

Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$629.31 from appellant's continuing compensation payments every 28 days; and (4) whether OWCP properly suspended appellant's entitlement to wage-loss compensation benefits, effective September 7, 2021, for failure to complete an EN1032 form as requested.

FACTUAL HISTORY

On December 11, 1996 appellant, then a 50-year-old senior wildlife biologist, filed an occupational disease claim (Form CA-2) alleging that his October 30, 1996 intracranial hemorrhage (ICH) was caused or aggravated by his federal employment. He attributed his ICH to the stress of his Study Director position, which had required nine weeks of field study, and little rest while living in a motel. OWCP accepted the claim for hemiplegia and hemiparesis following cerebral infarction affecting left non-dominant; unspecified convulsions; nontraumatic subarachnoid hemorrhage from other intracranial arteries; other sequelae of other cerebrovascular disease; other muscle spasm; and cerebral aneurysm, nonruptured; closed peritrochanteric fracture of neck of femur; and lumbago.³

On March 16, 1998 appellant returned to work in a modified wildlife biologist position. By decision dated October 30, 1998, OWCP determined that the modified position fairly and reasonably represented appellant's wage-earning capacity and adjusted his wage-loss compensation accordingly. It paid appellant wage-loss compensation. Effective September 2, 2017, appellant retired from the employing establishment. He continued to receive wage-loss compensation on OWCP's periodic rolls pursuant to OWCP's October 30, 1998 loss of wage-earning capacity determination.

On August 19, 2020 OWCP received a Federal Employee's Retirement System (FERS)/SSA dual benefits form, completed by a SSA official on that date. It indicated that appellant had been in receipt of SSA age-related retirement benefits since August 1, 2012. The form reported appellant's SSA age-related retirement benefit rates with FERS and without FERS for the period August 1, 2012 through December 1, 2019.

In an August 31, 2020 FERS offset overpayment calculation worksheet, OWCP determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from August 1, 2012 through August 15, 2020 resulted in a total overpayment of \$74,512.93.

In a September 8, 2020 preliminary overpayment determination, OWCP found that appellant had received an overpayment of compensation in the amount of \$74,512.93 for the period August 1, 2012 through August 15, 2020 for which appellant was without fault, because his wage-loss compensation payments had not been reduced to offset his SSA age-related retirement benefits attributable to federal service. In a September 9, 2020 letter, OWCP advised appellant, effective

³ Under OWCP File No. xxxxxx611, OWCP accepted a September 24, 2002 traumatic injury for the conditions of closed fracture of right femur at base of neck, right hip and other ossification of muscle, multiple sites. Appellant's claims have been administratively combined, with OWCP File No. xxxxxx791 serving as the master file.

August 16, 2020, his compensation benefits would be offset by his SSA benefits attributable to his federal service. 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 further requested supporting 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 prerecoupment hearing.

On October 7, 2020 appellant requested a prerecoupment hearing and submitted a completed Form OWCP-20 and supporting financial documentation.

By decision dated November 19, 2020, OWCP's hearing representative conducted a preliminary review and set aside OWCP's September 8, 2020 preliminary finding. The hearing representative found that the record did not contain an election form establishing that appellant was covered under the FERS retirement plan; rather, he received SSA benefits, effective August 1, 2012, as a result of his contributions to SSA under the Civil Service Retirement System (CSRS) offset retirement plan. The hearing representative remanded the case for further development regarding the amount and period of the overpayment, noting that OWCP should request additional information from SSA and Office of Personnel Management (OPM) regarding appellant's retirement system and his SSA rate with and without any required offset based on his federal civilian service.

On November 20, 2020 OWCP issued separate letters to SSA, OPM and the employing establishment requesting additional information. It requested that SSA verify whether the offset was for FERS and to specify appellant's SSA benefit rates with and without any required offset based on his federal civilian service.

On December 17, 2020 OWCP received the employing establishment's response, which included five notification of personnel action (PS Form 50) forms dated May 26, 1996, March 15, 1998, July 4, 1999, July 22, 2007, and September 2, 2017, each indicating that appellant's retirement plan was "FICA and civil service."

On December 21, 2020 OWCP received a second FERS/SSA dual benefits form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since August 1, 2012 and explained how the amounts posted were derived.

OWCP completed another FERS offset overpayment calculation on January 13, 2021. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period August 1, 2012 through August 15, 2020 resulted in a total overpayment of \$79,923.89.

On January 19, 2021 OWCP made a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$79,923.89 for which he was without fault, because his wage-loss compensation for the period August 1, 2012 through

August 15, 2020 had not been reduced to offset his SSA age-related retirement benefits attributable to federal service. It determined that he was without fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation to determine a reasonable repayment schedule and advised that he could request waiver of recovery. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or a prerecoumment hearing.

In a January 17, 2021 overpayment action request form, which OWCP received February 20, 2021, appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review regarding possible waiver. He submitted a January 17, 2021 Form OWCP-20 listing his monthly income of \$4,198.00, which included SSA benefits of \$1,681.00 and take-home earnings of \$2,517.00, and monthly expenses of \$5,240.00. Appellant requested that OWCP also consider his previously submitted financial documentation.

By decision dated March 15, 2021, OWCP denied appellant's request for a prerecoumment hearing as untimely filed. It found that, because his request was not filed within 30 days of the January 19, 2021 preliminary overpayment determination, he was not entitled to a prerecoumment hearing as a matter of right.

By decision dated March 18, 2021, OWCP finalized its preliminary determination, finding that appellant had received an overpayment of compensation in the amount of \$79,923.89 for the period August 1, 2012 through August 15, 2020. It determined that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment noting that the financial information provided did not fully establish the monthly expenses appellant listed on the OWCP-20 form. OWCP found that appellant had a surplus of \$1,731.00 after the monthly expenses were subtracted from the monthly income. Thus, the overpayment could not be waived as there was no evidence to substantiate that adjustment or recovery would defeat the purpose of the FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$629.31 from his continuing compensation payments.

On August 3, 2021 OWCP provided appellant with an EN1032 form and informed him that federal regulations required him to make an affidavit reading any earnings received or employment performed during the previous 15-month period. It notified him that he was required to fully answer all questions on the EN1032 form and return it within 30 days or his benefits would be suspended pursuant to 20 C.F.R. § 10.528. OWCP mailed the letter to appellant's address of record. No response was received.

By decision dated September 7, 2021, OWCP suspended appellant's wage-loss compensation and authorization for medical benefits under 20 C.F.R. § 10.525(a), effective that date, for failing to submit an EN1032 form as requested.

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 his or her duty.⁴ 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.⁵

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 states 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received a \$79,923.89 overpayment of compensation for the period August 1, 2012 through August 15, 2020 for which he was without fault because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset.

In its March 18, 2021 decision, OWCP found that an overpayment of compensation was created for the period August 1, 2012 through August 15, 2020. The overpayment determination was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant.

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.⁸ 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.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 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

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1 (h), (September 2018).

⁹ *See* 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

benefit.¹⁰ In identifying the fact and amount of an overpayment of compensation following a claimant's receipt of SSA age-related retirement benefits, OWCP sends a form 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.¹¹ OWCP then issues a preliminary overpayment determination if a prohibited dual benefit was received.¹²

The Board has observed, however, that not all federal employees are enrolled in FERS. 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. Herein, the evidence of record is clear that appellant was not enrolled in FERS. Rather, the PS Form 50 forms of record dated May 26, 1996, March 15, 1998, July 4, 1999, July 22, 2007, and September 2, 2017 established that appellant was covered under "FICA and civil service," not FERS. The Board, therefore, finds that OWCP has not established fact of overpayment.¹³

LEGAL PRECEDENT -- ISSUE 4

Section 8106(b) of FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.¹⁴

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.¹⁵ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.¹⁶

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

¹¹ *Id.*

¹² *N.C.*, Docket No. 21-1020 (issued February 4, 2022); *see 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).

¹³ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

¹⁴ 5 U.S.C. § 8106(b).

¹⁵ 20 C.F.R. § 10.528; *see also L.H.*, Docket No. 20-1455 (issued March 23, 2021); *R.B.*, Docket No. 20-0176 (issued June 25, 2020); *A.H.*, Docket No. 15-241 (issued April 3, 2015).

¹⁶ *Id.*

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly suspended appellant's entitlement to wage-loss compensation benefits, effective September 7, 2021, for failure to complete an EN1032 form as requested.

On August 3, 2021 OWCP provided appellant with an EN1032 form and notified him that federal regulations required him to complete the form and answer all questions concerning his employment or earnings. It properly notified him that, if he did not completely answer all questions and return within 30 days, his benefits would be suspended. The record reflects that OWCP's letter was sent to appellant's address of record and there is no indication that it was returned as undeliverable.¹⁷ Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.¹⁸

Appellant failed to timely submit the EN1032 form within 30 days of OWCP's request. He was receiving wage-loss compensation and was, therefore, required to complete the EN1032 form.¹⁹ Appellant's failure to file an EN1032 form within 30 days properly resulted in the suspension of his wage-loss compensation. Thus, the Board finds that OWCP properly suspended his wage-loss compensation benefits, effective September 7, 2021, pursuant to 20 C.F.R. § 10.528.²⁰

CONCLUSION

The Board finds that OWCP improperly determined that appellant received a \$79,923.89 overpayment of compensation for the period August 1, 2012 through August 15, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset. The Board further finds that OWCP properly suspended his wage-loss compensation benefits, effective September 7, 2021, for failure to complete an EN1032 form as requested.

¹⁷ See *J.H.*, Docket No. 20-0785 (issued October 23, 2020); *Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁸ *Id.*

¹⁹ See *R.S.*, Docket No. 20-0580 (issued September 14, 2020); *A.S.*, Docket No. 17-1530 (issued November 7, 2017).

²⁰ See *L.H.*, *supra* note 15; *P.M.*, Docket No. 16-0382 (issued May 19, 2016); *M.W.*, Docket No. 15-0507 (issued June 18, 2015).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2021 decision of the Office of Workers' Compensation Programs is reversed and the September 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board