵ Section 8116 limits the right of an employee to receive

⁴ Appellant listed \$1,000.00 in spousal income and \$760.00 from SSA, but did not list his periodic FECA compensation.

⁵ 5 U.S.C. § 8102(a).

compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA benefits that are attributable to the employee's federal service.⁷ FECA Bulletin No. 97-09 provides 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,427.70 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period September 10, 2015 through February 3, 2018 without an appropriate offset.

In the November 29, 2018 decision, an OWCP hearing representative found that an overpayment of compensation was created for the period September 20, 2015 through February 3, 2018. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA indicated that appellant received age-related SSA benefits that were attributable to federal service during the period September 20, 2015 through February 3, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing September 20, 2015 through February 3, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its March 1, 2018 preliminary overpayment determination. No contrary evidence was provided.

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see J.S.*, Docket No. 19-0824 (issued October 4, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *See J.S.*, *supra* note 7.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period September 20, 2015 through February 3, 2018 and finds that an overpayment of compensation in the amount of \$9,427.70 was created.¹⁰

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."¹¹ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹²

On the issue of fault, section 10.433(a) of OWCP's regulations provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³ With respect to whether an individual is without fault, section 10.433(b) provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.¹⁴

OWCP's procedures provide that if a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage loss compensation, in such a case, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

¹⁰ See *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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

¹² *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a); see *K.F.*, Docket No. 19-1016 (issued February 14, 2020); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹⁴ 20 C.F.R. § 10.433(b); *L.L.*, Docket No. 19-1690 (issued February 25, 2020); *C.L.*, *id.*

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

The Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results 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 benefits concurrent with disability/wage-loss compensation was prohibited.¹⁶ Because of the complex nature of SSA benefits administration, 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.¹⁷

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.¹⁸ The Board finds that appellant was without other options to avoid a potential FECA overpayment. 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 November 1, 2011 through April 28, 2018.

The Board will, therefore, reverse OWCP's finding of fault and remand the case for consideration of whether appellant is entitled to a waiver of recovery of the overpayment. After any further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,427.70 because he concurrently received SSA age-related retirement benefits while also receiving FECA compensation benefits for the period September 10, 2015 through February 3, 2018, without an appropriate offset. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

¹⁶ *Id.*

¹⁷ See *J.B.*, Docket No. 19-1244 (issued December 20, 2019); see also *G.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 prior to receipt of information for SSA).

¹⁸ *J.S.*, *supra* note 7.

¹⁹ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 25, 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