

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

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G.R., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS BENEFITS ADMINISTRATION)
REGIONAL OFFICE, Los Angeles, CA,)
Employer)

Docket No. 21-0209
Issued: December 20, 2021

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 7, 2020 appellant, through counsel, filed a timely appeal from an October 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that, following the October 26, 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,787.18 for the period November 2, 2018 through May 25, 2019 for which he was without fault, as he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 15, 2018 appellant, then a 67-year-old vocational rehabilitation counselor, filed an occupational disease claim (Form CA-2) alleging that he developed right middle and ring trigger fingers following his return to work on October 2, 2017. He stopped work on September 11, 2018. On October 17, 2018 appellant filed a second Form CA-2 and alleged that he had right thumb de Quervain's tenosynovitis due to constant typing required by his federal employment duties. On the reverse side of the claim form his supervisor indicated that appellant's retirement coverage was Federal Employees Retirement System (FERS). On December 19, 2019 OWCP accepted his claim for left carpal tunnel syndrome, right de Quervain's tenosynovitis, and right middle and ring trigger fingers. It authorized wage-loss compensation on the supplemental rolls from November 2 through December 31, 2018. OWCP paid appellant wage-loss compensation on the periodic rolls effective January 1, 2019. Appellant returned to full-duty work on May 28, 2019.

On June 18, 2019 OWCP received a completed FERS/SSA dual benefits calculation form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since January 2017. SSA reported that: beginning January 2017, appellant's monthly SSA rate with FERS was \$2,232.20 and without FERS was \$1,460.10; beginning December 2017, appellant's monthly SSA rate with FERS was \$2,276.80 and without FERS was \$1,489.30; beginning January 2018, appellant's monthly SSA rate with FERS was \$2,308.20 and without FERS was \$1,489.30; beginning December 2018, appellant's monthly SSA rate with FERS was \$2,372.80 and without FERS was \$1,531.00; and beginning January 2019, appellant's monthly SSA rate with FERS was \$2,397.90 and without FERS was \$1,531.00.

On July 20, 2020 OWCP notified appellant that it made a preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$5,787.18 because he received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period November 2, 2018 through May 25, 2019 for which he was without fault.⁴ It noted that the SSA had confirmed that a portion of his SSA age-related retirement

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that OWCP appears to have made a typographical error by listing the period of the overpayment as extending through July 25, 2019 in the preliminary overpayment determination. The FERS offset calculation and the memorandum of decision both provide the correct period of overpayment from November 2, 2018 through May 25, 2019.

benefits were attributed to his years of federal service as an employee under FERS and that portion required an offset of his FECA compensation benefits until July 26, 2019 when his monthly wage-loss compensation was adjusted. OWCP explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA benefit rates with and without FERS for each period, and then multiplying that amount by the number of days in each period. Using these figures, OWCP calculated that the total overpayment amount was \$5,787.18. It found that appellant was at 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 provided an overpayment action request form and advised 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 prerecoumment hearing.

On August 13, 2020 OWCP received a second FERS/SSA dual benefits calculation form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since January 2017. SSA reported that: beginning January 2017, appellant's monthly SSA rate with FERS was \$2,232.20 and without FERS was \$1,460.10; beginning December 2017, appellant's monthly SSA rate with FERS was \$2,276.80 and without FERS was \$1,489.30; beginning December 2018, appellant's monthly SSA rate with FERS was \$2,372.80 and without FERS was \$1,531.00; and beginning December 2019, appellant's monthly SSA rate with FERS was \$2,436.20 and without FERS was \$1,555.40.

In an overpayment action request form dated September 1, 2020, appellant requested waiver of recovery of the overpayment. He also requested that OWCP make a decision based on the written evidence. Appellant provided an August 6, 2020 Form OWCP-20 and some supporting financial documentation. He listed his monthly income as \$4,836.00. Appellant indicated that he supported his daughter, a college student, and provided his monthly expenses including housing \$5,171.00, food \$400.00, clothing \$50.00, utilities \$400.00, and homeowner association fees of \$280.00. He listed \$2,028.00 in monthly credit card expenses and \$8,329.00 in total monthly expenses. Appellant noted that he had no cash or other funds. He provided his earnings and leave statement, which indicated net income of \$1,419.48 every two weeks, savings allotment of \$1,234.00 as well as Thrift Savings Plan (TSP) contribution of 10 percent with matching funds from the employing establishment of \$170.18 every two weeks, his mortgage statement with a regular monthly payment of \$4,725.00, and \$23,650.00 in past due amounts, his past due property tax bill for \$5,377.53, his homeowners' association monthly assessment of \$280.00, his car loan of \$823.78, a loan payment with a monthly payment of \$679.80 and \$2,855.16 past due, a credit card with a monthly payment of \$141.22, and a second car loan of \$385.42 per month.

By decision dated October 26, 2020, OWCP finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$5,787.18 for the period November 2, 2018 through May 25, 2019. It found that he was without fault in the creation of the overpayment. OWCP denied waiver of recovery of the overpayment as appellant had not provided supporting financial documentation, so that there was insufficient evidence to establish that recovery would defeat the purpose of FECA or be against equity and good conscience. It requested payment for the full amount of overpayment.

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 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 OWCP properly determined that appellant received an overpayment of compensation.

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits that were attributable to his federal service without an appropriate offset. A claimant cannot concurrently receive FECA wage-loss compensation 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 November 2, 2018 through May 25, 2019. The Board thus finds that fact of overpayment is established.

The Board further finds, however, that the case is not in posture for decision with respect to the amount of the overpayment. To determine the amount of the overpayment, the portion of 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. SSA provided its rate with FERS and without FERS for the period November 2, 2018 through May 25, 2019. However, OWCP received two FERS/SSA dual calculation transmittal forms, the first dated June 18, 2019 and the second dated August 13, 2020, with differing amounts of SSA benefits with FERS shown. It is required by statute and regulations to make findings of fact and provide a statement of reasons.¹⁰ The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *L.D.*, Docket No. 21-0447 (issued September 28, 2021); *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 (issued February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *Supra* note 7.

¹⁰ *See L.D.*, *supra* note 7; *M.M.*, Docket No. 19-1914 (issued April 9, 2021); 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of fact and an award for or against payment of compensation. 20 C.F.R. § 10.126 provides that OWCP's final decision shall contain findings of fact and a statement of reasons. *See also H.B.*, Docket No. 19-0356 (issued March 20, 2020).

compensation with a clear statement showing how the overpayment was calculated. Although the record establishes that appellant received SSA age-related retirement benefits, which were attributable to his federal service, it is not clear how the amount of the overpayment was derived. OWCP has not offered an explanation for the discrepancy in the SSA benefit figures of record and used in its calculations.

For these reasons, the Board finds that it remains unclear whether the overpayment was calculated correctly for the period November 2, 2018 through May 25, 2019. Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP shall clarify the discrepancy between the figures provided by SSA to OWCP. It shall then determine the amount of the overpayment of compensation and issue a new preliminary overpayment determination, with an overpayment action request form, a new Form OWCP-20, and instructions for appellant to provide updated supporting documentation. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation because he concurrently received SSA age-related retirement benefits while also receiving FECA benefits without an appropriate offset. The Board further finds that the case is not in posture for decision regarding the amount of the overpayment.¹²

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. This case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 20, 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

¹¹ See *L.D.*, *supra* note 7; *S.H.*, Docket No. 20-1189 (issued January 27, 2021).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.