

² The Board notes that, following the August 29, 2022 decision, OWCP received additional evidence. 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.*

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 it properly required recovery of the overpayment by deducting \$276.92 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 10, 2009 appellant, then a 50-year-old mail distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he injured his right shoulder as a result of factors of his federal employment, including constantly lifting boxes and pushing mail containers. He noted that he first became aware of his condition and realized its relationship to his federal employment on January 23, 2009. On the reverse side of the claim form, the employing establishment indicated that appellant was enrolled in the Federal Employees Retirement System (FERS). OWCP accepted the claim for sprain of the right shoulder and upper arm. It subsequently expanded the acceptance of the claim to include cervical spondylosis without myelopathy and sprain of the shoulder and upper arm, rotator cuff, bilateral. OWCP paid appellant wage-loss compensation effective August 24, 2009.

On September 30, 2019 appellant informed OWCP that he sought to elect OPM disability retirement benefits in lieu of FECA wage-loss compensation benefits. In a September 24, 2019 Form CA-1105, he provided the effective date of his election as July 21, 2020.

On September 29, 2020 appellant informed OWCP that he sought to elect FECA wage-loss compensation benefits in lieu of OPM disability retirement benefits effective September 1, 2020. Thereafter, OWCP paid him wage-loss compensation on the supplemental rolls effective September 1, 2020 and on the periodic rolls, effective October 11, 2020.

In a September 30, 2020 letter to OWCP, OPM advised that appellant had elected FECA benefits in lieu of OPM benefits effective September 1, 2020. It noted that its records indicated that he had not received workers' compensation benefits from OWCP for the period September 1 through 30, 2020, and thus there was currently no dual payment.

On August 25, 2021 OWCP requested information from SSA regarding potential FERS/SSA dual benefits.

OWCP thereafter received a completed FERS/SSA dual benefits form from SSA dated October 4, 2021. The form indicated that appellant received SSA age-related retirement benefits as of August 2020 and provided SSA age-related benefit rates with FERS offset. Beginning

³ Docket No. 13-0958 (issued March 7, 2014).

August 2020, the SSA rate with FERS was \$1,349.10 and without FERS was \$764.50. Beginning December 2020, the SSA rate with FERS was \$1,366.60 and without FERS was \$774.40.⁴

In a preliminary overpayment determination dated March 23, 2022, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$8,461.97 for the period August 1, 2020 through October 9, 2021 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It provided him with a FERS offset overpayment calculation including the 28-day FERS offset amount for the days in each period. From August 1 through November 30, 2020, appellant received an overpayment in the amount of \$2,351.25, and from December 1, 2020 through October 9, 2021, he received an overpayment in the amount of \$6,110.72, for a total overpayment of \$8,461.97. OWCP determined that he was without fault in the creation of the overpayment. It provided an overpayment action request form, and advised appellant that he could request waiver of recovery of the overpayment. OWCP also provided an overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method. It requested that appellant submit financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support his reported income and expenses. Additionally, OWCP further notified him that, within 30 days of the date of the letter, he could request a decision based on the written evidence or a prerecoupment hearing.

On April 13, 2022 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He also indicated that he disagreed with the fact and amount of the overpayment and requested a waiver of recovery of the overpayment because he was found to be without fault in the creation of the overpayment. In an attached statement, appellant indicated that he received a total of \$4,374.80 in monthly income, including \$1,447.00 from SSA, \$1,561.28 from OWCP, and \$1,366.00 from the Veterans Administration (VA). He also listed expenses for rent, automobile payments, telephone, insurance, loan repayments, and church donations, which totaled \$5,263.58 per month.

A telephonic hearing was held on July 6, 2022. Appellant did not dispute that an overpayment occurred or the finding that he was without fault.

Following the prerecoupment hearing, appellant provided an additional list of monthly expenses totaling \$1,320.50, including \$250.00 for food, \$150.00 for clothing, \$400.00 for gasoline, \$244.00 in credit card repayments, and \$276.59 for utilities. He provided supporting financial documentation for his rent, credit card payments, utilities, and gasoline expenses.

By decision dated August 29, 2022, an OWCP hearing representative finalized OWCP's preliminary determination, finding that appellant had received an overpayment of compensation

⁴ In a preliminary overpayment determination dated October 21, 2021, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$7,845.30 for the period September 1, 2020 through October 9, 2021 because it had failed to reduce his wage-loss compensation to offset his SSA age-related retirement benefits that were attributable to federal service. On November 3, 2021 appellant requested waiver of recovery of the overpayment. By decision dated January 5, 2022, following a preliminary review, a representative of OWCP's Branch of Hearings and Review vacated the October 29, 2021 decision, noting that the portion of the decision summarizing payments made within the adjustment period was illegible. The hearing representative remanded the claim to OWCP to issue a new preliminary overpayment determination with a full explanation of the computation of the overpayment.

in the amount of \$8,461.97 for the period August 1, 2020 through October 9, 2021, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. He also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP's hearing representative required recovery of the overpayment by deducting \$276.92 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 that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation, for which he is without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.⁹

The evidence of record establishes that, while appellant was receiving compensation for wage loss under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. 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.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service without an appropriate offset. Consequently, the fact of overpayment has been established.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

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

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Id.*

The Board further finds, however, that this case is not in posture for decision regarding the period and amount of the overpayment.

As previously noted, the record indicated that appellant elected to receive OPM disability retirement benefits for the period July 21 through August 30, 2020, and thereafter received FECA wage-loss compensation effective September 1, 2020. However, OWCP finalized an overpayment for the period August 1, 2020 through October 9, 2021. Therefore, the period and amount of overpayment remain unclear. The case must, therefore, be remanded to OWCP for further development.¹¹

On remand, OWCP shall clarify the period and amount of the overpayment. It shall then issue a new preliminary overpayment determination with an overpayment action request form, a Form OWCP-20, and instructions for providing updated supporting financial documentation. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that this case is not in posture for decision.

¹¹ See *G.K.*, Docket No. 22-0024 (issued June 7, 2022); *A.V.*, Docket No. 21-0887 (issued May 12, 2022).

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

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 9, 2023
Washington, DC

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

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

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