

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,477.86, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset for the period August 1, 2017 to October 12, 2019; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$624.95 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On August 5, 2011 appellant, then a 59-year-old hazardous material laborer, filed a traumatic injury claim (Form CA-1) alleging that on August 4, 2011 he fractured his clavicle and skull when he fell off of scaffolding while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for: closed fracture of the base of the skull with hemorrhage and moderate loss of consciousness; traumatic extradural hematoma without open wound and no coma; closed fracture of the clavicle, acromial end; and cervical degenerative joint disease. It paid appellant wage-loss compensation on the supplemental rolls as of September 19, 2011 and on the periodic rolls as of September 25, 2011. On September 18, 2012 appellant underwent OWCP-authorized left shoulder arthroscopy with subacromial decompression, distal clavicle resection, and extensive debridement including extensive bursitis throughout subacromial space.

Appellant filed a claim for a schedule award (Form CA-7). By decision dated October 7, 2014, OWCP denied his claim for a schedule award. Appellant requested reconsideration. By decision dated March 9, 2015, OWCP denied modification of the October 7, 2014 decision.

On September 4, 2019 SSA forwarded a completed FERS/SSA dual benefits calculation form to OWCP. The form indicated that beginning in August 2017 appellant's SSA rate with FERS was \$1,562.00 and without FERS was \$1,250.30, beginning in December 2017 his SSA rate with FERS was \$1,593.00 and without FERS was \$1,275.30, and beginning in December 2018 his SSA rate with FERS was \$1,637.50 and without FERS was \$1,311.00.

In an October 9, 2019 letter, OWCP notified appellant that his compensation would be offset by the portion of his SSA age-related retirement benefits attributable to his federal service. It indicated that he would receive net compensation of \$2,518.28 every 28 days effective October 13, 2019.

In a preliminary determination dated November 4, 2019, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$8,477.86 because his wage-loss compensation benefits had not been reduced for the period August 1, 2017 through October 12, 2019 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$8,477.86. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment and requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial

documentation. Additionally, it notified him that, he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing. OWCP allotted 30 days for appellant to respond. No response was received.

By decision dated January 22, 2020, OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$8,477.86 for the period August 1, 2017 through October 12, 2019, for which he was not at fault, because his FECA compensation payments were not offset by the portion of his SSA age-related retirement benefits attributable to his federal service. It found that he was without fault in the creation of the overpayment, but denied waiver of recovery because he had not responded to the overpayment recovery questionnaire or provided supporting financial documentation. OWCP required recovery of the overpayment by deducting \$624.95 every, 28 days from appellant's continuing wage-loss compensation.

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.⁴ However, section 8116 also 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 When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$8,477.86, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period August 1, 2017 to October 12, 2019.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

In its January 22, 2020 decision, OWCP found that an overpayment of compensation was created for the period August 1, 2017 to October 12, 2019. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning August 1, 2017. OWCP, however, neglected to offset his FECA benefits until October 12, 2019. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period August 1, 2017 through October 12, 2019.

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 SSA age-related retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rates with FERS and without FERS for the period August 1, 2017 through October 12, 2019. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2017 through October 12, 2019 and finds that an overpayment of compensation in the amount of \$8,477.86 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her 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.¹¹ 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

⁹ 5 U.S.C. § 8116(d)(2); *see R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

¹⁰ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹¹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹²

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹³ Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

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

The fact that a claimant is without fault in creating an overpayment does not preclude OWCP from recovering the overpayment.¹⁵ 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.¹⁶ Appellant, however, has the responsibility to provide the appropriate financial information to OWCP.¹⁷

In its preliminary determination dated November 4, 2019, OWCP explained the importance of providing the completed overpayment recovery questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested information within 30 days. Appellant, however, did not respond. As such, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.¹⁸

¹² *Id.* at § 10.437(a)(b).

¹³ *Id.* at § 10.438(a).

¹⁴ *Id.* at § 10.438(b).

¹⁵ See *George A. Rodriguez*, 57 ECAB 224 (2005); *Joyce O. Diaz*, 51 ECAB 124 (1999).

¹⁶ 20 C.F.R. § 10.436.

¹⁷ *Id.* at § 10.438; see also *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

¹⁸ *D.B.*, Docket No. 20-0592 (issued September 21, 2020); *R.M.*, Docket No. 19-1570 (issued June 1, 2020); *G.G.*, Docket No. 19-0684 (issued December 23, 2019).

As appellant did not submit the information required under 20 C.F.R. § 10.438, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.¹⁹

On appeal, counsel contends that appellant is unable to repay the overpayment without financial hardship. As explained above, the Board finds that OWCP properly denied waiver of recovery of the overpayment as he failed to submit the financial information needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations 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 the error is discovered or his or her 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.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$624.95 from appellant's continuing compensation payments every 28 days.

OWCP provided a Form OWCP-20 to appellant with the November 4, 2019 preliminary overpayment determination. Appellant did not complete the form or provide the necessary financial information to support his income and expenses prior to the final January 22, 2020 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²¹ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²² The Federal (FECA) Procedure Manual provides that, in these instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²³ While appellant did not submit the financial information requested, the record reflects that his continuing 28-day compensation as of November 4, 2019 was \$2,504.62. Therefore, deducting \$624.95 every 28 days from his continuing compensation is not in excess of the 25 percent repayment rate.²⁴

¹⁹ *D.B., id.; S.P.*, Docket No. 19-1318 (issued July 31, 2020).

²⁰ 20 C.F.R. § 10.441(a).

²¹ *Id.* at § 10.438. See also *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

²² See *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

²³ *Supra* note 11 at Chapter 6.500.8(c)(1) (September 2018).

²⁴ *D.B., supra* note 18; *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

As appellant did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in directing recovery of the \$8,477.86 overpayment at the rate of \$624.95 every 28 days from his continuing compensation payments.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,477.86, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period August 1, 2017 to October 12, 2019. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$624.95 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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