

March 31, 2018; (2) whether OWCP properly found appellant 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 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On July 19, 2006 appellant, then a 64-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he tripped while delivering mail and injured his right elbow, right shoulder, and both knees the previous day while in the performance of duty. OWCP accepted the claim for superficial injury of the right elbow, forearm, wrist, without infection; contusion of the left knee, left; and complete right rotator cuff rupture. It initially paid appellant intermittent wage-loss compensation. On November 7, 2008 OWCP accepted that he sustained a recurrence of disability as of August 10, 2008. Appellant thereafter was paid wage-loss compensation on the periodic compensation rolls by OWCP and has not returned to work.³

On EN1032 forms dated December 2, 2009 to January 8, 2018, each of which was signed by appellant, he indicated that he was not receiving SSA benefits as part of an annuity for federal service.

On March 21, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in February 2008 appellant's SSA rate with FERS was \$1,413.10 and without FERS \$1,318.00; beginning in December 2008, his rate with FERS was \$1,495.00 and without FERS \$1,394.50; beginning January and December 2009, and January 2010, his SSA rate with FERS was \$1,504.20 and without FERS \$1,403.10; beginning in December 2011, his SSA rate with FERS was \$1,558.30 and without FERS \$1,453.50; beginning in December 2012, his SSA rate with FERS was \$1,584.80 and without FERS \$1,478.20; beginning in December 2013, his SSA rate with FERS was \$1,608.60 and without FERS \$1,500.30; beginning in December 2014 and December 2015, his SSA rate with FERS was \$1,635.90 and without FERS \$1,525.70; beginning in December 2016, his SSA rate with FERS was \$1,640.70 and without FERS \$1,530.20; and beginning in December 2017, his SSA rate with FERS was \$1,673.60 and without FERS \$1,560.80.

On April 5, 2018 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$12,887.77 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-based benefits that he received for the period February 1, 2008 through March 31, 2018 were based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20).⁴ It explained its calculation of the

³ Appellant continues to receive FECA wage-loss compensation on the periodic compensation rolls to date.

⁴ OWCP explained that appellant was to attach documents to the overpayment recovery questionnaire including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

overpayment, informed appellant of the actions he could take, and allotted 30 days for him to respond. OWCP reduced his wage-loss compensation effective April 1, 2018 to reflect an adjustment for SSA/FERS offset.

On May 1, 2018 appellant submitted an overpayment action request in which he requested a prerecoupment hearing with OWCP's Branch of Hearings and Review. He indicated that he disagreed that the overpayment occurred, disagreed with the amount of the overpayment, disagreed that he was at fault, and requested waiver of recovery of the overpayment.

In a letter dated July 16, 2018, an OWCP hearing representative notified appellant that in order for waiver of recovery of an overpayment to be considered or to determine a reasonable method of collection of the overpayment, he must complete and submit an OWCP-20, which was enclosed. She also noted that he should furnish specific financial documentation. The hearing representative allotted 30 days for him to submit this information.

On July 30, 2018 appellant submitted a completed OWCP-20. This indicated that he had \$5,464.00 in household monthly income and \$4,144.00 in monthly household expenses. Appellant wrote that OWCP had not informed him regarding the FERS offset prior to the preliminary overpayment determination and maintained that, therefore, he was not at fault. He attached financial information including FECA benefit statements, car and property insurance invoices, medical prescription information and physician bills, credit card bills, utility bills, bank statements, and correspondence from SSA regarding his wife's SSA benefits.

At the hearing, held telephonically on August 28, 2018, appellant was represented by a union representative. He testified that since he had not officially retired from the employing establishment, he did not think the EN1032 question about receiving SSA based on a FERS annuity applied to him. Appellant indicated that he had not applied for SSA benefits until he reached 70 years of age. He requested a new OWCP-20 so that he could add his wife's expenses. The record was left open 30 days.

On September 21, 2018 appellant submitted an amended OWCP-20. He listed monthly income of \$5,465.00.⁵ On attached handwritten sheets he itemized monthly expenses, listing a total of \$5,134.00. In an attached statement, appellant reiterated that no one had explained the FERS offset, again relating that he had not retired. He maintained that his FECA payment had nothing to do with his SSA benefit and implied that SSA had erred by paying him too much.

By decision dated October 5, 2018, an OWCP hearing representative finalized the overpayment determination. She found that appellant received an overpayment of compensation in the amount of \$12,887.77 because he received a prohibited dual benefit from SSA while he concurrently received FECA compensation. The hearing representative referenced FECA Bulletin No. 97-09 which provided that FECA benefits had to be adjusted for the FERS portion of SSA benefits, noting that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently was a prohibited dual benefit. She found appellant at fault because he answered "no" to the

⁵ This included \$2,879.00 in FECA benefits, \$1,534.00 in SSA benefits for appellant and \$810.00 for SSA benefits for his wife, \$238.00 in military retirement, and \$4.00 in dividends.

question, “do you receive benefits from the SSA as part of an annuity for [f]ederal service” on his signed EN1032 forms. As such, appellant was not entitled to waiver of recovery of the overpayment. The hearing representative noted that his reported monthly income of \$5,465.00 exceeded his claimed monthly expenses of \$5,124.00 by \$341.00. She disallowed claimed expenses for trips to visit family and friends, cable television, storage locker rental, donations, his wife’s manicure, and cigarettes, and set repayment at \$300.00 per 28-day compensation period.

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 duty.⁶ 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.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ 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.⁹

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.¹⁰ Section 404.409 of SSA regulations provides that for individuals born in 1942, full retirement age is 65 years 10 months.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,887.77 because he concurrently received SSA age-based benefits while also receiving FECA benefits for the period February 1, 2008 through March 31, 2018

In its October 5, 2018 decision, OWCP’s hearing representative found that an overpayment of compensation was created for the period February 1, 2008 through March 31, 2018. The overpayment was based on the evidence received from SSA with respect to age-based benefits paid to appellant. Although appellant maintains on appeal that, because he was not officially

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see J.T.*, Docket No. 18-1791 (issued May 17, 2019).

⁹ FECA Bulletin No. 97-09 (issued February 3, 1997).

¹⁰ 20 C.F.R. § 404.310.

¹¹ *Id.* at § 404.409.

retired from the employing establishment, he was entitled to full SSA benefits without offset, a claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹² The information provided by SSA indicated that he received age-based SSA benefits that were attributable to federal service during the period February 1, 2008 through March 31, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing February 1, 2008 through March 31, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits appellant received for the period February 1, 2008 through March 31, 2018 and finds that an overpayment of compensation in the amount of \$12,887.77 was created.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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 would be against equity and good conscience."¹⁴

On the issue of fault, section 10.433(a) of OWCP's regulations provides that 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; (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.¹⁵ With respect to whether an individual is without fault, section 10.433(b) provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.¹⁶

¹² See *J.T.*, *supra* note 7 and 8.

¹³ See *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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

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

¹⁶ *Id.* at § 10.433(b); *C.L.*, *id.*

OWCP's procedures also provide that if:

“The claimant receives benefits from the Social Security Administration (SSA) as part of an annuity under the Federal Employees' Retirement System concurrently with disability/wage loss compensation. *See* 5 U.S.C. § 8116(d)(2). In such cases, 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.”¹⁷ (Emphasis in the original.)

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not established that appellant was at fault in the creation of the overpayment of compensation. OWCP found him at fault because he accepted a payment which he knew or should have known was incorrect.

The record as submitted to the Board does not contain evidence that the claimant was aware that his receipt of full SSA benefits concurrent with his FECA compensation was a prohibited dual benefit. Therefore, pursuant to OWCP's procedures as set forth at Chapter 6.300.4.g.(4)(a), the Board finds that OWCP has not met its burden to establish that appellant accepted payments which he knew or should have known were incorrect.¹⁸

The record of evidence does not contain a clear notification to appellant that his receipt of SSA benefits following his age-related eligibility was resulting in an overpayment of compensation due to a prohibited dual benefit. The record only contains a number of EN1032 forms in which he indicated that he was not in receipt of SSA benefits as part of an annuity for federal service.¹⁹ It was only in the August 5, 2018 preliminary overpayment determination that OWCP included an explanation in which it indicated that a portion of appellant's SSA benefits was due to civilian federal service, known as the FERS component, which referred to the retirement system to which he belonged. It was in the April 5, 2018 preliminary determination of overpayment that OWCP cited section 10.421(d) of OWCP's regulations which provides that, while a FECA beneficiary could receive SSA benefits, OWCP was required to reduce the amount of FECA compensation by the amount of any SSA benefits which were attributable to federal service of the employee.²⁰ Appellant received no notification prior to that preliminary

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

¹⁸ *Id.*

¹⁹ The Board also notes that the EN1032 forms submitted by appellant do not cover the entire period of the overpayment of compensation. As written on EN1032 forms, they cover the preceding 15 months. Thus, Form EN1032 dated December 2, 2009 covered the period September 2, 2008 to December 2, 2009 and did not cover the period February 1 to September 2, 2008. Likewise, the last EN1032 dated prior to the final overpayment decision dated October 5, 2018 was dated January 8, 2018. It, therefore, did not cover the period of overpayment from January 8 to March 31, 2018.

²⁰ 20 C.F.R. § 10.421(d).

determination that his FECA benefits would be offset if he was in receipt of SSA age-based benefits, based upon his federal service.²¹

The Board finds that OWCP has insufficiently explained how appellant's various EN1032 forms dating back to 2008 established that he knew or should have known that he was receiving FECA compensation benefits without an appropriate offset due to his SSA retirement benefits.²² To determine if an individual was at fault in the creation of an overpayment depends on 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.²³ Therefore, based on the circumstances described above, OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period February 1, 2008 through March 31, 2018.²⁴

As appellant was not at fault in the creation of the overpayment, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment. Because the issue of waiver of recovery is not in posture for decision, it is premature to address whether OWCP properly required recovery of the overpayment by making periodic deductions of \$300.00 every 28 days from his continuing FECA compensation payments.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,887.77 because he concurrently received SSA age-based benefits while also receiving FECA benefits for the period February 1, 2008 through March 31, 2018. The Board further finds that he was not at fault in the creation of the overpayment, and the case will be remanded to OWCP for consideration of waiver of recovery of the overpayment.

²¹ The Board notes that appellant reached full retirement age in November 2007.

²² *B.M.*, Docket No. 19-0158 (issued July 11, 2019).

²³ *Supra* note 16.

²⁴ *Supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part, reversed in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 4, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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