

FACTUAL HISTORY

Appellant, a 73-year-old former electrician, injured his lower back in the performance of duty on March 4, 1991. He and a coworker were lifting a 4x8 foot sheet of particle board when the injury occurred. OWCP initially accepted appellant's claim for low back strain, but subsequently expanded the claim to include herniated nucleus pulposus at L4-5. At the time of injury, appellant held a temporary appointment. The employing establishment terminated his services effective April 14, 1991, which coincided with the expiration of appellant's temporary appointment. OWCP paid wage-loss compensation for temporary total disability beginning April 20, 1991 and placed appellant on the periodic compensation rolls effective August 25, 1991.

After undergoing OWCP-sponsored vocational rehabilitation, appellant accepted private sector employment (A&J Industries, Inc.) as an electronics technician effective May 28, 1996.

In an August 12, 1996 decision, OWCP found that appellant's recent reemployment with A&J Industries fairly and reasonably represented his wage-earning capacity. He had successfully performed the position for at least 60 days. Accordingly, OWCP adjusted appellant's wage-loss compensation based on his then-current weekly earnings of \$280.00.²

Between February 1997 and July 2014, appellant regularly submitted annual statements (Form EN1032) regarding his employment status, volunteer work, dependents, and other Federal benefits received. He reported that he continued to work for A&J Industries through August 2007. Appellant also reported that he was self-employed from May 1, 2007 through July 2014. He consistently denied receiving any benefits from the Office of Personnel Management (OPM). Appellant also consistently denied receiving benefits from the Social Security Administration (SSA) based on his federal service. The only other federal benefits appellant reported receiving were from the Department of Veterans Affairs, which he identified as a 10 percent award for a left wrist injury.

Appellant was born in August 1942. When he reached age 62 in 2004, he was eligible to receive age-related social security retirement benefits. The record indicates that appellant was subject to Federal Insurance Contributions Act (FICA) withholding while a federal employee.³

On August 13, 2014 OWCP contacted both SSA and OPM regarding benefits appellant might be receiving.

On September 17, 2014 SSA advised OWCP that appellant was entitled to retirement benefits, which began in September 2004. SSA provided a breakdown of appellant's monthly SSA benefits that included contributions from his federal service (w/FERS), as well as a monthly benefit that excluded his federal service contributions (w/o FERS). Beginning September 2004 appellant's total monthly SSA benefit was \$970.60. The corresponding monthly amount

² At the time of his March 4, 1991 employment injury, appellant earned \$578.00 per week as an electrician.

³ An April 9, 1991 notification of personnel action (Standard Form 50-B) identified appellant's retirement plan as "FICA," with an August 7, 1980 service computation date. As a temporary employee (Tenure "0"), appellant was not eligible for certain employee fringe benefits such as life insurance (FEGLI) and a retirement annuity under the Federal Employees' Retirement System (FERS).

excluding appellant's federal service contributions was \$780.80. SSA provided additional calculations for subsequent periods from December 2004 to December 2013.

On September 29, 2014 OWCP advised appellant that he could not receive FECA wage-loss compensation along with SSA retirement benefits attributable to his federal service. It explained that this was a prohibited dual benefit, and therefore, his FECA benefits would have to be reduced by the amount of SSA benefits attributable to his federal service. OWCP calculated the SSA deduction/offset to be \$209.91 every 28 days. The offset was effective September 21, 2014.

On October 27, 2014 OPM advised that it was not currently paying appellant any type of retirement or disability benefits.

On October 29, 2014 OWCP issued a preliminary overpayment determination in the amount of \$28,825.20 for the period September 1, 2004 through September 20, 2014. It explained that the overpayment was a result of appellant having received FECA wage-loss compensation and social security retirement benefits based on his federal service, which was a prohibited dual benefit. Additionally, OWCP advised that appellant was not at fault in creating the overpayment.

Appellant timely requested a precoupment hearing, which the Branch of Hearings & Review scheduled for August 6, 2015. He argued that his SSA benefits were unrelated to his federal service because as a temporary employee he was not eligible to receive FERS benefits. Appellant did not submit a complete overpayment recovery questionnaire (OWCP-20) with supporting documentation. At the August 6, 2015 precoupment hearing, appellant indicated he could repay \$200.00 every 28 days from his continuing compensation.

By decision dated October 8, 2015, the hearing representative finalized OWCP's preliminary determination regarding the fact and amount of the overpayment, as well as its finding that appellant was not at fault.⁴ Regarding appellant's request for waiver of recovery, the hearing representative noted that OWCP had yet to receive any financial information from appellant that would allow for consideration of a waiver. The hearing representative further noted that appellant continued to receive FECA wage-loss compensation, and had previously expressed an ability to repay \$200.00 every 28 days from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of Social Security Act benefits attributable to the employee's federal service.⁶

⁴ The hearing representative incorrectly identified the amount of the overpayment as \$28,825.50 rather than \$28,825.20 as initially determined by OWCP.

⁵ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

ANALYSIS -- ISSUE 1

Appellant argued that because of his temporary employment status he was not eligible to receive retirement benefits under FERS. An April 9, 1991 notification of personnel action (Standard Form 50-B) confirms that appellant was a temporary employee. The document also identified appellant's retirement plan as "FICA," and did not specify additional coverage under FERS. While the record supports appellant's contention that he was ineligible to receive a FERS-based retirement annuity, the evidence indicates he was entitled to age-related Social Security Act benefits based, in part, on his federal service.⁷ As such, appellant is not entitled to simultaneously receive FECA wage-loss compensation and retirement benefits based on his federal service. On September 17, 2014, SSA represented that a portion of appellant's monthly retirement benefit was attributable to his federal service. Consequently, OWCP was obliged to offset appellant's FECA wage-loss compensation by the amount of SSA age-related retirement benefits attributable to his federal service.⁸

Although the Board finds that the fact of overpayment has been established, the case is not in posture for decision with respect to the amount of the overpayment. As noted, the record establishes that appellant received age-related Social Security Act retirement benefits, some of which were attributable to his federal service. However, the Board is unable to determine how OWCP calculated the portion of appellant's SSA benefits attributable to his federal service. Accordingly, the case shall be remanded to OWCP for further development regarding the appropriate SSA/FECA offset.

LEGAL PRECEDENT -- ISSUES 2 & 3

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁰ Additionally, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on

⁷ The "FICA" designation on the April 9, 1991 SF 50-B indicates that the employing establishment made contributions for Social Security Act benefits.

⁸ 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

⁹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁰ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

notice that such payments would be made, relinquished a valuable right or changed his position for the worse.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP.¹² This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.¹³ The information is also used to determine an appropriate repayment schedule, if necessary.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

When an overpayment has been made to an individual who is entitled to further payments, OWCP shall decrease later payments of compensation, taking into account 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 hardship.¹⁶

ANALYSIS -- ISSUE 2 & 3

The hearing representative agreed with OWCP's preliminary determination that appellant was not at fault in creating the overpayment. However, he denied waiver of recovery because appellant did not complete his overpayment recovery questionnaire. The record included information regarding appellant's FECA benefits, SSA benefits, and his income from self-employment,¹⁷ but appellant neglected to provide information regarding his assets, liabilities, and expenses. In light of appellant's failure to provide the requested financial information, the hearing representative properly denied waiver of recovery of the overpayment.¹⁸ The Board further finds that based on appellant's representations at the prerecoumment hearing, the hearing representative properly imposed a repayment schedule of \$200.00 every 28 days to be withheld from appellant's ongoing FECA wage-loss compensation.

CONCLUSION

Appellant is not entitled to receive both FECA wage-loss compensation and SSA age-related retirement benefits based on his prior federal service. SSA represented that appellant's age-related retirement benefits beginning September 1, 2004 were based, in part, on his federal service. However, the record does not clearly establish the amount that should have been offset for the period September 1, 2004 through September 20, 2014. The Board further finds that

¹¹ 20 C.F.R. § 10.437(a), (b).

¹² *Id.* at § 10.438(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.438(b).

¹⁶ *Id.* at § 10.441(a).

¹⁷ Appellant's latest CA-1032 noted income from self-employment of \$9,300.00 for the period August 1, 2014 through July 31, 2015.

¹⁸ 20 C.F.R. § 10.438(b).

appellant is not entitled to a waiver of recovery, and that the hearing representative properly deducted \$200.00 every 28 days from appellant's continuing FECA wage-loss compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part, and remanded for further action consistent with this decision.

Issued: July 13, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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