

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$20,030.86, for the period June 1, 2017 through February 2, 2019, because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for this period without appropriate offset; (2) whether OWCP properly determined 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 \$393.11 from appellant's compensation payments every 28 days.

FACTUAL HISTORY

On May 27, 2011 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging injury due to twisting his left arm in an attempt to catch a falling mail tray while in the performance of duty. OWCP accepted his claim for sprains of the left elbow/forearm, left shoulder/upper arm (including rotator cuff), and left biceps. It paid appellant wage-loss compensation for disability from work on the supplemental rolls commencing September 10, 2011 and on the periodic rolls commencing September 25, 2011.

In a September 29, 2011 letter, OWCP advised appellant that he had been placed on the periodic rolls, effective September 25, 2011. It informed him that, if he was covered under the Federal Employees' Retirement System (FERS), it was possible that he could receive a prohibited dual benefit upon future receipt of Social Security Administration (SSA) age-related retirement benefits. In a June 10, 2013 letter, OWCP advised appellant that section 8116(d)(2) of FECA required that a claimant's continuing FECA compensation be reduced if he or she received SSA age-related retirement benefits based on age or federal service.

OWCP periodically required appellant to complete EN1032 forms, which contained language advising him what types of employment activities and earnings that he was required to report for each 15-month period prior to the time he signed each form.

On January 24, 2019 OWCP received a FERS/SSA dual benefits calculation form completed by an SSA official on January 11, 2019. The form provided SSA benefit rates with a FERS offset and without a FERS offset for the period June 1, 2017 through December 2018. The form indicated that beginning June 1, 2017, the SSA rate with FERS was \$1,733.00 and without FERS was \$757.00; beginning December 1, 2017, the SSA rate with FERS was \$1,768.00 and

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the April 8, 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.*

without FERS was \$772.10; and beginning December 1, 2018 the SSA rate with FERS was \$1,817.00 and without FERS was \$793.70.

OWCP completed a FERS offset calculation worksheet on February 21, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period from June 1, 2017 through February 2, 2019 for a total overpayment amount of \$20,030.86. OWCP determined that during the period June 1 through November 30, 2017 appellant received an overpayment of \$5,888.18; during the period December 1, 2017 through November 30, 2018 he received an overpayment of \$11,983.63, and during the period December 1, 2018 through February 2, 2019 he received an overpayment of \$2,159.05.

In a preliminary overpayment determination dated February 28, 2019, OWCP notified appellant that he received an overpayment of compensation in the amount of \$20,030.86, for the period June 1, 2017 through February 2, 2019, because he received SSA age-related retirement benefits based on his age and attributable to his federal service, without an offset being made, while he received FECA compensation benefits. It also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments he knew, or reasonably should have known, to be incorrect.⁵ OWCP advised him that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of the overpayment. It informed appellant that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of the overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

In an overpayment action request form, signed on March 18, 2019, appellant indicated that he disagreed that the claimed overpayment occurred. In March 18 and 26, 2019 statements, he challenged OWCP's preliminary overpayment determination and asserted that SSA never advised him that his SSA age-related retirement benefits would be "combined" with FERS.⁶ No additional evidence, including a completed Form OWCP-20, was received.

By decision dated April 8, 2019, OWCP finalized the preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$20,030.86, for the period June 1, 2017 through February 2, 2019, because he received SSA age-related retirement benefits based on his age and attributable to his federal service, without an offset being made, while he received FECA compensation benefits. It found that appellant was at fault in the creation of the overpayment because he accepted payments he knew, or reasonably should have known, to be incorrect.⁷ OWCP determined that, therefore, waiver of recovery of the

⁵ OWCP asserted that appellant misrepresented the type of SSA benefits he received as not being age related.

⁶ Appellant submitted several documents from SSA and OPM that were previously of record. He also submitted a June 1, 2017 SSA document informing him that he would receive SSA age-related retirement benefits effective June 1, 2017.

⁷ OWCP also briefly discussed appellant's completion of EN1032 forms and generally noted without elaboration, "You made an incorrect statement as to a material fact which you knew or should have known to be incorrect."

overpayment was precluded. It required repayment of the overpayment by deducting \$393.11 from appellant's continuing compensation payments every 28 days.

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.⁸ However, 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.⁹

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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$20,030.86, for the period June 1, 2017 through February 2, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset.¹²

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. As explained, a claimant cannot receive both wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹³ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period while he was receiving wage-loss compensation on the periodic rolls. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with

⁸ 5 U.S.C. § 8102.

⁹ *Id.* at § 8116.

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

¹¹ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹² *E.L.*, Docket No. 20-0723 (issued October 15, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹³ *E.L.*, *id.*

respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from June 1, 2017 through February 2, 2019. OWCP properly calculated the amount that it should have offset during the relevant period based on SSA's documentation.

The Board thus finds that an overpayment of compensation in the amount of \$20,030.86 was created.¹⁴

On appeal appellant's representative suggests that appellant did not receive an overpayment of compensation because he did not receive SSA age-related retirement benefits as part of an annuity for federal service. However, as explained above, the evidence of record demonstrates that appellant did in fact receive SSA age-related retirement benefits as part of an annuity for federal service for the period June 1, 2017 through February 2, 2019.

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.¹⁵ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹⁶

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 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

¹⁴ See *E.L., id.; L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

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

¹⁶ *J.S.*, Docket No. 19-1363 (issued April 10, 2020); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)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

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.¹⁹

OWCP's procedures in effect at the time of the April 8, 2019 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.²⁰

ANALYSIS -- ISSUE 2

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

As noted above, 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 age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.²¹ 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

¹⁷ 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.

¹⁸ *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).

¹⁹ *Id.* at Chapter 6.300.4(g)(4) (September 2018).

²⁰ *Id.* at Chapter 6.300.4(c) (September 2018).

²¹ *Id.*

relevant period that his concurrent receipt of SSA age-related retirement benefits constituted an actual prohibited dual benefit.²²

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.²³ Therefore, based on the circumstances described, OWCP has not met its burden of proof to establish that he was at fault in the creation of the overpayment for the period June 1, 2017 through February 2, 2019.

As appellant was not at fault in the creation of the overpayment for the period June 1, 2017 through February 2, 2019, the case will be remanded to OWCP to issue a new preliminary determination on the issues of waiver and, if warranted, recovery of the overpayment which affords him the right to request a prerecoupment hearing on those two issues.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$20,030.86, for the period June 1, 2017 through February 2, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for this period without appropriate offset. The Board further finds however, that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

²² *R.B.*, Docket No. 19-0023 (issued September 3, 2020) (issued December 23, 2019) (OWCP found that appellant was without fault in the creation of an overpayment caused by dual receipt of SSA age-related retirement benefits and FECA wage-loss compensation because he could not have known the amount of offset to be applied to his wage-loss compensation payments). *See also 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 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).

²³ *Supra* note 21.

²⁴ *See* 20 C.F.R. §§ 10.431(d) and 10.439.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: March 16, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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