

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

_____)	
L.S., Appellant)	
)	
and)	Docket No. 21-0562
)	Issued: November 30, 2021
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 28, 2021 appellant filed a timely appeal from a January 13, 2021 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 over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,344.57, for the period January 1 through November 7, 2020, because he concurrently received Social Security Administration (SSA) age-

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence 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.*

related retirement benefits and FECA wage-loss compensation 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 \$150.00 from appellant's continuing compensation every 28 days.

FACTUAL HISTORY

On September 5, 2012 appellant, then a 56-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 2012 he fell from a squatting position onto his right hip area while in the performance of duty. Initially, he did not stop work. Appellant's retirement coverage was listed as Federal Employees Retirement System (FERS). On September 24, 2012 OWCP accepted the claim for right hip strain. It paid appellant wage-loss compensation on the supplemental rolls as of November 20, 2012 and on the periodic rolls as of February 10, 2013.

On March 24, 2020 appellant forwarded a February 19, 2020 letter from SSA indicating that he would begin receiving \$1,369.80 on February 19, 2020 and every 28 days thereafter for his age-related retirement benefits.

On October 5, 2020 OWCP provided SSA with a FERS/SSA dual benefits calculation form. It listed the computation period as December 27, 2017 onward.

On October 21, 2020 SSA forwarded OWCP a completed FERS/SSA dual benefits calculation form. SSA indicated that, effective January 2020, appellant's SSA rate with FERS was \$1,369.80, and without FERS was \$461.30.

By letter dated November 18, 2020, OWCP notified appellant that SSA had confirmed his receipt of age-related retirement benefits since January 1, 2020 attributable, in part, to his federal service. It explained that the portion of his SSA age-related retirement benefits attributable to his federal service would be deducted from his 28-day periodic rolls compensation payments beginning November 8, 2020, resulting in a net compensation benefit of \$1,597.50 every 28 days.

OWCP completed a FERS offset overpayment calculation worksheet on November 18, 2020. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days from January 1 through November 7, 2020, for a total overpayment amount of \$9,344.57.

In a preliminary overpayment determination dated November 18, 2020, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$9,344.57, for the period January 1 through November 7, 2020, because his wage-loss compensation payments had not been reduced to offset his SSA age-related retirement benefits that were attributable to federal service. It determined that he was at fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method. It advised him that he could request a waiver of recovery of the overpayment, if he believed that recovery of the overpayment would defeat the purpose of FECA, or would be against equity and good conscience. OWCP requested financial

information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It further notified appellant that, within 30 days of the date of the letter, he could contest the overpayment and request a telephonic conference, a final decision based on the written evidence, or a precoupment hearing.

On December 29, 2020 OWCP received appellant's Form OWCP-20 overpayment recovery questionnaire. Appellant contested the overpayment and indicated that he was informed by OWCP that "everything was in order." He listed total monthly income of \$2,869.00 and total monthly expenses of \$2,239.00. Appellant listed assets of \$1,200.00 in checking and \$35,000.00 in savings. He indicated that, in February 2020, he called OWCP to inform them that he had received his first SSA check. Appellant also indicated that he was not aware of an overpayment. He noted that he informed OWCP of his receipt of SSA benefits "which was my responsibility and expected OWCP to make the necessary adjustment." Appellant also noted that February 2020, "was the first letter that explain[ed] anything to [him]."

By decision dated January 13, 2021, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$9,344.57, for the period January 1 through November 7, 2020, because he had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset. It further found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$150.00 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.³ 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.⁴

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.⁵ 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.⁶

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

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

⁶ FECA Bulletin No. 97-09 (February 3, 1997).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,344.57, for the period January 1 through November 7, 2020, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation 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.⁷ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service from January 1 through November 7, 2020. 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 benefit rates with FERS and without FERS during the period January 1 through November 7, 2020. OWCP provided its overpayment calculation for the relevant period based on SSA's dual benefits worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 1 through November 7, 2020, and finds that an overpayment of compensation in the amount of \$9,344.57 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."⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹

On the issue of fault, Section 10.433(a) of OWCP's regulations provides that an individual is at 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 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.¹⁰ Section 10.433(b) further provides that whether an individual was at fault with respect to the creation of an overpayment depends on the circumstances

⁷ *Supra* note 4.

⁸ 5 U.S.C. § 8129(a).

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 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).

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.¹¹

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.¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$9,344.57 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 benefits concurrent with disability/wage-loss compensation was prohibited.¹³ The record reflects that on March 24, 2020 appellant forwarded a February 19, 2020 letter from SSA indicating that he would begin receiving \$1,369.80 on February 19, 2020 and every 28 days thereafter for his age-related retirement benefits. Because of the complex nature of SSA benefits administration, he could not have been expected to be able to calculate the amount of an offset. Therefore, appellant could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.¹⁴

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.¹⁵ The Board finds that appellant was without other options to avoid a potential FECA overpayment. The Board further finds that his attempt to inform OWCP of his SSA age-related retirement award notice was timely and reasonable.¹⁶

¹¹ *Id.* at § 10.433(b); *L.L.*, Docket No. 19-1690 (issued February 25, 2020); *C.L.*, *id.*

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

¹³ *Id.*

¹⁴ *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 he was not expected to be able to calculate the amount of the offset prior to receipt of information for the SSA).

¹⁵ *Supra* note 11.

¹⁶ *Marcia L. Wright*, 37 ECAB 435 (issued March 28, 1986) (The Board found that, given the extenuating circumstances of the case, the claimant's actions in reporting her change in status were both timely and reasonable and concluded that the claimant should be found not at fault).

Therefore, based on the circumstances described, OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period January 1 through November 7, 2020.¹⁷

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.¹⁸

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,344.57, for the period January 1 through November 7, 2020, 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.

¹⁷ See *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

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

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2021 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: November 30, 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