



recovery of the overpayment by deducting \$611.00 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On May 26, 1994 appellant, then a 42-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee and leg when he slipped on spilled coffee and fell, landing on his right knee while in the performance of duty.<sup>2</sup> On October 31, 1995 OWCP accepted appellant's May 26, 1994 claim for right knee contusion under OWCP File No. xxxxxx787. It subsequently expanded its acceptance of the claim to include tear of the medial meniscus of the right knee and resulting arthroscopic surgery.

Appellant stopped work on September 19, 1996. On June 16, 1997 OWCP informed him that he would receive wage-loss compensation on the periodic rolls beginning May 25, 1997.

On December 3, 2013 OWCP notified appellant that FECA required that his continuing compensation benefits be reduced if he began receiving SSA retirement benefits based on his age and federal service. It further noted that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation. OWCP directed appellant to contact it immediately if he was receiving or had been approved to receive SSA retirement benefits.

On February 10, 2014 appellant elected to receive FECA benefits rather than Office of Personnel Management (OPM) retirement benefits, effective January 12, 2014.

On June 13, 2019 OWCP received from SSA a Federal Employees Retirement System (FERS)/(SSA) dual benefits calculation form which reported that appellant had been in receipt of SSA age-related retirement benefits since December 2016. SSA listed appellant's SSA benefit rates with and without FERS for periods beginning December 2016, December 2017, and December 2018. Beginning December 2016, appellant's monthly rate with FERS was \$1,136.40 and without FERS was \$548.60. Beginning December 2017 appellant's monthly rate with FERS was \$1,159.10 and without FERS was \$559.50 per month. Beginning December 2018 appellant's monthly SSA rate with FERS was \$1,191.40 and without FERS was \$575.10.

In a July 11, 2019 letter, OWCP informed appellant that based on the information provided by SSA regarding the amount of his age-related retirement benefits, which were attributable to Federal service, his FECA wage-loss compensation had been adjusted. It indicated that his gross FECA benefits of \$2,960.00 would be offset by his SSA benefit attributable to Federal service in the amount of \$616.30 to \$2,243.70 every 28 days.

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<sup>2</sup> OWCP assigned the claim OWCP File No. xxxxxx787. On June 15, 1994 appellant filed another Form CA-1 alleging that on that date he slipped on a grape and fell onto his right leg and side while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx273 and accepted it for right knee contusion. On July 26, 1996 appellant filed a Form CA-1 alleging that on June 26, 1996 he developed discomfort in the right side of his neck and shoulder due to prepping an e-mail while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx756 and accepted it for rotator cuff tendinitis under OWCP File No. xxxxxx756. Appellant's claims in File Nos. xxxxxx787, xxxxxx756, and xxxxxx273.

On July 15, 2019 OWCP issued a preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$18,432.73 because it failed to reduce his FECA wage-loss compensation benefits for the period December 1, 2016 through June 22, 2019 to offset his SSA age-related benefits that were attributable to federal service. It explained that it had calculated the overpayment of compensation by determining the difference between the SSA amount 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 \$542.58 from December 1, 2016 through November 30, 2017, \$553.48 from December 1, 2017 through November 20, 2018, and \$616.30 from December 1, 2018 through June 22, 2019. Using these figures, it calculated that the total overpayment amount was \$18,432.73. The FERS also determined that appellant was at fault in the creation of the overpayment, as he failed to provide evidence that he knew or should have known was material. 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 precoupment hearing. Appellant did not respond to the preliminary decision.

In a July 15, 2019 letter, appellant elected to receive OPM retirement benefits effective October 1, 2019. He requested that his FECA benefits end on September 30, 2019.

By decision dated August 14, 2019, OWCP finalized the July 15, 2019 preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$18,432.73 for the period December 1, 2016 through June 22, 2019, for which he was at fault. OWCP required recovery of the overpayment by deducting \$611.00 or 25 percent of his net periodic rolls compensation every 28 days beginning September 15, 2019.

### **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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 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).

federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$18,432.73 for the period December 1, 2016 through June 22, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, he was concurrently receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>7</sup> The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to federal service during the period December 1, 2016 through June 22, 2019. Consequently, the fact of overpayment has been established.<sup>8</sup>

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-related SSA retirement benefits that were attributable to federal service. The SSA provided their rate with FERS, and without FERS for specific periods commencing December 1, 2016 through June 22, 2019. OWCP provided its calculations for each relevant period based on a FERS offset calculation worksheet and in its July 15, 2019 preliminary overpayment determination. No contrary evidence was provided by appellant.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 1, 2016 through June 22, 2019 and finds that an overpayment of compensation in the amount of \$18,432.73 was created.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that an overpayment of 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 be against equity and good

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<sup>6</sup> FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>7</sup> 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).

<sup>8</sup> *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

<sup>9</sup> *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

conscience.<sup>10</sup> No waiver of payment is possible if appellant is at fault in helping to create the overpayment.<sup>11</sup>

Section 10.433(a) of OWCP's regulations provides that OWCP:

“[M]ay consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment --

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”<sup>12</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.<sup>13</sup>

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, 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.<sup>14</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly found appellant at fault in the creation of the overpayment for the period December 1, 2016 through June 22, 2019.

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<sup>10</sup> 5 U.S.C. § 8129; A.S., Docket No. 17-0606 (issued December 21, 2017).

<sup>11</sup> *J.B.*, Docket No. 19-1244 (issued December 20, 2019); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>12</sup> 20 C.F.R. § 10.433(a) and § 10.430; *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>13</sup> *Id.* at § 10.433(b); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

<sup>14</sup> *Id.*

The Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at 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.<sup>15</sup> Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, he could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.<sup>16</sup>

Thus, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that he was at fault in the creation of the overpayment for the period December 1, 2016 through June 22, 2019.<sup>17</sup>

As appellant was without 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. Following any further development deemed necessary, OWCP shall issue a *de novo* decision on waiver.

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$18,432.73 for the period December 1, 2016 through June 22, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that he was without fault in the creation of the overpayment for the period December 1, 2016 through June 22, 2019.<sup>18</sup>

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<sup>15</sup> *Supra* note 13 at Chapter 6.300.4(g)(4) (September 2018).

<sup>16</sup> *See J.B.*, Docket No. 19-1244; *G.G.*, Docket No. 19-0684 (issued December 24, 2019) (the Board affirmed OWCP's finding that, due to the complexity of SSA age-related retirement benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that he was not expected to be able to calculate the amount of the offset prior to receipt of information for the SSA).

<sup>17</sup> *R.W.*, Docket No. 19-0334 (issued August 7, 2020); *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>18</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 7, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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