

compensation and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation benefits.

FACTUAL HISTORY

This case has previously been before the Board on other issues.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 19, 2003 appellant, then a 55-year-old rural route carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he slipped on ice and fell, landing on his right arm and leg while in the performance of duty. He stopped work that day. On January 27, 2004 OWCP accepted appellant's claim for right shoulder, knee, and thigh strains. On April 29, 2004 appellant returned to part-time limited-duty work for four hours a day. He returned to full-time light-duty work on May 3, 2005. Appellant stopped work again on October 23, 2006.⁴ On February 1, 2008 OWCP expanded the acceptance of appellant's claim to include left knee meniscal tear. On February 29, 2008 it expanded the acceptance of his claim to include lumbar strain. On June 23, 2008 OWCP entered appellant on the periodic rolls for wage-loss compensation, effective May 7, 2008. It subsequently expanded the acceptance of his claim to include additional conditions including right rotator cuff syndrome, osteoarthritis of the right knee, venous embolism of the lower extremity, right knee joint replacements, and mechanical failure of the prosthetic joint implant as well as total left knee joint replacements.

On October 16, 2018 OWCP received a completed Federal Employees Retirement System (FERS)/SSA dual benefits calculation form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since August 2014. SSA indicated that appellant's monthly SSA rate with FERS was \$1,137.70 beginning August 2014, while the monthly SSA rate without FERS was \$299.80. It provided that from December 2014 through November 2016 appellant's monthly SSA rate with FERS was \$1,157.00, while his SSA rate without FERS was \$304.80. The form further indicated that beginning December 2016 through November 2017, his monthly SSA rate with FERS was \$1,160.40, while the rate without FERS was \$305.70. For the period beginning December 2017, appellant's monthly SSA rate with FERS was \$1,183.60, while his rate without FERS was \$311.80.

On November 16, 2018 OWCP informed appellant that he had been receiving dual FERS and SSA age-related retirement benefits. It further informed him that his FECA benefits must be adjusted based on the FERS portion of SSA benefits that were attributable to federal service.

³ Docket No. 08-1270 (issued July 2, 2009).

⁴ On February 5, 2007 appellant filed an occupational disease claim (Form CA-2) alleging that he had aggravated his underlying degenerative disc disease developing left leg radiculopathy, and left knee strain due to factors of his federal employment. OWCP assigned File No. xxxxxx658, accepted the claim on January 22, 2008 for left knee lateral meniscus tear, and on February 1, 2008 explained that this condition was accepted as a consequence of his accepted right knee injury in his December 19, 2003 claim under Master File No. xxxxxx374, which is the current claim.

OWCP indicated that appellant's FECA benefits would be reduced from \$3,828.00 to \$2,645.48 every 28 days.

On January 3, 2019 OWCP notified appellant that it made a preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$44,107.20 because he received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period August 1, 2014 through November 10, 2018. It noted that the SSA had confirmed that a portion of his SSA benefits were attributed to his years of federal service as an employee under the FERS retirement program and that portion required an offset of his FECA compensation benefits until November 11, 2018 when his monthly compensation for wage loss was adjusted. OWCP explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA rates with and without FERS for each period, and then multiplying that amount by the number of days in each period. The FERS offset calculation worksheet indicated that OWCP had utilized a 28-day FERS offset amount of \$773.45 for August 1, 2014 through November 30, 2014, \$786.64 for December 1, 2014 through November 30, 2016, \$788.95 for December 1, 2016 through November 30, 2017, and \$804.74 for December 1, 2017 through November 10, 2018. Using these figures, OWCP calculated that the total overpayment amount was \$44,107.20. It found that he was without fault in the creation of the overpayment. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or request a prerecoument hearing.

In an overpayment action request form dated January 18, 2019, appellant requested a prerecoument hearing with a representative of OWCP's Branch of Hearings and Review and also requested waiver of recovery of the overpayment as he was found to be without fault.

On January 18, 2019 appellant submitted a completed Form OWCP-20 and indicated that he had \$30,180.00 in cash. He listed his monthly income as \$1,216.50 in SSA benefits, \$555.00 in Supplemental Security Income, \$6,200.00 in Department of Veterans Affairs' benefits, and \$2,700.00 in FECA benefits for a total of \$10,671.50. Appellant listed monthly expenses including \$1,858.00 in rent or mortgage, \$750.00 in food, \$100.00 in clothing, \$415.00 in utilities, \$600.00 in miscellaneous expenses, \$525.00 in money owed to SSA, and \$1,700.00 in a bank loan totaling \$5,948.00. He further indicated that he had \$25,000.00 in cash as well as \$3,000.00 in his checking account for a total of \$28,000.00 on hand.

On May 17, 2019 appellant testified before an OWCP hearing representative and disagreed that he should be required to repay the overpayment.

By decision dated August 6, 2019, OWCP's hearing representative finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$44,107.20 for the period August 1, 2014 through November 10, 2018. She determined that appellant was not at fault in the creation of the overpayment. OWCP's hearing representative denied waiver of recovery of the overpayment as there was no evidence that recovery would defeat the purpose of FECA, finding appellant's monthly income was \$10,879.63 including \$1,771.50 in combined SSA benefits, monthly FECA benefits of \$2,908.13, and other income of \$6,200.00 totaling \$10,879.63 with reported monthly

expenses of \$5,948.00 resulting in approximately \$4,931.63 in income over debt each month which exceeded the statutory amount of \$50.00. She further found that there was no evidence that recovery would be against equity and good conscience. The hearing representative required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

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.⁵ 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.⁶

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.⁷ 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 benefits 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 \$44,107.20 for the period August 1, 2014 through November 10, 2018, for which he was not at fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

As noted above, a claimant cannot receive both FECA 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 during the period August 1, 2014 through November 10, 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

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

⁹ 5 U.S.C. § 8116(d)(2); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided its rates with FERS, and without FERS for specific periods commencing August 1, 2014 through November 10, 2018. OWCP provided its calculations for each relevant period based on a FERS offset calculation worksheet and in its January 3, 2019 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2014 through November 10, 2018 and finds that an overpayment of compensation in the amount of \$44,107.20 was created.¹⁰

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.¹¹ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹²

Recovery of an overpayment will defeat the purpose of FECA if 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.¹³ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴

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 notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵

¹⁰ *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹¹ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹² *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 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).

¹⁴ *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

¹⁵ 20 C.F.R. § 10.437(a)(b).

OWCP 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.¹⁶ 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.¹⁷

OWCP procedures provide that a finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary. The burden is on the overpaid individual to show that the expenses are reasonable and needed for a legitimate purpose. If the claims examiner or hearing representative determines that the amount of certain expenses is not ordinary and necessary, he or she must state, in writing, the reasons for the determination. The determination should be supported by rationale, which may include utilizing statistics from the Bureau of Labor Statistics that show that the overpaid individual's expenses exceed that of the range for the general population. OWCP should be careful to avoid counting an expense twice when totaling the overpaid individual's ordinary and necessary living expenses. For example, if the overpaid individual's credit card debt is already calculated as a fixed and miscellaneous living expense, the credit card expense(s) should not be added again as consumer debt expense. If the amount is added again, it would result in an excessive total for the overpaid individual's ordinary and necessary living expenses, and would make the individual appear less able to repay his or her overpayment than would actually be the case. Furthermore, OWCP should ensure that the monthly expense used for each credit card reflects only the minimum payment required by the creditor. The minimum amount should be verified, if necessary, by requiring the overpaid individual to submit copies of his or her monthly billing statement(s).¹⁸

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 of recovery of the overpayment 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.¹⁹ OWCP considered appellant's financial information, as reported in appellant's statements, to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary and necessary living expenses. Based on

¹⁶ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁷ *Id.* at § 10.438(b).

¹⁸ *Supra* note 13 at Chapter 6.400.4(b)(2).

¹⁹ 20 C.F.R. § 10.436.

appellant's January 18, 2019 overpayment recovery questionnaire and the record, his total monthly income of \$10,879.63 and subtracting \$5,948.00 in monthly expenses, resulted in \$4,931.63 in income over debt each month. Thus, based on appellant's statements and the record, appellant's monthly income exceeded his ordinary and necessary living expenses by more than \$50.00, he did not need substantially all of his income for ordinary and necessary living expenses such that recovery would defeat the purpose of FECA.²⁰

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant did not submit evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment he gave up a valuable right or changed his position for the worst. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²¹

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²²

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.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$600.00, OWCP explained how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.²⁴ Thus, OWCP did not abuse its discretion in setting the

²⁰ *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

²¹ *N.J.*, *supra* note 14; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²² *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

²³ 20 C.F.R. § 10.441(a); *A.F.*, *supra* note 11; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

²⁴ *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

rate of recovery.²⁵ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$600.00 every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$44,107.20 for the period August 1, 2014 through November 10, 2018, for which he was not at fault, as he concurrently received FECA wage-loss compensation 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 \$600.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2021
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

²⁵ *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).