

**United States Department of Labor
Employees' Compensation Appeals Board**

L.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Antonio, TX, Employer**

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**Docket No. 20-1455
Issued: March 23, 2021**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 23, 2020 appellant filed a timely appeal from March 4 and April 22, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an \$118,570.22 overpayment of wage-loss compensation for the period March 1, 2007 through October 12, 2019 for which he was not at fault because he concurrently received FECA wage-loss compensation benefits and Social Security

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 22, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days; and (4) whether OWCP properly suspended appellant's wage-loss compensation benefits, effective April 26, 2020, for failure to complete an EN1032 form as requested.

FACTUAL HISTORY

This case has previously been before the Board.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 November 18, 2003 appellant, then a 61-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on November 17, 2003 he injured his back while in the performance of duty. OWCP accepted the claim for degeneration of lumbar or lumbosacral intervertebral discs and an aggravation of displacement of a cervical intervertebral disc without myelopathy. Appellant stopped work on November 17, 2003 and returned to modified employment for six hours per day on January 3, 2007. Beginning March 19, 2007, OWCP paid him wage-loss compensation based on its determination of his wage-earning capacity.

A notification of personnel action (PS Form 50) dated February 29, 2008 indicated that appellant was covered under the Federal Employee Retirement System (FERS).⁴

By decisions dated January 6 and July 12, 2011, OWCP denied appellant's claim for a schedule award. Appellant appealed to the Board. By decision dated August 20, 2012, the Board affirmed OWCP's July 12, 2011 decision.⁵

In a FERS/SSA dual benefits calculation form dated May 10, 2019, SSA provided the monthly payments that appellant was entitled from March 2007 to December 2018 with and without FERS. In the "remarks" section, SSA advised that he had become entitled to retirement benefits on March 2007 but that his benefits were suspended until November 2007 "because of doing work."

In a FERS offset calculation form dated October 15, 2019, OWCP calculated that appellant had received a total overpayment of \$118,570.22. It calculated the period of the overpayment as March 1, 2007 through October 12, 2019.

On November 6, 2019 OWCP advised appellant of its preliminary determination that he had received an overpayment of wage-loss compensation in the amount of \$118,570.22 for the period March 1, 2007 through October 12, 2019 because it failed to offset the portion of his SSA

³ Docket No. 12-519 (issued August 20, 2012).

⁴ In EN1032 forms beginning 2008, appellant indicated that he received benefits from SSA as part of an annuity for federal service.

⁵ *Supra* note 3.

age-related retirement benefits that he received due to his federal service from his workers' compensation benefits. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment of wage-loss compensation. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents so that it could determine whether he was entitled to waiver of recovery of the overpayment. 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 precoupment hearing.

In an overpayment action request form received December 10, 2019, appellant requested a decision based on the written evidence. He submitted a completed Form OWCP-20 providing assets in cash, checking, and savings accounts of \$7,686.12, property valued at \$14,000.00 for which he owed \$3,000.00, and a timeshare worth \$8,000.00 with a \$4,000.00 loan remaining. Appellant also provided his monthly income and expenses and submitted supporting financial documentation.

By decision dated March 4, 2020, OWCP found that appellant had received an \$118,570.22 overpayment of compensation March 1, 2007 through October 12, 2019 because he had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. It further determined that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP found that appellant's assets exceeded the allotted resource base. It further noted that he had not adequately documented his expenses. OWCP determined that it would recovery the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

On March 10, 2020 OWCP provided appellant with an EN1032 form and informed him that federal regulations required him to make an affidavit reading any earnings received or employment performed during the previous 15-month period. It notified him that he was required to fully answer all questions on the EN1032 form and return it within 30 days or his benefits would be suspended pursuant to 20 C.F.R. § 10.528. OWCP mailed the letter to appellant's address of record. Appellant did not respond to OWCP's request.

By decision dated April 22, 2020, OWCP suspended appellant's wage-loss compensation and authorization for medical benefits under 20 C.F.R. § 10.525(a) effective April 26, 2020 for failing to submit an EN1032 form as requested.

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.⁶ Section 8116 limits the right of an employee to receive

⁶ 5 U.S.C. § 8102.

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 OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

OWCP paid appellant wage-loss compensation for partial disability following his injury. Appellant subsequently began receiving SSA age-related retirement benefits. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.¹⁰ Accordingly, the Board finds that fact of overpayment has been established.¹¹

The Board further finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment. In a May 10, 2019 FERS/SSA dual benefits calculation form, SSA advised that appellant had become entitled to retirement benefits in March 2007, but that his benefits had been suspended due to his performing work until November 2007. OWCP, however, calculated the period and the amount of the overpayment as beginning March 2007. The Board will, therefore, remand the case for OWCP to further explain its calculation of the amount and period of the overpayment.

On remand OWCP should determine the exact period and amount of the overpayment of compensation. It should then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁹ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹⁰ *Supra* note 8. *See A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹¹ *See S.H.*, Docket No. 20-1157 (issued December 23, 2020); *K.H.*, Docket No. 18-0171 (issued August 2, 2018).

supporting financial information.¹² After this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹³

LEGAL PRECEDENT -- ISSUE 4

Section 8106(b) of FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.¹⁴

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.¹⁵ If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.¹⁶

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly suspended appellant's wage-loss compensation benefits, effective April 26, 2020, for failure to complete an EN1032 form as requested.

On March 10, 2020 OWCP provided appellant with the EN1032 form and notified him that federal regulations required him to complete the form and answer all questions concerning his employment or earnings. It properly notified him that, if he did not completely answer all questions and return within 30 days, his benefits would be suspended. The record reflects that OWCP's letter was sent to appellant's address of record and there is no indication that it was returned as undeliverable.¹⁷ Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee.¹⁸

Appellant failed to timely submit the EN1032 form within 30 days of OWCP's request. He was receiving wage-loss compensation and was, therefore, required to complete the EN1032

¹² See *L.K.*, Docket No. 20-0416 (issued November 12, 2020).

¹³ In light of the Board's disposition regarding Issue 1, Issues 2 and 3 are moot.

¹⁴ 5 U.S.C. § 8106(b).

¹⁵ 20 C.F.R. § 10.528; see also *R.B.*, Docket No. 20-0176 (issued June 25, 2020); *A.H.*, Docket No. 15-241 (issued April 3, 2015).

¹⁶ *Id.*

¹⁷ See *J.H.*, Docket No. 20-0785 (issued October 23, 2020); *Kenneth E. Harris*, 54 ECAB 502 (2003).

¹⁸ *Id.*

form.¹⁹ Appellant's failure to file an EN1032 form within 30 days properly resulted in the suspension of his wage-loss compensation. Thus, the Board finds that OWCP properly suspended his wage-loss compensation benefits, effective April 26, 2020, pursuant to 20 C.F.R. § 10.528.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of wage-loss compensation for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment. The Board further finds that OWCP properly suspended appellant's wage-loss compensation benefits, effective April 26, 2020, for failure to complete an EN1032 form as requested.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed and the March 4, 2020 decision is affirmed in part and set

¹⁹ See *R.S.*, Docket No. 20-0580 (issued September 14, 2020); *A.S.*, Docket No. 17-1530 (issued November 7, 2017).

²⁰ See *R.B.*, *supra* note 15; *P.M.*, Docket No. 16-0382 (issued May 19, 2016); *M.W.*, Docket No. 15-0507 (issued June 18, 2015).

aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 23, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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