

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

<p>T.C., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, POST OFFICE, Garden City, NY, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 20-1294 Issued: August 16, 2022</p>
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 13, 2020 appellant filed a timely appeal from a June 8, 2020 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 found that appellant received an overpayment of compensation in the amount of \$56,575.63, for the period September 1, 2008 through November 9, 2019, because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset; (2) whether OWCP properly determined that appellant was at fault in the creation of the

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 8, 2020 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.*

overpayment thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$650.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On April 1, 2004 appellant, then a 61-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained injuries to his right shoulder, right arm, and left hip area when a hamper of mail rolled backwards and knocked him off a truck while in the performance of duty. He stopped work that day. OWCP initially accepted the claim for right shoulder contusion. It subsequently expanded its acceptance of the claim to include disorder of bursae and tendons in right shoulder region, adhesive capsulitis of right shoulder, sprain of right shoulder and upper arm, superior glenoid labrum, sprain of lumbosacral joint, and displacement of lumbar intervertebral disc without myelopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls from May 18 through June 12, 2004, and on the periodic rolls as of June 13, 2004.

In a letter dated June 8, 2004, 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. OWCP advised appellant to notify it immediately after filing for or receiving SSA age-related retirement benefits. On June 15, 2004 appellant, through his signature, acknowledged that he understood that willful failure on his part to comply with these conditions could result in termination or forfeiture of benefits and liability for resulting overpayments.

On September 19, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form and requested that the computation period be provided.

On September 30, 2019 OWCP received the FERS/SSA dual benefits form from SSA dated September 25, 2019, which indicated appellant's SSA benefit rates with FERS and without FERS from September 2008 through December 2018. Beginning September 2008, the SSA rate with FERS was \$1,406.70 and without FERS was \$1,024.00. Beginning December 2008, December 2009, and December 2010, the SSA rate with FERS was \$1,488.20 and without FERS was \$1,083.30. Beginning December 2011, the SSA rate with FERS was \$1,541.70 and without FERS was \$1,122.20. Beginning December 2012, the SSA rate with FERS was \$1,567.90 and without FERS was \$1,141.20. Beginning December 2013, the SSA rate with FERS was \$1,591.40 and without FERS was \$1,158.30. Beginning December 2014 and December 2015, the SSA rate with FERS was \$1,618.40 and without FERS was \$1,177.90. Beginning December 2016, the SSA rate with FERS was \$1,523.20 and without FERS was \$1,181.40. Beginning December 2017, the SSA rate with FERS was \$1,655.60 and without FERS was \$1,205.00. Beginning December 2018, the SSA rate with FERS was \$1,701.90 and without FERS was \$1,238.70.

In a November 19, 2019 letter, OWCP advised appellant that he had been receiving FERS/SSA dual benefits and that a portion of the SSA benefits, which were attributed to his federal service, required an offset of his FECA compensation benefits. It indicated that an SSA offset of \$15.27 would be made from his FECA payments and that his new compensation payment every 28 days after SSA offset would be \$2,637.25. Based on information provided by SSA regarding

the amount of appellant's age-related retirement benefits, which were attributable to federal service, OWCP adjusted his FECA wage-loss compensation effective November 10, 2019.

On November 25, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$56,575.63 had been created. It explained that the overpayment occurred because appellant's SSA age-related retirement benefits that he received from September 1, 2008 through November 9, 2019 were partially based on credits earned while working for the Federal Government, and that this portion of his SSA benefit constituted a prohibited dual benefit. OWCP documented its calculation of the total overpayment in the amount of \$56,575.63. It found that appellant was without fault in the creation of this overpayment. OWCP forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and requested that appellant provide supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. It afforded him 30 days to respond.

On December 18, 2019 *via* the overpayment action request form, appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. He maintained that the overpayment occurred through no fault of his own and requested waiver of the recovery of the overpayment. Appellant argued that repayment of the overpayment would create a tremendous hardship on his family's lifestyle in light of their rising medical bills due to their declining health.

In a December 12, 2019 Form OWCP-20, appellant noted a monthly gross income of \$2,529.00 in SSA benefits for himself, \$4,823.00 in monthly expenses, and assets of \$3,058.00. He attached over 100 pages of financial documentation to substantiate his expenses.

A prerecoumment hearing was held telephonically on March 31, 2020. OWCP's hearing representative advised him to submit additional financial documentation and information pertaining to the alleged overpayment. She afforded appellant 30 days to provide the additional information.

In a March 31, 2020 letter, appellant indicated that he had previously repaid a \$20,336.00 overpayment to SSA, which was deducted from his SSA benefit payments in monthly installments of \$200.00. In support of his contention, he submitted a December 23, 2007 notice of change in benefits from SSA informing appellant that he had been overpaid SSA disability benefits in the amount of \$20,336.00. Appellant also submitted a March 3, 2008 repayment withholding schedule from SSA which indicated that, effective March 2008, SSA was withholding \$200.00 each month from his SSA benefits to collect the overpayment of SSA disability benefits. The letter further indicated that appellant would not receive his full regular monthly payment until October 2016. Appellant also submitted additional financial documentation concerning his reported monthly income and expenses.

By decision dated June 8, 2020, OWCP's hearing representative finalized the preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$56,575.63 occurred because appellant received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset for the period September 1, 2008 through November 9, 2019. She modified the preliminary overpayment determination and found that he was at fault in the creation of the overpayment because he had failed to report his SSA age-related

retirement benefits as instructed and that therefore he was in receipt of SSA retirement benefits that he “could reasonably be known to be incorrect.” The hearing representative determined that appellant had a total monthly income of \$4,794.95, cash/checking balances of over \$3,000.00, and a retirement account balance over \$20,000.00. She further found that his total monthly expenses were \$3,378.71. The hearing representative found that appellant had \$1,416.24 in surplus income after subtracting the total monthly income from the adjusted monthly expenses. She allowed additional living expenses of \$500.00 per month. The hearing representative required recovery of the overpayment by deducting \$650.00 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.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 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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation, for the period September 1, 2008 through November 9, 2019, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement attributable to his federal service during the relevant period. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁷ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 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).

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also M.A.*, Docket No. 20-0120 (issued January 8, 2021); *S.M.*, Docket No. 20-0152 (issued August 10, 2020).

⁷ *See N.B.*, Docket No. 20-0727 (issued January 26, 2021); *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

federal service during the period September 1, 2008 through November 9, 2019. Consequently, the fact of overpayment has been established.

The Board further finds, however, that the case is not in posture for decision with respect to the amount of the overpayment. To determine the amount of the overpayment, the portion of SSA 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 age-related retirement benefit rates with FERS and without FERS for the period September 2008 through December 2018. OWCP provided its calculations of the amount that should have been offset during the relevant period of September 1, 2008 through November 9, 2019 based on information provided by SSA by determining the difference between the SSA with FERS rate and the SSA without FERS rate and determined that he received an overpayment in the amount of \$56,575.63.

The Board notes that appellant owed SSA \$20,335.00 from a prior overpayment of SSA disability benefits. In a March 3, 2008 letter, SSA indicated that it was withholding \$200.00 each month from appellant's remaining SSA disability pay and, would subsequently withhold in part from his SSA age-related retirement benefits, to collect the overpayment of SSA disability benefits. The record indicates that appellant received \$200.00 less in SSA age-related retirement benefits each month from September 2008 until October 2016.

For this reason, the Board finds that it remains unclear whether the overpayment was calculated correctly for the period September 1, 2008 through November 9, 2019. Accordingly, the case must be remanded to OWCP. On remand, OWCP shall clarify the amount of SSA age-related retirement benefits that appellant actually received during the overpayment period, accounting for the fact that appellant received \$200.00 less in SSA age-related retirement benefits each month from September 2008 until October 2016 due to the overpayment of SSA disability benefits. It shall then compute the amount of the overpayment of compensation and issue a new preliminary overpayment determination, with an overpayment action request form, a new Form OWCP-20, and instructions for appellant to provide updated supporting documentation. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁸ 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 would be against equity and good conscience.⁹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁰ On the issue of fault, 20 C.F.R. § 10.433(a) 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; or (2) failed to furnish information, which the individual knew or should have known to be material; or (3) with respect to the overpaid

⁸ 5 U.S.C. § 8129(b).

⁹ *Id.*

¹⁰ *See V.B.*, Docket No. 19-1082 (issued October 29, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹¹

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.¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period September 1, 2008 through November 9, 2019, thereby precluding waiver of recovery of the overpayment.

In the preliminary decision dated November 25, 2019, OWCP found that appellant was without fault in the creation of the overpayment due to the complexity of the matter and the lack of evidence of record that appellant knew or should have known the proper course of action to be followed in reporting his SSA age-related retirement benefits. OWCP's hearing representative, in the decision dated June 8, 2020, however, found that appellant was at fault in the creation of the overpayment because he knew that he was receiving SSA benefits and failed to report his receipt of SSA benefits on the pertinent EN1032 forms.

Effective September 2018, OWCP's procedures provide that a claimant should be found without fault in a dual benefits scenario where the claimant receives SSA benefits as part of an annuity under FERS unless there is evidence on file that the claimant was aware that the receipt of

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.¹³

Therefore, based on the circumstances described above, OWCP has not established that appellant was at fault in the creation of the overpayment for the period September 1, 2008 through November 9, 2019.

As the Board finds that appellant was without fault in the creation of the overpayment for the period September 1, 2008 through November 9, 2019, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period September 1, 2008 through November 9, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset; however, the case is not in posture for decision regarding the amount of the overpayment. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g (4) (September 2018); *see P.H., (K.H.)*, Docket No. 19-1130 (issued November 19, 2020); *J.B.*, Docket No. 19-1244 (issued December 20, 2019); *G.G.*, Docket No. 19-0684 (issued December 24, 2019) (Due to the complexity of SSA age-related retirement benefits administration, appellant was without 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 the SSA); *V.B.*, *supra* note 10.

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

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part, and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 16, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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