

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, MID-ISLAND
PROCESSING & DISTRIBUTION CENTER,
Melville, NY, Employer**

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**Docket No. 20-0964
Issued: May 10, 2021**

Appearances:

*Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 30, 2020 appellant, through counsel, filed a timely appeal from a December 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' 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

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 December 5, 2019 decision, appellant submitted additional evidence to OWCP and on appeal. 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 determined that appellant received an overpayment of compensation in the amount of \$11,117.91, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period December 1, 2011 through September 14, 2019 without appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$310.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On May 13, 2005 appellant, then a 59-year-old tractor-trailer operator, filed a traumatic injury claim (Form CA-1) relating that on that date he injured his right shoulder shutting the door on a trailer while in the performance of duty. OWCP accepted his claim for right upper arm/shoulder sprain.

Between September 2005 and November 2013, appellant underwent multiple OWCP-authorized right shoulder surgical procedures. OWCP paid compensation on the supplemental rolls for temporary total disability for various periods of wage loss associated with appellant's approved surgeries, including September 30 through October 2, 2005 and June 30 through December 20, 2008.

Appellant returned to a full-time modified position as a clerk on October 25, 2008. On August 28, 2012 he underwent OWCP-approved ultrasound cryoblation of right subclavicular nerve. OWCP accepted a recurrence of disability, effective August 28, 2012, and appellant has not since returned to work. It paid him on the supplemental rolls from September 6, 2012 through May 4, 2013 and then on the periodic rolls beginning May 5, 2013.⁵ Appellant last worked on August 28, 2012.

In a letter dated May 8, 2013, OWCP explained appellant's entitlement to compensation benefits. It advised him that, if he was covered under the Federal Employees' Retirement System (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.

⁴ Docket No. 16-1680 (issued August 10, 2017).

⁵ A review of appellant's compensation history indicates that appellant did not receive FECA wage-loss compensation benefits from December 21, 2008 through September 5, 2012.

Appellant was therefore advised to notify OWCP immediately after filing for or receiving SSA retirement benefits.⁶

On August 30, 2019 OWCP forwarded a FERS/SSA dual benefits calculation form to SSA.

The form as completed by SSA on September 5, 2019 was received by OWCP on September 10, 2019 and indicated that, with FERS, appellant was entitled to a monthly payment rate of: \$2,253.70 effective December 2011; \$2,255.70 effective January 2012; \$2,294.00 effective December 2012; \$2,328.40 effective December 2013; \$2,367.90 effective December 2014 and December 2015; \$2,375.00 effective December 2016; \$2,422.50 effective December 2017; and \$2,490.30 effective December 2018. Without FERS he was entitled to a monthly payment rate of: \$2,142.40 effective December 2011 and January 2012; \$2,178.80 effective December 2012; \$2,211.40 effective December 2013; \$2,248.90 effective December 2014 and December 2015; \$2,255.60 effective December 2016; \$2,300.70 effective December 2017; and \$2,365.10 effective December 2018. On September 30, 2019 OWCP another completed FERS/SSA dual benefits calculation form dated September 13, 2019, which contained the same figures as above, but excluded the January 2012 effective date.

In a FERS offset calculation form dated October 2, 2019, OWCP documented its calculation of the total overpayment in the amount of \$11,095.83 for the period December 1, 2011 through September 14, 2019. It determined that, between December 1, 2011 and November 30, 2012, appellant received an overpayment in the amount of \$1,342.94; from December 1, 2012 through November 30, 2013, an overpayment in the amount of \$1,386.20; from December 1, 2013 through November 30, 2014, an overpayment in the amount of \$1,407.86; from December 1, 2014 through November 30, 2015, an overpayment in the amount of \$1,435.85; from December 1, 2015 through November 30, 2016, an overpayment in the amount of \$1,435.85; from December 1, 2016 through November 30, 2017, an overpayment in the amount of \$1,436.74; from December 1, 2017 through November 30, 2018, an overpayment in the amount of \$1,465.62; and from December 1, 2018 through September 14, 2019, an overpayment in the amount of \$1,188.71.

In an amended FERS offset calculation form dated October 25, 2019, OWCP documented its calculation of the total overpayment in the amount of \$11,117.91 for the period December 1, 2011 through September 14, 2019. It determined that, from December 1 through 31, 2011, appellant received an overpayment in the amount of \$113.75; d from January 1, 2012 through November 30, 2012, an overpayment in the amount of \$1,251.28; from December 1, 2012 through November 30, 2013, an overpayment in the amount of \$1,386.20; from December 1, 2013 through November 30, 2014, an overpayment in the amount of \$1,407.86; from December 1, 2014 through November 30, 2015, an overpayment in the amount of \$1,431.92; from December 1, 2015 through November 30, 2016, an overpayment in the amount of \$1,435.85; from December 1, 2016 through November 30, 2017, an overpayment in the amount of \$1,436.74; from December 1, 2017 through

⁶ By decision dated July 21, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity, which ran from June 27, 2016 through January 31, 2017. Appellant timely appealed the July 21, 2016 schedule award decision to the Board and in a decision dated August 10, 2017, the Board set aside the July 21, 2016 decision and remanded the claim for utilization of a consistent method for calculating permanent impairment of the upper extremities and issuance of a *de novo* decision on appellant's claim for an upper extremity schedule award. The record reflects that from July 24, 2016 to January 31, 2017 appellant was in receipt of schedule award benefits.

November 30, 2018, an overpayment in the amount of \$1,465.62; and from December 1, 2018 through September 14, 2019, an overpayment in the amount of \$1,188.71.

On October 25, 2019 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$11,117.91 had been created, based on the amended FERS offset calculation form dated October 25, 2019. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that he received from December 1, 2011 through September 14, 2019 included a prohibited SSA/FERS component that was not offset from his FECA benefits. OWCP determined that he was not at fault in the creation of the overpayment. 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 him 30 days to respond.

In a November 22, 2019 overpayment action request form, appellant requested that OWCP make a decision based upon the written evidence regarding waiver of recovery of the overpayment. In an attached Form OWCP-20 dated November 19, 2019, appellant noted a monthly gross income of \$2,315 in SSA benefits for himself, \$986.00 in SSA benefits for his spouse, and other income of \$2,080.00, for a total of \$5,381.00 in monthly income. He noted \$2,900.00 in monthly expenses and assets of \$43,000.00.

By decision dated December 5, 2019, OWCP finalized the preliminary determination, finding that an overpayment of compensation in the amount of \$11,117.91 occurred because appellant received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery, as he had not submitted sufficient financial documentation of expenses and he had a monthly positive income balance of \$2,481.00, as well as \$43,000.00 in assets. OWCP required recovery of the overpayment by deducting \$310.00 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.⁷ 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.⁸

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.⁹ 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

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 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).

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.¹⁰

ANALYSIS

The Board finds that fact of overpayment has been established.

Appellant received FECA wage-loss compensation from September 6, 2012 through June 26, 2016 and February 1, 2017 through September 14, 2019 while he continued to receive age-related retirement benefits from SSA. As noted, a claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service.¹¹ The fact of overpayment is therefore established.

The Board further finds, however, that OWCP improperly calculated appellant's overpayment for the periods December 1, 2011 through September 5, 2012 and June 27, 2016 through January 31, 2017. Following his return to work on October 25, 2008, a review of appellant's compensation history indicates that appellant did not again receive FECA wage-loss compensation benefits until September 6, 2012. Consequently, the SSA benefits appellant received during the period December 1, 2011 through September 5, 2012 were not a prohibited dual benefit and should not have been included in the overpayment calculation.¹² Furthermore, for the period June 27, 2016 through January 31, 2017, the record reflects that appellant received FECA schedule award payments from OWCP while he continued to receive age-related retirement benefits from SSA. OWCP's regulations provide that retirement benefits paid by the Office of Personnel Management (OPM) or SSA can be paid concurrently with schedule award compensation under FECA without a deduction from FECA benefits.¹³ Consequently, the SSA benefits appellant received during the period June 27, 2016 through January 31, 2017 were not dual benefits and similarly should not have been included in the overpayment calculation.

On remand OWCP shall determine the amount of the overpayment of compensation based on the correct dates during which the overpayment occurred. It shall 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.¹⁴

CONCLUSION

The Board finds that fact of overpayment has been established. The Board further finds that this case is not in posture for decision regarding the amount of the overpayment.

¹⁰ FECA Bulletin No. 97-09 (February 3, 1997).

¹¹ 5 U.S.C. § 8116(d)(2); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

¹² *See M.A.*, Docket No. 20-0120 (issued January 8, 2021).

¹³ *See J.H.*, Docket No. 19-1887 (issued June 16, 2020); *K.C.*, Docket No. 19-1838 (issued May 1, 2020).

¹⁴ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 10, 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