

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 \$276.92 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On January 12, 2007 appellant, then a 51-year-old heating, ventilation and air conditioning equipment technician, filed an occupational disease claim (Form CA-2) alleging that he sustained heavy metal toxicity as a result of exposure to toxic chemicals related to factors of his federal employment. He related that he first became aware of his condition and that it was caused or aggravated by his federal employment on April 8, 2005. The employing establishment noted on the reverse side of the form that appellant had transferred to a new work location in August 2005. It provided that his retirement coverage was the Federal Employees Retirement System (FERS). OWCP accepted the claim for metal toxicity. It paid appellant wage-loss compensation for total disability on the supplemental rolls effective February 22, 2008 and on the periodic rolls effective November 22, 2009.

On September 5, 2019 OWCP sent a FERS/SSA dual benefits calculation form to SSA for completion.³ In a response dated September 10, 2019, SSA advised that appellant's SSA rate with FERS effective December 2018 was \$1,533.30 and without FERS was \$777.60. It indicated that he had received disability benefits from August 2008 through November 2018 and retirement benefits effective December 2018.

On October 8, 2020 OWCP again sent SSA a FERS/SSA dual benefits calculation form for completion.

In an October 21, 2020 response, SSA completed the FERS/SSA form and provided appellant's monthly benefits with and without FERS from December 2018 through December 2019. It indicated that effective December 2018 appellant's SSA rate with FERS was \$1,533.30 and without FERS was \$845.40 and effective December 2019 his SSA rate with FERS was \$1,557.80 and without FERS was \$858.80.

On November 17, 2020 OWCP completed FERS offset overpayment calculation forms. It calculated the amount that it should have offset from appellant's compensation for each period from December 1, 2018 through November 7, 2020. OWCP found that he had received an overpayment of \$8,277.48 for the period December 1, 2018 through November 30, 2019 and an overpayment of \$7,904.08 for the period December 1, 2019 through November 7, 2020. Based on these figures, it calculated the total overpayment amount of \$16,181.55.

On November 18, 2020 OWCP notified appellant of its preliminary overpayment determination that he had received a \$16,181.55 overpayment of compensation for the period December 1, 2018 through November 7, 2020 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It further

³ OWCP previously requested that SSA complete a dual benefits calculation form on August 30, 2017. In an October 12, 2017 response, SSA advised that appellant was receiving payments due to disability.

advised him of its preliminary determination that he was with fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method. Additionally, it provided an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoument hearing.

On November 23, 2020 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review and submitted a completed Form OWCP-20 with supporting financial documentation.

Following a preliminary review on January 5, 2022, OWCP's hearing representative vacated the November 18, 2020 preliminary overpayment determination. The hearing representative noted that OWCP had not sufficiently explained its calculation of the overpayment in the preliminary overpayment determination and further found that appellant was without fault in the creation of the overpayment. The hearing representative remanded the case for OWCP to issue a new preliminary overpayment determination and obtain updated financial information from appellant.

On January 19, 2022 OWCP notified appellant of its preliminary overpayment determination that he had received a \$16,181.55 overpayment of compensation for the period December 1, 2018 through November 7, 2020 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It provided its calculation of the overpayment. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised that he could request waiver of recovery of the overpayment. 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 telephone conference, a final decision based on the written evidence, or a prerecoument hearing.

On January 23, 2022 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He requested waiver of recovery of the overpayment, emphasizing that he had informed OWCP when he began receiving SSA retirement benefits.

In a completed Form OWCP-20 dated January 23, 2022, appellant indicated that he had \$70.00 in a checking account. He provided his monthly income as \$4,965.92 and his monthly expenses as \$5,881.00. Appellant submitted supporting financial information.

A telephonic hearing was held on May 20, 2022. At the hearing appellant related he had insufficient funds in his checking account and was unable to pay for dentures. He advised that his wife had a brain tumor. Appellant described his expenses and the hearing representative requested that he provided copies of his bills.

On May 23, 2022 appellant submitted additional financial documentation.

By decision dated October 19, 2022, OWCP's hearing representative finalized the January 19, 2022 preliminary overpayment determination. He found that appellant had received a

\$16,181.55 overpayment for the period December 1, 2018 through November 7, 2020 for which he was without fault because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The hearing representative noted that appellant's checking account showed an average balance of \$377.82. He determined that documentation supported that appellant had monthly income of \$5,362.38 and monthly expenses of \$4,341.93. The hearing representative denied waiver of recovery of the overpayment as appellant did not require substantially all of his income to meet ordinary and necessary living expenses. He required recovery of the overpayment by deducting \$276.92 from appellant's continuing compensation payments every 28 days.

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 properly determined that appellant received an overpayment of wage-loss compensation for the period December 1, 2018 through November 7, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability on the periodic rolls beginning November 22, 2009. Appellant received SSA age-related retirement benefits beginning December 1, 2018. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.⁸ The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see P.G.*, Docket No. 22-1073 (issued December 28, 2022); *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 *Supra* note 5; *see P.G.*, *supra* note 6; *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

attributable to his federal service. Accordingly, the Board finds that fact of overpayment has been established.⁹

The Board further finds that this case is not in posture for decision with respect to the amount of the overpayment.

The case record contains contradictory evidence from SSA regarding the amount that appellant would receive without FERS effective December 2018. On September 10, 2019 SSA completed a FERS/SSA dual benefits calculation form that indicated that his monthly SSA rate with FERS effective December 2018 was \$1,533.30 and without FERS was \$777.60. However, in a subsequent FERS/SSA dual benefits calculation form dated October 21, 2020, SSA advised that, effective December 2018, appellant's SSA rate with FERS was \$1,533.30 and without FERS was \$845.40.

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.¹⁰ The Board finds that OWCP has not adequately explained how the overpayment was determined given the discrepancies in the evidence provided by SSA regarding the amount of appellant's monthly SSA rate without the FERS offset effective December 2018. Consequently, OWCP has not established the amount of the overpayment in question.¹¹

Accordingly, the Board finds that the case must be remanded to OWCP. On remand OWCP shall seek clarification from SSA regarding appellant's SSA rate with and without FERS for the period in question. It shall then determine the amount of the overpayment of compensation and issue a new preliminary overpayment determination with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation for the period December 1, 2018 through November 7, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The Board further finds that the case is not in posture for decision regarding the amount of the overpayment.¹²

⁹ See *L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹⁰ *D.D.*, Docket No. 20-1172 (issued September 29, 2021); *L.H.*, Docket No. 20-0115 (issued September 4, 2020).

¹¹ *T.N.*, Docket No. 20-0164 (issued November 23, 2021); *A.V.*, Docket No. 20-0774 (issued June 10, 2021).

¹² In light of the Board's disposition in Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 4, 2023
Washington, DC

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

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

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