

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

_____))
L.L., Appellant))
))
and)) **Docket No. 12-1724**
)) **Issued: March 26, 2013**
DEPARTMENT OF THE AIR FORCE,))
GRIFFISS AIR FORCE BASE, Rome, NY,))
Employer))
_____))

Appearances:
Gustave J. Detraglia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 15, 2012 appellant, through his attorney, filed a timely appeal of a July 24, 2012 Office of Workers' Compensation Programs (OWCP) merit decision finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$19,436.05 because he received retirement benefits from the Social Security Administration (SSA) and compensation benefits from April 1, 2003 through June 2, 2012; (2) whether OWCP properly found that he was at fault in the creation of the overpayment; and (3) whether it properly required repayment of the overpayment in full.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel argued that appellant did not receive SSA benefits for an annuity, but for his pension and that he properly completed the ambiguous forms provided by OWCP.

FACTUAL HISTORY

On August 20, 1991 appellant, then a 52-year-old electrician filed a traumatic injury claim alleging that he injured his right knee when standing from a kneeling position in the performance of duty, on August 15, 1991, OWCP File No. xxxxxx273. He filed a second traumatic injury knee claim on November 27, 1991, OWCP File No. xxxxxx653. OWCP accepted appellant's claim for right knee internal derangement (aggravation of a torn medial meniscus) on January 6, 1992 and combined both files under OWCP File No. xxxxxx653. By decision dated February 27, 1995, it reduced his compensation benefits effective March 5, 1995 on the grounds that the position of electrical counter sales representative fairly and reasonably represented his wage-earning capacity.

Appellant completed and signed a Form EN1032 on December 15, 2002 indicating that he had not worked for the previous 15 months, was not self-employed and had not received either retirement benefits or SSA benefits as part of an annuity under the Federal Employees' Retirement System (FERS). This form stated, "I understand that I must immediately report to OWCP any improvement in my medical condition, any employment, any change in that status of claimed dependents, any third[-]party settlement and any change in income from federally assisted disability or benefit programs." On January 25, 2005, January 3, 2007, January 7, 2008, February 4, 2009, March 3, 2010, February 11, 2011 and February 21, 2012 appellant completed and signed similar EN1032 Forms.

In a letter dated May 29, 2012, OWCP stated that appellant had been receiving SSA benefits because of his age since April 1, 2003. It stated that SSA had confirmed that a portion of his SSA benefits are attributable to his years of federal service as an employee under the FERS retirement program. OWCP noted that the portion of appellant's SSA benefits attributed to his federal service requires an offset of his FECA benefits. SSA informed OWCP that appellant's current monthly benefit amount was \$1,096.60, but if his federal service was not included he would be entitled to \$900.50. OWCP stated, "Therefore, your federal service has increased your monthly SSA payment by \$196.10. This difference of \$196.10 is the portion of SSA benefits amount attributed to federal services and is the amount that must be offset against your compensation benefits."

OWCP included a calculation of the retroactive offset requirement and overpayment providing the appropriate offsets for appellant's SSA benefits from April 1, 2003 until June 2, 2012.

OWCP issued a preliminary decision on June 21, 2012 finding that appellant had received an overpayment in the amount of \$19,436.05 because he received retirement benefits from SSA and compensation benefits under FECA from OWCP for the same period without the required offset. It determined that the period of the overpayment was April 1, 2003 through June 2, 2012 and that he was at fault in the creation of the overpayment. OWCP found that appellant completed the EN1032 Forms indicating that he had not received benefits from SSA, and failed to provide information which he knew or should have known to be material. It

provided him with appeal options and requested that he complete an overpayment recovery questionnaire and provide supportive financial documentation.

By decision dated July 24, 2012, OWCP finalized the overpayment. It noted that appellant had not provided any financial information, that he was not entitled to waiver of recovery of the overpayment and requested repayment of the debt in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.²

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.³ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁴

ANALYSIS -- ISSUE 1

The record establishes that appellant received SSA benefits attributable to his federal employment under FERS from April 1, 2003 through June 2, 2012. Appellant also received FECA disability compensation for overlapping periods. SSA records provided the offset calculations for the entire period from April 1, 2003 through June 2, 2012 in the amount of \$19,436.05. As appellant is not entitled to receive both FECA disability benefits and that portion of his SSA benefits attributable to his federal employment, the Board finds that OWCP properly determined that an overpayment in compensation was created.

² *Id.* at § 8116(d). See, *D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits* Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁴ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period April 1, 2003 through June 2, 2012. OWCP properly determined that he received dual benefits totaling \$19,436.05 for this period, thus creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁵ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."⁶ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations⁷ provides in relevant part:

"An individual is with 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; or
- (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."

ANALYSIS -- ISSUE 2

In this case, OWCP applied the second standard, that appellant failed to furnish information which the individual knew or should have known to be material and the third standard that appellant accepted a payment which he knew or should have known to be incorrect. It stated that he consistently denied receiving benefits from SSA. OWCP further noted that the EN1032 forms advised appellant that he must immediately report to OWCP any improvement in his medical condition, any employment, any change in the status of claimed dependents, any third-party settlement and any change in income from federally assisted disability or benefits programs.

⁵ 5 U.S.C. § 8101-8193, 8129(a).

⁶ *Id.* at § 8129(b).

⁷ 20 C.F.R. § 10.320(b).

The Board finds that the evidence in this case establishes that appellant was aware that he was receiving SSA and FECA benefits simultaneously. However, appellant failed to inform OWCP that he was receiving SSA benefits on the multiple EN1032 forms he completed. Counsel contends that the language of the EN1032 forms was ambiguous and that appellant was not receiving an annuity, but instead a SSA pension. As noted above, the Form EN1032 not only requests that appellant indicate whether he received an annuity from SSA, but also whether he had a change in income from any federally assisted benefit program. Based on the clear language of the forms which appellant knowingly signed, he failed to provide information which he knew or should have known was material. The Board finds, therefore, that he was at fault in the creation of the overpayment and is precluded from receiving a waiver.⁸

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship on the individual.⁹

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. As noted, appellant failed to submit the requested overpayment recovery questionnaire or any financial information. In cases where the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441 is not submitted, OWCP is unable to consider financial circumstances. The Board finds that OWCP did not abuse its discretion in following its regulations and finding that the overpayment was due in full.¹⁰

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$19,436.05 for the period April 1, 2003 through June 2, 2012 and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board further finds that it did not abuse its discretion in determining that appellant should repay the overpayment amount in full, as he failed to submit the necessary financial information from which OWCP could determine an appropriate repayment schedule.

⁸ *D.F.*, Docket No. 11-1595 (issued February 1, 2012).

⁹ 20 C.F.R. § 10.441(a). See *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁰ *Supra* note 8; *C.H.*, Docket No. 09-26 (issued November 17, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board