



March 3, 2018, because he concurrently received Social Security Administration (SSA) age-related retirement benefits while also receiving FECA benefits without an 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 \$308.00 from appellant's continuing compensation every 28 days.

### **FACTUAL HISTORY**

On May 16, 2006 appellant, then a 67-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on May 15, 2006 he sustained a crush injury to his left lower extremity when a hand truck he was operating carrying a commercial water heater tipped over, causing the water heater to fall onto his left lower leg while in the performance of duty.<sup>3</sup> He stopped work on May 15, 2006 and did not return. Appellant's retirement coverage was listed as Federal Employees Retirement System (FERS) with a service computation date of March 16, 1993.

On June 27, 2006 OWCP accepted the claim for a crush injury of the left ankle. It subsequently expanded its acceptance of the claim to include contusion of the left lower leg, crushing injury of the left ankle, and lymphedema. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing July 30, 2006 and on the periodic rolls commencing August 6, 2006.<sup>4</sup>

On February 5, 2018 OWCP provided SSA a dual benefits calculation form. It listed the computation period as May 15, 2006 onward.

On March 12, 2018 SSA forwarded a FERS/SSA dual benefits calculation form, wherein SSA calculated SSA benefit rates with a FERS offset and without a FERS offset from January 2003 through December 2017. Beginning January 1, 2003, the SSA rate with FERS was \$924.90 and without FERS was \$865.30. Beginning December 1, 2003, the SSA rate with FERS was \$944.20 and without FERS was \$883.40. Beginning December 1, 2004, the SSA rate with FERS was \$969.70 and without FERS was \$907.20. Beginning December 1, 2005, the SSA rate with FERS was \$1,009.40 and without FERS was \$944.30. Beginning December 1, 2006, the SSA rate with FERS was \$1,042.70 and without FERS was \$975.40. Beginning December 1, 2007, the SSA rate with FERS was \$1,066.60 and without FERS was \$997.80. Beginning December 1, 2008, the SSA rate with FERS was \$1,128.40 and without FERS was \$1,055.60. Beginning December 1, 2009, the SSA rate with FERS was \$1,128.40 and without FERS was \$1,055.60. Beginning December 1, 2010, the SSA rate with FERS was \$1,128.40 and without FERS was \$1,055.60. Beginning December 1, 2011, the SSA rate with FERS was \$1,169.00 and without FERS was \$1,093.50. Beginning December 1, 2012, the SSA rate with FERS was

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<sup>3</sup> Prior to the present claim, under OWCP File No. xxxxxx590, OWCP accepted that on May 30, 2004 appellant sustained a left rotator cuff tear and closed fracture of the left shoulder, necessitating authorized arthroscopic surgery performed on June 23, 2004. On June 22, 2007 it administratively combined the present claim, with OWCP File No. xxxxxx590 as the master claim number.

<sup>4</sup> By decision dated July 18, 2008, OWCP reduced appellant's wage-loss compensation effective that day based on his ability to earn wages in the constructed position of customer service representative.

\$1,188.80 and without FERS was \$1,112.10. Beginning December 1, 2013, the SSA rate with FERS was \$1,206.50 and without FERS was \$1,128.70. Beginning December 1, 2014, the SSA rate with FERS was \$1,227.10 and without FERS was \$1,147.80. Beginning December 1, 2015, the SSA rate with FERS was \$1,227.10 and without FERS was \$1,147.80. Beginning December 1, 2016, the SSA rate with FERS was \$1,230.70 and without FERS was \$1,151.20. Beginning December 1, 2017, the SSA rate with FERS was \$1,255.30 and without FERS was \$1,174.20.

In a letter dated March 16, 2018, OWCP notified appellant that SSA had confirmed his receipt of age-related retirement benefits attributable, in part, to his federal service. It explained that the portion of SSA age-related retirement benefits attributable to his federal service would be deducted from his 28-day periodic rolls compensation payments beginning March 4, 2018, in the amount of \$74.86 every 28 days.

In a letter dated March 26, 2018, appellant acknowledged that he received \$1,268.00 a month in SSA benefits. He contended that OWCP should not have reduced his FECA payments as he did not receive FERS retirement.

In a letter dated April 9, 2018, OWCP noted that, while appellant had not received FERS retirement benefits through the Office of Personnel Management, he had received a prohibited dual benefit as his SSA benefits were based in part on FERS service. It explained that it had reduced his FECA benefits based on the FERS portion of SSA benefits that were attributable to federal service.

OWCP completed a FERS offset calculation worksheet on April 2, 2020. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period July 23 through March 3, 2018 for a total overpayment amount of \$10,436.69. OWCP determined: during the period July 23 through November 30, 2006, an overpayment had been created in the amount of \$281.15; for the period December 1, 2006 through November 30, 2007, an overpayment had been created in the amount of \$809.82; for the period December 1, 2007 through November 30, 2008, an overpayment had been created in the amount of \$830.14; for the period December 1, 2008 through November 30, 2009, an overpayment had been created in the amount of \$876.00; for the period December 1, 2009 through November 30, 2010, an overpayment had been created in the amount of \$876.00; for the period December 1, 2010 through November 30, 2011, an overpayment had been created in the amount of \$876.00; for the period December 1, 2011 through November 30, 2012, an overpayment had been created in the amount of \$910.98; for the period December 1, 2012 through November 30, 2013, an overpayment had been created in the amount of \$922.93; for the period December 1, 2013 through November 30, 2014, an overpayment had been created in the amount of \$937.37; for the period December 1, 2014 through November 30, 2015, an overpayment had been created in the amount of \$954.21; for the period December 1, 2015 through November 30, 2016, an overpayment had been created in the amount of \$956.83; for the period December 1, 2016 through November 30, 2017; an overpayment had been created in the amount of \$956.62; and for the period December 1, 2017 through March 3, 2018, an overpayment had been created in the amount of \$248.65. It added the overpaid amounts to equal \$10,436.69.

In a preliminary overpayment determination dated April 2, 2020, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$10,436.69, for the period

July 23, 2006 through March 3, 2018, because the SSA/FERS offset was not applied to payments for this period. It determined that he was with fault in the creation of the overpayment because he accepted a payment which he knew, or reasonably should have known, to be incorrect. OWCP requested that appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method, and advised him that he could request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. It further notified him that, within 30 days of the date of the letter, he could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a prercoupment hearing.

In response, appellant provided an overpayment action request form requesting that OWCP issue a decision on the issues of fault and possible waiver based on the written evidence of record. He contended that he did not report SSA benefits received as they were based only on private sector employment. Appellant also submitted a statement dated April 8, 2020, noting that OWCP did not indicate any problem with his benefits in its communications to him from 2006 through 2020. He also provided a statement dated April 14, 2020, contending that his SSA benefits were based on 42 years of private sector employment. Appellant did not complete the overpayment recovery questionnaire or otherwise provide the financial information requested.

By decision dated June 5, 2020, OWCP finalized the preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$10,436.69, for the period July 23, 2006 through March 3, 2018, because the SSA/FERS offset had not been applied to his wage-loss compensation. It further found that he was with fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment, because he accepted payments which he knew or should have known to be incorrect. Recovery of the overpayment would be accomplished by deducting \$308.00 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 duty.<sup>5</sup> 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.<sup>6</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-09 provides that FECA benefits have

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,436.69, for the period July 23, 2006 through March 3, 2018, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without appropriate offset.

As noted, a claimant cannot receive concurrent FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service from July 23, 2006 through March 3, 2018. Consequently, the fact of the overpayment has been established.

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 the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS during the specific period July 23, 2006 through March 3, 2018. OWCP provided its calculation for each relevant period based on SSA's worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period July 23, 2006 through March 3, 2018 and finds that an overpayment of compensation in the amount of \$10,436.69 has been established.

### **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."<sup>10</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>11</sup>

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; (2) failed to furnish

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<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>9</sup> *Supra* note 5. *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>10</sup> 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

<sup>11</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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.<sup>12</sup> 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.<sup>13</sup>

OWCP's procedures provide that, if a claimant receives benefits from 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.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$10,436.69 overpayment of compensation.

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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> Therefore, based on the circumstances described, the Board finds

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<sup>12</sup> 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).

<sup>13</sup> *Id.* at § 10.433(b); *L.L.*, Docket No. 19-1690 (issued February 25, 2020); *C.L.*, *id.*

<sup>14</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *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).

<sup>17</sup> *J.S.*, Docket No. 19-0824 (issued October 4, 2019).

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 July 23, 2006 through March 3, 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.<sup>18</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,436.69, for the period July 23, 2006 through March 3, 2018, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset. The Board further finds that OWCP improperly determined that he was at fault in the creation of the overpayment of compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 5, 2020 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: May 27, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.