

³ The Board notes that, following the September 15, 2021 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,650.61 for the period October 1, 2019 through June 19, 2021, as 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 overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On September 13, 2000 appellant, then a 47-year-old customs inspector, filed a traumatic injury claim (Form CA-1) alleging that on September 12, 2000 he injured his left upper extremity pushing a disabled vehicle while in the performance of duty. The employing establishment indicated on the reverse side of the form that his retirement coverage was the Federal Employees Retirement System (FERS). OWCP accepted the claim for left ulnar neuropathy, lesion of left ulnar nerve, neck strain, displacement of cervical disc, benign neoplasm of larynx, diverticulum of esophagus acquired, and reflux esophagitis.

In a February 10, 2015 letter, OWCP notified appellant that FECA required that his continuing compensation benefits be reduced if he began receiving SSA retirement benefits based on his age and federal service. It further noted that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation. OWCP directed appellant to contact it immediately if he was receiving or had been approved to receive SSA age-related retirement benefits.

On June 2, 2021 OWCP sent a FERS/SSA dual benefits form to SSA for completion.

In a response dated June 9, 2021, SSA reported appellant's SSA age-related retirement benefit rates with FERS and without FERS for periods beginning October and December 2019 and January and December 2020. It indicated that, beginning October 2019, his SSA rate with FERS was \$2,019.80 and without FERS was \$1,129.00; effective December 2019, appellant's monthly rate with FERS was \$2,052.10 and without FERS was \$1,147.00 per month; effective January 2020, appellant's monthly SSA rate with FERS was \$2,161.50 and without FERS was \$1,147.00; and effective December 2020, appellant's monthly SSA rate with FERS was \$2,189.00 and without FERS was \$1,161.90.

OWCP completed a FERS offset overpayment calculation form on June 24, 2021. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period October 1, 2019 through June 19, 2021. OWCP found that, from October 1 through November 30, 2019, he received an overpayment of \$1,791.39; from December 1, 2019 through December 31, 2020, he received an overpayment of \$11,845.87; from January 1 through November 30, 2020, he received an overpayment of \$11,204.09; and from December 1, 2020 through June 19, 2021, he received an overpayment of \$6,809.26.

In a June 24, 2021 letter, OWCP informed appellant that, based on the information provided by SSA regarding the amount of his age-related retirement benefits, which were

attributable to federal service, his FECA wage-loss compensation had been adjusted. It indicated that his gross FECA benefits of \$3,524.77 would be offset by his SSA benefit attributable to federal service in the amount of \$948.55, to \$2,339.70 every 28 days.

In a preliminary overpayment determination dated June 24, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$31,650.61 from October 1, 2019 through June 19, 2021 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. It provided him with the offset overpayment calculation form and explained that it had calculated the overpayment of compensation by determining the difference between the SSA amount with and without FERS for each period, and then multiplying that amount by the number of days in each period. OWCP also advised appellant of its preliminary determination that he was at fault in the creation of the overpayment, as he failed to provide evidence that he knew or should have known was material. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. 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 evidence or a precoupment hearing.

In an overpayment action request form signed June 21, 2021, appellant requested a decision on the written evidence. He asserted that he was without fault in creating the overpayment and requested waiver of recovery. In a completed Form OWCP-20 of even date, appellant reported monthly income of \$7,107.11, which included \$2,041.00 in SSA benefits and Department of Veterans Affairs (VA) benefits of \$1,047.96 for retirement and \$1,678.45 for service-connected disability. He also reported monthly expenses totaling \$4,328.20, which included \$2,082.32 for mortgage; \$200.00 for food; \$120.00 for clothing; \$550.00 for utilities; \$68.40 for dental care; \$21.97 for vision care; and \$1,285.51 for other expenses and loan repayments. Appellant reported that he had \$100.00 cash on hand, \$150.23 in a checking account, \$10,880.00 in a savings account, and \$153,078.64 in an investment account, totaling \$164,208.87. He asserted that he should be found to be without fault for the overpayment because he did not know that he had to disclose SSA benefits based on his military service.

By decision dated September 15, 2021, OWCP finalized the June 24, 2021 preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$31,650.61 for the period October 1, 2019 through June 19, 2021, for which he was at fault, thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$300.00 from his net periodic rolls compensation every 28 days beginning October 10, 2021.

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

⁴ 5 U.S.C. § 8102(a).

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 retirement benefits that are attributable to the employee's federal service.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$31,650.61 as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation for the period October 1, 2019 through June 19, 2021, without an appropriate offset.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA accurately indicated that he had received SSA age-related retirement benefits that were attributable to his federal service from October 1, 2019 through June 19, 2021. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.⁹

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits 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 appellant's SSA age-related retirement benefit rates with FERS and without FERS from October 2019 through December 2020. OWCP provided its calculations for each relevant period based on SSA's dual benefits form and determined that he received an overpayment in the amount of \$31,650.61. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period October 1, 2019 through June 19, 2021 and finds that an overpayment of compensation in the amount of \$31,650.61 was created.¹⁰

⁵ *Id.* at § 8116.

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

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also E.M.*, Docket No. 19-0857 (issued December 31, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *Id.* *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

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

¹⁰ *See J.S.*, Docket No. 22-0369 (issued June 7, 2022); *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA 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 be against equity and good conscience.”¹¹ No waiver of payment is possible if appellant is at fault in helping to create the overpayment.¹²

Section 10.433(a) of OWCP’s regulations provides that an individual is at 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; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³ To determine if an individual was at fault with respect to the creation of an overpayment, section 10.433(b) provides that OWCP will examine 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.¹⁴

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 benefits concurrent with disability/wage-loss compensation was prohibited.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the period October 1, 2019 through June 19, 2021.

As noted above, OWCP’s procedures provide that, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.¹⁶ 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. Therefore, he could not reasonably have been aware

¹¹ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹² *J.B.*, Docket 19-1244 (issued December 20, 2019); *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also id.* at § 10.430.

¹⁴ *Id.* at § 10.433(b); *C.L., id.*; *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4d (September 2020).

¹⁵ *Id.* at Chapter 6.300.4g(4) (September 2020).

¹⁶ *Id.*

during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.¹⁷

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.¹⁸ The Board finds that appellant was without other options to avoid a potential FECA overpayment. Therefore, based on the circumstances described, the Board finds that OWCP improperly determined that he was at fault in the creation of the overpayment for the period October 1, 2019 through June 19, 2021.¹⁹

As appellant was without fault in the creation of the overpayment for the period October 1, 2019 through June 19, 2021, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.²⁰

CONCLUSION

The Board finds that appellant received a \$31,650.61 overpayment of compensation because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2019 through June 19, 2021, without an appropriate offset. The Board further finds that he was without fault in the creation of the overpayment for the period October 1, 2019 through June 19, 2021.

¹⁷ See *M.W.*, Docket No. 22-0388 (issued January 19, 2023); *N.V.*, Docket No. 20-0080 (issued January 21, 2022); *D.W.*, Docket No. 20-1533 (issued May 27, 2021); *J.B.*, Docket No. 19-0757 (issued April 16, 2021); *R.W.*, Docket No. 19-0334 (issued August 7, 2020).

¹⁸ *Supra* note 14 at § 10.433(b); see also *supra* note 14 at Chapter 6.300.4d (September 2020); *J.S.*, Docket No. 19-0824 (issued October 4, 2019).

¹⁹ See *M.W.*, *supra* note 17; *N.V.*, Docket No. 20-0080 (issued January 21, 2022).

²⁰ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 28, 2023
Washington, DC

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

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

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