

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

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D.S., Appellant )

and )

DEPARTMENT OF TRANSPORTATION, )  
FEDERAL AVIATION ADMINISTRATION, )  
Longmont, CO, Employer )

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Docket No. 21-0305  
Issued: November 12, 2021

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REVERSING CASE**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On December 26, 2020 appellant filed a timely appeal from a November 9, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 21-0305.

On May 10, 1988, appellant filed a claim for occupational disease (Form CA-2) alleging hearing loss due to factors of his federal employment as an air traffic control specialist since December 29, 1978. OWCP accepted his claim for bilateral hearing loss due to noise and bilateral tinnitus. The record provides documentation that appellant received wage-loss compensation on the periodic rolls, based upon his loss of wage-earning capacity since June 16, 2002.

In a claim for compensation (Form CA-7) dated April 20, 2006, appellant indicated that his retirement system was "other" than Civil Service Retirement System (CSRS), the Federal Employees Retirement System (FERS), or Social Security Administration (SSA) benefits.

In a Form CA-7 dated June 23, 2017, appellant indicated that he was covered under the CSRS.

In a form dated July 13, 2020, SSA advised OWCP that appellant had concurrently received Federal Employees' Compensation Act<sup>1</sup> (FECA) benefits and retirement benefits through FERS beginning April 2017. It provided the amount he had received in retirement benefits, including the amount earned through FERS and the hypothetical amount that he would have received without FERS for April and December 2017, January and December 2018, January and December 2019, and January 2020.

In a FERS offset calculation sheet dated August 18, 2020, OWCP calculated appellant's total overpayment amount from April 1, 2017 through August 15, 2020 as \$17,082.97.

On August 18, 2020 OWCP issued a preliminary overpayment determination that appellant had received an overpayment of compensation, for which he was without fault, in the amount of \$17,082.97 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period April 1, 2017 through August 15, 2020. It provided an overpayment calculation. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and provided him with an overpayment action request form containing appeal rights. It afforded him 30 days to respond.

Appellant completed and returned the Form OWCP-20, which was received by OWCP on September 2, 2020. Received along with his Form OWCP-20 was a letter from the employing establishment addressed to him dated August 2, 2019. The employing establishment informed appellant that he was entitled to corrective action under the Federal Erroneous Retirement Coverage Corrections Act (FERCCA) due to an error in retirement plan coverage. It noted that he was appointed to a position correctly covered by CSRS on January 9, 1975 and separated twice while receiving workers' compensation benefits from August 2, 1987 to January 30, 1988 and from August 26, 1989 through January 10, 2004. The employing establishment explained that, because appellant was covered under CSRS and received FECA benefits while separated, he should not have been placed in CSRS Offset program upon being rehired, and should have remained covered under CSRS. However, a review of appellant's personnel records indicates that on January 11, 2004 he was incorrectly placed under the CSRS Offset program. It noted that, because the error existed for over three years, he was entitled the benefits under FERCCA. However, because the law excluded appellant from Social Security, he did not have the choice of whether to stay under his current retirement plan or to change the plan he should have been placed under. In an e-mail from the employing establishment to appellant dated August 28, 2020, an employing establishment representative explained that appellant should have been placed back under the CSRS retirement system when he was rehired in 2004, but was instead placed under the CSRS Offset system.

By decision dated November 9, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$17,082.97, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits from April 1, 2017 through August 15, 2020.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

The Board, having duly considered this matter, finds that OWCP failed to properly develop the underlying issue of what portion of appellant's SSA age-related retirement benefits were attributable to federal employment.<sup>2</sup>

OWCP's procedures provide that an overpayment occurs when FECA compensation is not reduced by the FERS/FECA offset amount. Since the SSA will not report an offset amount until after SSA benefits are received, an overpayment will almost always occur and will need to be calculated for each period in which the offset amount was not withheld from compensation.<sup>3</sup> The offset provision of 5 U.S.C. § 8116(d)(2) and applicable regulations apply to SSA age-related retirement benefits that are attributable to federal service.<sup>4</sup> 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.<sup>5</sup> In identifying the fact and amount of an overpayment of compensation following a claimant's receipt of SSA age-related retirement benefits, the Board has observed that OWCP uses a FERS Offset Calculation Worksheet.<sup>6</sup> This calculation worksheet is sent to SSA and the completed form is returned to OWCP setting forth purported SSA calculations as to the effective date and rate of SSA benefits without FERS and the effective date and rate of SSA benefits with FERS.<sup>7</sup> Following receipt of the purported SSA calculations, a preliminary determination of overpayment is issued if a prohibited dual benefit was received.<sup>8</sup>

The Board has observed, however, that not all federal employees are enrolled in FERS.<sup>9</sup> Some FECA claimants are enrolled in another retirement program, such as the CSRS. Other federal employees are not entitled to be enrolled in a federal retirement program. Therefore, OWCP's procedures with regard to requesting offset information are not applicable to all recipients of FECA compensation and SSA age-related retirement benefits. As such, the information solicited on the FERS Offset Calculation Worksheet that OWCP sends to SSA is not applicable to non-FERS claimants and does not establish either the fact or amount of an overpayment.

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<sup>2</sup> See *Order Reversing Case, C.T., widow of J.T.*, Docket No. 21-0153 (issued July 21, 2021); *Order Reversing Case, W.G.*, Docket No. 20-1389 (issued June 30, 2021); *Order Reversing Case, R.L.*, Docket No. 20-1333 (issued May 13, 2021); *J.L.*, Docket No. 19-1806 (issued July 29, 2020); *A.C.*, Docket No. 19-0174 (issued July 9, 2019).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management *Identifying and Calculating an Overpayment*, Chapter 6.200.1 (h), (September 2018).

<sup>4</sup> See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

<sup>5</sup> FECA Bulletin No. 97-09 (issued February 3, 1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *J.L.*, *supra* note 2.

<sup>9</sup> See *Order Reversing Case, W.G.*, *supra* note 2.

Here, the evidence of record does not establish that appellant was covered under FERS. Rather the evidence establishes that he was covered either under CSRS or CSRS Offset during his federal service. As such, the Board finds that the November 9, 2020 decision must be reversed.<sup>10</sup>

**IT IS HEREBY ORDERED THAT** the November 9, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 12, 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

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<sup>10</sup> See *Order Reversing Case, R.L., supra* note 2.