

FACTUAL HISTORY

On April 9, 2001 appellant, then a 63-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 6, 2001 he twisted and injured both knees while in the performance of duty. OWCP accepted the claim for right knee strain, a left knee contusion/blunt trauma, and an aggravation of osteoarthritis of the bilateral knees. It paid appellant wage-loss compensation for intermittent periods of total disability.²

On April 10, 2008 appellant underwent a right total knee replacement and on September 23, 2008 he underwent a left total knee replacement. OWCP paid him wage-loss compensation for total disability on the periodic rolls from April 13, 2008 until May 9, 2009, and then on the supplemental rolls until October 22, 2011. On October 27, 2011 it accepted that appellant had sustained a recurrence of a medical condition on August 5, 2011. OWCP paid him wage-loss compensation for total disability on the periodic rolls beginning October 23, 2011.

In a letter dated October 14, 2014, OWCP advised appellant that his Federal Employees Retirement System (FERS) benefits would be reduced by the amount of SSA benefits that he received based on his age that were attributable to his federal service. It provided him with an election form.

In a Form CA-1032 dated March 18, 2015, appellant indicated that he received \$1,909.60 in retirement benefits monthly from SSA as part of an annuity for federal service.

On October 2, 2015 SSA forwarded a FERS/SSA dual benefit calculation form. The form indicated that with FERS appellant was entitled to a monthly payment of \$1,865.00 effective April 2014, \$1,897.00 effective December 2014, and \$1,909.00 effective January 2015. Without his federal service contributions, he was entitled to a monthly payment rate of \$773.00 effective April 2014, \$786.00 effective December 2014, and \$786.00 effective January 2015.

By letter dated December 22, 2015, OWCP advised appellant that it was adjusting his wage-loss compensation effective December 13, 2015 to offset the portion of his SSA age-related retirement benefits attributable to his federal service. It informed him that the portion of the SSA benefits that he earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

On December 23, 2015 OWCP calculated the overpayment by determining the difference between appellant's SSA amount with and without FERS for each period and then multiplying that amount by the number of days in each period. For the period April 1 to November 30, 2014, it multiplied the number of days, 244, by the offset amount of \$1,092.00 to find an overpayment of \$9,516.00. OWCP multiplied the 31 days from December 1 to 31, 2014 by an offset amount of \$1,111.00 to find an overpayment of \$1,230.04, and multiplied 346, the number of days from

² OWCP previously accepted that appellant had sustained internal derangement of the right knee due to a March 16, 1995 employment injury, under subsidiary File No. xxxxxx723.

January 1 to December 12, 2015, by the offset amount of \$1,123.00, to find an overpayment of \$13,877.07. It added the overpayment amounts to find a total overpayment of \$24,623.11.

On January 22, 2016 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$24,623.11 as it paid him compensation benefits for the period April 1, 2014 to December 12, 2015 that had not been reduced by the portion of his SSA age-related retirement benefits attributable to his federal service. It further advised him of its preliminary determination that he was without fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On February 10, 2016 appellant requested a prerecoupment hearing. In response to the Form OWCP-20, he indicated that he had monthly income of \$4,876.00 and listed expenses. Appellant advised that he had \$21,000.00 in a savings account.

A prerecoupment hearing was held on June 24, 2016. Appellant related that he had received retirement benefits from SSA beginning April 1, 2014. He indicated that he used credit cards to buy gasoline, clothing, and cigarettes. Appellant advised that he had money in his Thrift Savings Plan (TSP).

In an overpayment recovery questionnaire dated July 11, 2016, appellant advised that he had \$120,000.00 in his TSP and total liquid assets of \$142,800.00. He also owned a condominium that was worth approximately \$65,000.00. Appellant provided his monthly income as \$4,846.00. He listed expenses as \$1,398.00 for a mortgage, \$450.00 for food, \$150.00 for clothing, \$483.00 for utilities, and \$650.00 in other expenses, including \$300.00 per month for cigarettes. Appellant further advised that he paid \$206.00 per month for television, \$50.00 per month for a newspaper, \$300.00 a year for pet care, \$15.00 a month for a gym membership, \$1,800.00 per year for car insurance, and \$2,200.00 a year for home insurance. He also provided expenses for his second home of \$310.00 for insurance, \$245.00 a month in fees, and \$446.00 a year for appliance insurance. Appellant listed the total amount owed on credit cards and advised that he paid what he could monthly.³ He indicated that he had assets in cash, bank accounts, and his TSP of \$142,800.00.

By decision dated September 7, 2016, OWCP's hearing representative modified the amount of overpayment to find that appellant received a \$22,729.08 overpayment of compensation for the period April 1, 2014 to December 12, 2015 because OWCP did not offset his compensation by the SSA age-related retirement benefits he earned as a result of his federal service. She calculated the monthly FERS offset amount and then converted that amount to the 28-days FERS offset amount for each period. After determining the daily offset amount, the hearing representative multiplied this amount by the number of days in each period and added the total to find a total overpayment of \$22,729.08. She determined that appellant was precluded from waiver of recovery of the overpayment as his monthly income of \$4,846.00 exceeded his monthly

³ In a list of monthly payments dated June 24, 2016, appellant related that he made monthly payments on various credit cards totaling \$620.00.

expenses by more than the allowed amount. The hearing representative reduced his listed monthly expenses to \$4,227.00 after excluding the monthly amount he paid for cigarettes and credit card debt as it was used to buy items already considered. She ordered recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.

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 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 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$22,729.08 for the period April 1, 2014 to December 12, 2015, for which he was not at fault, because he concurrently received FECA benefits and SSA age-related retirement benefits without an appropriate offset.

SSA paid appellant age-related benefits retirement beginning April 1, 2014. OWCP paid him wage-loss compensation until December 12, 2015 without offsetting the portion of the SSA age-related retirement benefits due to his federal service. As discussed, a claimant cannot receive both compensation for wage loss and the portion of SSA age-related retirement benefits that are attributable to his federal service for the same period.⁸ Appellant received SSA benefits based on his federal service concurrently with disability compensation from OWCP without an appropriate offset and thus received an overpayment of compensation.

To determine the amount of the overpayment, OWCP must calculate the portion of the SSA benefits that were attributable to federal service. It received documentation from SSA

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

⁸ *Id.*; *see also L.G.*, Docket No. 19-1274 (issued July 10, 2020).

providing appellant's SSA rate with FERS and without FERS for the period April 1, 2014 through December 12, 2015. OWCP's hearing representative calculated the amount that OWCP should have offset during the relevant period based on the information provided by SSA. The hearing representative modified the amount of the overpayment by reducing appellant's monthly SSA monthly benefit attributable to federal service to a 28-day benefit, which was then subtracted from appellant's FECA benefits, which he received every 28 days. No contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits received by appellant for the period April 1, 2014 through December 12, 2015 and finds that an overpayment of compensation in the amount of \$22,729.08 was created.⁹

On appeal appellant questions why the amount of the overpayment exceeds his credit card debt. However, OWCP properly determined the amount of the overpayment based on information provided by SSA regarding the rates of his age-related retirement benefits attributable to his federal service.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment must be recovered 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."¹⁰ (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹¹

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹² An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹³ Nonliquid assets include, but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.¹⁴

⁹ *LG., id.; R.B.*, Docket No. 19-0571 (issued June 12, 2020).

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹³ Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.6(a)(1) (June 2009).

¹⁴ *Id.* at Chapter 6.200.6(a)(4).

OWCP's procedures in effect at the time of the September 7, 2016 decision provided that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent.¹⁵ An individual's liquid assets include, but are not limited, to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.¹⁶ Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings and supplies.¹⁷

Section 10.437 provides that 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 attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right, or changes his position for the worse.¹⁸ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁰

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary and necessary living expenses. The hearing representative found, after subtracting expenses for cigarettes and expenses that duplicated those already listed, that he had monthly income of \$4,846.00 and monthly expenses of \$4,227.00, and that consequently his income exceeded his expenses by more than the allotted amount. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.²¹ Further, the Board notes that he is not entitled to waiver as his assets of \$142,800.00 exceed the resource base of \$8,000.00. A claimant's contributions to TSP and

¹⁵ *Id.* at Chapter 6.200.6(a)(1)(b).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.437.

¹⁹ *Id.* at § 10.437(b)(1).

²⁰ *Id.* at § 10.436.

²¹ *See M.C.*, Docket No. 19-0699 (issued February 12, 2020).

earnings from those contributions are considered to be assets which OWCP may consider in determining waiver.²² A second home owned by appellant is also included in calculating assets.²³

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, OWCP properly denied waiver of the overpayment.²⁴

On appeal appellant argues that he is unable to repay the overpayment without financial hardship. He also notes that he was without fault in creating the overpayment. A finding that appellant was without fault, however, does not automatically result in waiver of the overpayment.²⁵ OWCP must determine whether recovery of the overpayment without defeat the purpose of FECA or be against equity and good conscience. As explained, OWCP properly denied waiver as recovery would not defeat the purpose of FECA or be against equity and good conscience.

Appellant maintains that he used his SSA benefits to pay his credit card debt. He did not, however, submit any evidence to OWCP prior to its decision showing that he detrimentally relied upon the payments.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations²⁶ provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his attention is called to the same. If no refund is made, 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.²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation every 28 days.

The record supports that, in requiring repayment of the overpayment by deducting \$300.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information he submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found

²² See *H.F.*, Docket No. 17-0101 (issued September 5, 2017); *C.W.*, Docket No. 11-1338 (issued December 19, 2011).

²³ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6(a)(4) (June 2009).

²⁴ See *supra* note 21; see also *B.S.*, Docket No. 16-0712 (issued November 7, 2016).

²⁵ See *C.P.*, Docket No. 19-1935 (issued July 1, 2020); *R.G.*, Docket No. 15-0144 (issued July 27, 2016).

²⁶ 20 C.F.R. § 10.441(a).

²⁷ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.²⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$22,729.08 for the period April 1, 2014 to December 12, 2015, for which he was not at fault, because he concurrently received FECA benefits and SSA age-related retirement benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$300.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

²⁸ See *L.G.*, Docket No. 19-1274 (issued July 10, 2020).