

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

S.C., Appellant)	
)	
and)	Docket No. 21-0404
)	Issued: October 20, 2022
DEPARTMENT OF DEFENSE DEPENDENTS)	
SCHOOLS, LAKENHEATH MIDDLE)	
SCHOOL, Feltwell, Norfolk, U.K., 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 28, 2021 appellant filed a timely appeal from a September 15, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$27,428.36 for the period July 6, 2017 through

¹ The Board notes that, following the September 15, 2020 decision, OWCP and the Board 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.*

² 5 U.S.C. § 8101 *et seq.*

July 18, 2020 for which she was at fault, as she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On December 20, 1999 appellant, then a 48-year-old teacher, filed a traumatic injury claim (Form CA-1) alleging that on December 11, 1999 she sustained injuries to her head, legs, chest, and right shoulder as the result of a motor vehicle accident while in the performance of duty. She stopped work on that date.³ On the reverse side of the claim form, her supervisor indicated that she was covered by the Federal Employees' Retirement System (FERS).

On January 9, 2004 OWCP accepted appellant's claim for right femur fracture, right patella fracture, sternum fracture, nasal bone fracture, forehead laceration, concussion, central auditory processing disorder, subluxed right sternoclavicular joint, left knee partial anterior cruciate ligament tear/bony fragment, rib cage contusions/costal chondral separations, quadriceps tendon laceration, right knee post-traumatic global osteopenia, inflammation of the right acromioclavicular (AC) joint, central auditory processing disorder, post-traumatic right knee global osteopenia, and left knee partial anterior cruciate ligament tear.

On January 29, 2003 OWCP authorized wage-loss compensation on the daily rolls. Beginning on April 14, 2004, it paid wage-loss compensation on the periodic rolls, effective January 29, 2003.

In an April 3, 2009 letter, OWCP noted that appellant had received a third-party recovery in the amount of \$1,500,000.00 resulting in a retained surplus in the amount of \$478,213.39. It ended her wage-loss compensation, effective April 12, 2009, until the surplus was depleted. On May 4, 2009 OWCP noted that appellant had elected Office of Personnel Management (OPM) benefits.

In a memorandum of telephone call (Form CA-110) dated April 2, 2019, OWCP indicated that it had informed appellant that as she had reached retirement age and that it would ask SSA to complete documentation of her FERS offset. In May 24, 2019 CA-110 notes, it advised appellant that when it resumed her wage-loss compensation it would offset the FERS portion.

³ The date of injury occurred during the weekend, appellant's first missed day of work was December 13, 1999. Appellant returned to work on May 22, 2000 until her retirement in January 2003.

On June 20, 2019 appellant elected to receive FECA benefits retroactively to include a period during which benefits were paid by OPM effective July 8, 2017.⁴

On July 29, 2019 OWCP received a completed (FERS)/(SSA) dual benefits calculation form dated June 17, 2019 from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since July 2017. The form listed her SSA age-related retirement benefit rates with FERS and without FERS as follows: beginning July 2017, the monthly SSA rate with FERS was \$1,241.40 and without FERS was \$904.50; beginning December 2017, the monthly SSA rate with FERS was \$1,266.20 and without FERS was \$922.50; beginning December 2018, the monthly SSA rate with FERS was \$1,301.60 and without FERS was \$948.30.

On April 9, 2020 OWCP determined that the surplus of \$478,213.39 was absorbed during the period April 12, 2009 through July 5, 2017. It further deducted for dual benefit payment to OPM for July 8, 2017 through October 30, 2019 in the amount of \$30,622.83 and authorized wage-loss compensation beginning July 6, 2017.

In a letter dated April 15, 2020, appellant requested that OWCP deduct any SSA benefits from her ongoing wage-loss compensation to avoid an overpayment.

On August 4, 2020 OWCP received an additional completed (FERS)/(SSA) dual benefits calculation form from SSA dated July 18, 2020, which reported that appellant had been in receipt of SSA age-related retirement benefits and FECA benefits since July 2017. SSA reported that: beginning July 2017, the monthly SSA rate with FERS was \$1,241.40 and without FERS was \$520.50; beginning December 2017 the monthly SSA rate with FERS was \$1,266.20 and without FERS was \$530.90; beginning December 2018, the monthly SSA rate with FERS was \$1,301.60 and without FERS was \$545.70; beginning December 2019, the monthly SSA rate with FERS was \$1,322.40 and without FERS was \$554.40.

OWCP completed a FERS offset overpayment calculation worksheet on August 6, 2020. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from July 6, 2017 through July 18, 2020, resulted in a total overpayment of \$27,428.36. OWCP related: from July 1 to November 30, 2017, appellant received an overpayment in the amount of \$3,636.19; from December 1, 2017 through November 30, 2018, appellant received an overpayment in the amount of \$8,847.84; from December 1, 2018 through November 30, 2019, appellant received an overpayment in the amount of \$9,095.72; from December 1, 2019 through July 18, 2020, appellant received an overpayment in the amount of \$5,848.62.

In an August 10, 2020 letter, OWCP informed appellant that she had been receiving dual FERS and SSA age-related retirement benefits without an appropriate offset. It further informed her that her FECA wage-loss compensation benefits must be adjusted based on the FERS portion

⁴ On October 4, 2019 OPM provided OWCP with an estimate of \$29,114.27 for the period from July 18, 2017 through September 30, 2019. It requested the official effective date. On October 30, 2019 OPM noted that benefits were being paid on July 8, 2017, that FERS benefits were terminated as of October 30, 2019, and that appellant received dual benefits during the period July 8, 2017 through October 30, 2019 in the amount of \$30,622.83. It repeated this request on January 16, 2020.

of SSA benefits that were attributable to federal service. OWCP indicated that appellant's FECA benefits would be reduced beginning July 19, 2020 to the amount of \$708.92 every 28 days.

On August 10, 2020 OWCP made a preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$27,428.36 for which she was at fault because her wage-loss compensation payments for the period July 6, 2017 through July 18, 2020 had not been reduced to offset her SSA age-related retirement benefits attributable to federal service. It determined that she was at fault in the creation of the overpayment as she failed to provide information which she knew or should have known, to be material. OWCP requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation to determine a reasonable repayment schedule and advised that she could request waiver of recovery. It further requested that appellant 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 notified her that within 30 days of the date of the letter, she could request a final decision based on the written record or a precoupment hearing.

By decision dated September 15, 2020, OWCP found that appellant had received an overpayment in the amount of \$27,428.36 for the period July 6, 2017 through July 18, 2020. It determined that appellant was at fault in the creation of the overpayment and denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$400.00 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 his or her duty.⁵ 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.⁶

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.⁷ 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.⁸

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

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.⁹

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.¹⁰

ANALYSIS -- ISSUE 1

The Board finds the OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$27,428.36 for which she was at fault because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period July 6, 2017 through July 18, 2020 without an appropriate offset.

As previously noted, OWCP is required to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.¹¹ On July 29, 2019 and August 4, 2020 it received completed (FERS)/(SSA) dual benefits calculation forms from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since July 2017. However, the (FERS)/(SSA) dual benefits calculation forms included varying rates for appellant's SSA benefits without FERS. SSA reported that: beginning July 2017 appellant's monthly SSA rate with FERS was \$1,241.40 and without FERS was either \$904.50 or \$520.50; beginning December 2017 her monthly SSA rate with FERS was \$1,266.20 and without FERS was either \$922.50 or \$530.90; and beginning December 2018 her monthly SSA rate with FERS was \$1,301.60 and without FERS was either \$948.30 or \$545.70. OWCP applied the rate which resulted in the greater overpayment for appellant without requesting clarification from SSA.

The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.¹² With respect to the amount of the overpayment, the Board finds that OWCP has not adequately explained how the overpayment was determined in light of the discrepancies in the evidence provided by SSA as to the monthly SSA rate without FERS. As such, the Board is unable to verify the fact and amount of the overpayment of compensation in the amount of \$27,428.36.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

¹⁰ 20 C.F.R. § 10.433(b); *Id.* at Chapter 6.300.4g(4) (September 2018).

¹¹ 20 C.F.R. § 10.421(d); *S.H.*, Docket no. 20-1189 (issued January 27, 2021); *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019).

¹² *S.H.*, *id.*; *R.E.*, Docket No. 19-1583 (issued May 27, 2020); *J.M.*, Docket No. 18-1505 (issued June 21, 2019); *Teresa A. Ripley*, 56 ECAB 528 (2005).

Furthermore, as noted above, the Federal (FECA) Procedure Manual provides that, regarding an SSA dual benefits scenario, where the claimant receives SSA age-related retirement benefits as part of an annuity and wage-loss compensation under FECA, resulting in an overpayment the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.¹³ 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 and OWCP had repeatedly assured her that it would make the calculation prior to reinstating her on the periodic rolls. Therefore, she could not reasonably have been aware during the relevant period that her 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 Therefore, based on the circumstances described, the Board finds 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 6, 2017 through July 18, 2020. As appellant was not at fault in the creation of the overpayment for the period July 6, 2017 through July 18, 2020, OWCP should consider the issue of waiver of recovery of the overpayment.¹⁶

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$27,428.36 for which she was at fault because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period July 6, 2017 through July 18, 2020 without an appropriate offset.

¹³ *Supra* note 8; *H.H.*, Docket No. 18-0674 (issued September 3, 2020).

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 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.).

¹⁵ *Supra* note 8.

¹⁶ In light of the Board's findings with regard to Issue 1, the remaining issues are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 20, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board