

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

A.P., Appellant	)	
	)	
and	)	<b>Docket No. 19-1671</b>
	)	<b>Issued: February 22, 2021</b>
	)	
DEPARTMENT OF THE AIR FORCE,	)	
DEFENSE COMMISSARY AGENCY,	)	
MAXWELL-GUNTER AIR FORCE BASE,	)	
Montgomery, AL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 5, 2019 appellant filed a timely appeal from July 1 and 2, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,738.23 for which he was not at fault, because he concurrently received FECA wage-

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the July 2, 2019 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.*

loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period February 26, 2017 through December 31, 2018 without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the \$5,738.23 overpayment; (3) whether appellant also received an overpayment of compensation in the amount of \$1,594.07 for which he was not at fault because he concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation benefits for the period January 1 through April 27, 2019; and (4) whether OWCP properly denied waiver of recovery of the \$1,594.07 overpayment.

### **FACTUAL HISTORY**

OWCP accepted that on November 15, 2015 appellant, then a 77-year-old store worker, sustained a strain of unspecified muscle(s) and tendon(s) at the “lower leg level, left leg,” initial encounter; other strain of the left hip, initial encounter; and lumbar radiculopathy as he removed a product from a stocking cart that tipped over and caused him to fall on the floor while in the performance of duty. He stopped work on February 26, 2017 and returned to work on September 14, 2017 in a modified-duty store worker position, four hours per day. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 26 to June 24, 2017, on the periodic rolls from June 25 to September 16, 2017, and again on the supplemental rolls from September 19, 2017 to April 14, 2018. On April 15, 2018 it reduced his wage-loss compensation based on his actual earnings as a modified-duty store worker.

In a February 21, 2019 memorandum of a telephone call (Form CA-110), appellant notified OWCP that he had retired on December 31, 2018 and that he was waiting to receive retirement benefits from the Office of Personnel Management (OPM).

On March 27, 2019 appellant signed a form electing retirement benefits through OPM in lieu of compensation under FECA. On April 23, 2019 he signed a separate form noting the election. Both forms listed the effective date of appellant’s election as January 1, 2019.

On April 10, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form.

In an EN1032 form signed April 16, 2019, appellant indicated that he had not received disability or retirement benefits from OPM. He, however, noted that he received SSA retirement benefits due to his age.

On April 24, 2019 OWCP again requested that SSA provide a dual benefits calculation. SSA returned the form on that same day, indicating that: beginning in January 2017, appellant’s SSA rate was \$1,041.00 with FERS and \$648.20 without FERS; beginning in December 2017, his SSA rate was \$1,061.80 with FERS and \$661.00 without FERS; beginning in January 2018, his SSA rate was \$1,070.80 with FERS and \$661.00 without FERS; and beginning in December 2018, the SSA rate was \$1,100.70 with FERS and \$679.50 without FERS.

A May 1, 2019 Form CA-110 indicated that appellant called again to inform OWCP that he was regular “SS.” Another Form CA-110 of even date indicated that OWCP had requested that the employing establishment verify appellant’s retirement coverage and the employing establishment confirmed that he was under the FERS program.

In a letter dated May 1, 2019, OWCP informed OPM that appellant had elected to receive OPM retirement benefits, effective January 1, 2019, in lieu of wage-loss compensation benefits under FECA. It requested that OPM commence monthly annuity payments, effective January 1, 2019, and to process his health benefits enrollment forms, which it was transferring to OPM. OWCP also requested that OPM reimburse the amount of \$1,594.07 in compensation appellant received during the period January 1 through April 27, 2019. It attached a copy of the election form completed by appellant on April 23, 2019.

On May 3, 2019 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$1,594.07 had been created because appellant received both FECA compensation benefits and OPM retirement benefits for the period January 1 through April 27, 2019. It further found that he was at fault in its creation because, “You recently elected OPM benefits in lieu of FECA benefits, but you did so retroactively. You should have reasonably known that the payments issued after the effective date of the election ... would be improper due to the overlapping dates with a period of benefits from OPM.” OWCP explained its calculation of the overpayment and provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for his completion. It also informed him of the actions he could take, and allotted 30 days for him to respond.

OWCP, in a FERS offset calculation worksheet dated May 20, 2019, found an overpayment of compensation in the amount of \$3,599.95 for the period February 26 through November 30, 2017, \$409.61 for the period December 1 through 31, 2017, and \$1,405.03 for the period January 1 through April 14, 2018.

On May 22, 2019 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$5,738.23 had been created for the period February 26, 2017 through December 31, 2018. It explained that the overpayment occurred because appellant received both FECA compensation benefits and OPM retirement benefits for the period February 26, 2017 through December 31, 2018<sup>3</sup> without appropriate FERS offset, which resulted in a prohibited dual benefit. OWCP also made a preliminary determination that he was without fault in its creation, finding that, due to the complexity in benefits administration, he could not have reasonably known that an improper payment occurred. It explained its calculation of the overpayment and provided appellant with an overpayment action request form and a Form OWCP-20 for his completion. OWCP also informed him of the actions he could take, and allotted 30 days for him to respond.

In an overpayment action request form completed by appellant on May 20, 2019 and received by OWCP on May 30, 2019, appellant requested waiver of recovery of the \$1,594.07 overpayment since the overpayment occurred through no fault of his own. He noted that on December 31, 2018 he spoke to Mrs. R. and told her to stop his compensation payment because he had retired. After appellant received another compensation payment in January 2019 he again called Mrs. R. to stop the payment for the same reason. Mrs. R. advised him that the payment could not be stopped until he made an election of benefits. Appellant indicated that he

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<sup>3</sup> The Board notes that a typographical error was made by OWCP in its May 22, 2019 preliminary determination as it indicated that the overpayment period ended on December 31, 2019, rather than on December 31, 2018. The FERS offset calculation sheet indicates that the overpayment was calculated for the period February 26, 2017 through December 31, 2018.

subsequently selected OPM benefits. On an attached Form OWCP-20 dated May 20, 2019, appellant listed total monthly income of \$734.00 and monthly expenses of \$1,201.00. He reported assets of \$6,000.00 from checking and savings accounts.

During a telephone conference held on June 14, 2019, an OWCP senior claims examiner addressed the issue of waiver of recovery of appellant's \$5,738.23 overpayment for the period February 26, 2017 through December 31, 2018 along with the separate overpayment of compensation in the amount of \$1,594.07 that occurred for the period January 1 through April 27, 2019. He noted that appellant reported total monthly income of \$2,503.00<sup>4</sup> and monthly expenses of \$1,858.50.<sup>5</sup> The claims examiner determined that appellant's monthly income exceeded his monthly expenses by \$644.50 per month (\$2,503.00 monthly income - \$1,858.50 monthly expenses) and, thus, he was not entitled to waiver of recovery of the overpayment.

In an overpayment action request form signed June 21, 2019, appellant requested that OWCP issue a decision based on a review of the written record regarding the \$5,738.23 overpayment. He also requested a telephonic precoupment hearing before a representative of OWCP's Branch of Hearings and Review. Additionally, appellant requested waiver of recovery of the overpayment as he believed that the overpayment occurred through no fault of his own. In a completed Form OWCP-20 dated June 21, 2019, he listed total monthly income of \$1,234.00 and monthly expenses of \$705.00.

OWCP, by decision dated July 1, 2019, finalized its determination that a \$1,594.07 overpayment of compensation was created for the period January 1 through April 27, 2019. It explained that the overpayment occurred because appellant received both FECA wage-loss compensation and OPM retirement benefits between February 26, 2017 and December 31, 2018. OWCP, however, modified its preliminary determination of fault, finding that appellant was without fault in creation of the overpayment because he did not understand the consequences of his decision to elect OPM retirement benefits in lieu of FECA benefits. It denied waiver of recovery of the overpayment of compensation as his monthly income exceeded his monthly expenses based on the sums provided during the June 14, 2019 telephone conference. OWCP ordered appellant to repay the \$1,594.07 overpayment in full.

By decision dated July 2, 2019, OWCP also finalized its determination that a \$5,738.23 overpayment of compensation was created for the period February 26, 2017 through December 31, 2018, because appellant was paid dual compensation under FECA and SSA without appropriate offset. It 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

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<sup>4</sup> In his calculation, OWCP's senior claims examiner miscalculated the total amount of appellant's monthly income as \$2,513.00. Monthly income was reported as \$965.00 from SSA, \$1,269.00 in military retirement benefits, and \$269.00 in VA disability benefits. This amounts to \$2,503.00 as opposed to the \$2,513.00 total found by the claims examiner.

<sup>5</sup> The Board notes that the claims examiner incorrectly calculated a total of \$1,852.50 for appellant's monthly expenses. The monthly expenses were reported as: \$605.00 for rent or mortgage; \$200.00 for food; \$57.00 for electricity; \$55.00 for water; \$75.00 for insurance; \$108.50 for a telephone combined with cable/internet; \$200.00 for a vehicle payment; \$200.00 for vehicle fuel/oil; \$60.00 for vehicle insurance; \$20.00 for medication; \$26.00 for a membership; \$26.00 for accident insurance; \$100.00 for a bank credit card; \$31.00 for another bank credit card; \$25.00 for a store credit card; and \$70.00 for another store credit card. This amounts to \$1,858.50 rather than the \$1,852.50 total found by the claims examiner.

amount by the number of days in each period. OWCP utilized the 28-day FERS offset amount for the 278 days from February 26 through November 30, 2017, 31 days from December 1 through 31, 2017, and January 1 through April 14, 2018, and found corresponding overpayments of \$3,599.95, \$409.61, and \$1,405.03, respectively, for a total overpayment amount of \$5,414.59. It did not utilize the 28-day FERS offset for the period April 15 through December 31, 2018 because the amount of the 28-day offset exceeded the amount of compensation actually paid to appellant when his compensation was reduced on April 15, 2018. OWCP indicated that the total compensation paid for this period was \$2,200.50. It then concluded that the total FERS/SSA offsets for all the periods that should have been withheld from appellant's wage-loss compensation was \$5,738.23 for the period February 26, 2017 through December 31, 2018. OWCP found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because he failed to establish that he needed substantially all of his monthly income to meet current ordinary and necessary living expenses. It ordered appellant to repay the \$5,738.23 overpayment in the amount of \$250.00 per month, commencing August 19, 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>6</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>7</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 retirement benefits that are attributable to the employee's federal service.<sup>8</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 age-related retirement 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.<sup>9</sup>

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

The Board finds that appellant received an overpayment of compensation for the period February 26, 2017 through December 31, 2018.

The record establishes that appellant received SSA age-related retirement benefits attributable to his federal service beginning February 26, 2017, in addition to FECA wage-loss compensation. Appellant is precluded from simultaneously receiving FECA wage-loss

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

compensation and SSA age-related retirement benefits based on his federal service.<sup>10</sup> On April 24, 2019 SSA represented that a portion of appellant's monthly retirement benefit was attributable to his federal service. Consequently, OWCP was obliged to offset appellant's FECA wage-loss compensation by the amount of SSA age-related retirement benefits attributable to his federal service.<sup>11</sup>

Although the Board finds that the fact of overpayment has been established, the Board further finds that the case is not in posture for decision with respect to the amount of the overpayment. OWCP is required by statute and regulation to make findings of fact and provide a statement of reasons.<sup>12</sup> Further, the Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.<sup>13</sup> As noted, the record establishes that appellant received SSA age-related retirement benefits, which were attributable to his federal service. However, it is not clear how the amount of the overpayment was derived. OWCP received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. SSA provided the SSA rate with FERS and without FERS for specific periods commencing January 2017 through December 2018.

For the period February 26, 2017 through April 14, 2018, SSA provided appellant's SSA rate with FERS and without FERS. OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet and determined that he received an overpayment in the amount of \$5,414.59 for the period February 26, 2017 through April 14, 2018. For the period April 15 through December 31, 2018, it found that use of the applicable SSA rates were not warranted because the amount of the 28-day offset amount exceeded the amount of compensation appellant received as a result of its April 15, 2018 loss of wage-earning capacity determination. While OWCP determined that appellant received wage-loss compensation in the amount of \$2,200.00 and concluded that the total overpayment amount for the period February 26, 2017 through December 31, 2018 was \$5,738.23, the record reveals that he actually received \$3,591.91 in wage-loss compensation. Additionally, it did not explain how it added \$2,200.00 to obtain the total overpayment amount. For these reasons, the Board finds that the record does not support that the overpayment was calculated correctly for the period April 15 through December 31, 2018.

Accordingly, the Board finds that the case must be remanded to OWCP. On remand OWCP shall determine the proper amount of the overpayment of compensation based on the correct rates provided by SSA for the period during which the overpayment occurred. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After

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<sup>10</sup> *Id.*

<sup>11</sup> 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

<sup>12</sup> *Id.* at § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. *Id.* at § 10.126 provides that its final decision shall contain findings of fact and a statement of reasons. See also *H.B.*, Docket No. 19-0356 (issued March 20, 2020); *Order Remanding Case, H.O.*, Docket No. 19-0198 (issued July 3, 2019).

<sup>13</sup> *J.M.*, Docket No. 18-1505 (issued June 21, 2019); *Teresa A. Ripley*, 56 ECAB 528 (2005).

this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8102 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.<sup>15</sup> Section 8116(a) states that while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the VA, unless such benefits are payable for the same injury or the same death being compensated for under FECA.<sup>16</sup>

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>17</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>18</sup> OWCP's procedures also explain that the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.<sup>19</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,594.07 for the period January 1 through April 27, 2019.

On March 27 and April 23, 2019 appellant completed forms indicating his election of OPM retirement benefits effective January 1, 2019. OWCP, however, continued to pay him wage-loss compensation for temporary total disability for the period January 1 through April 27, 2019. It calculated that an overpayment of \$1,594.07 was therefore created.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>20</sup> The clear language of section 8116(a) of FECA, section

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<sup>14</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

<sup>15</sup> 5 U.S.C. § 8102(a).

<sup>16</sup> *Id.* at § 8116(a).

<sup>17</sup> 20 C.F.R. § 10.421(a).

<sup>18</sup> *Id.*

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

<sup>20</sup> *Supra* note 19.

10.421(a) of OWCP's implementing regulations, and OWCP's procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.<sup>21</sup>

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period January 1 through April 27, 2019.<sup>22</sup> It was not until May 1, 2019 that OWCP informed OPM that appellant had elected to receive retirement annuity benefits effective January 1, 2019 in lieu of FECA wage-loss compensation and requested that OPM commence annuity payments effective retroactively to that date.

OWCP based its overpayment findings on its determination that appellant had received prohibited dual OPM and FECA benefits for the period January 1 through April 27, 2019. The Board has previously held that the mere fact that a claimant received FECA benefits after the effective date of an OPM election will not establish receipt of a prohibited dual benefit.<sup>23</sup> While the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that he also received OPM retirement benefits for that same period.<sup>24</sup>

The Board, thus, finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,594.07 for the period January 1 through April 27, 2019.<sup>25</sup>

### CONCLUSION

With regard to the July 2, 2019 OWCP decision, the Board finds that appellant received an overpayment of compensation for the period February 26, 2017 through December 31, 2018 for which he was not at fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset. The Board further finds, however, that the case is not in posture for decision regarding the amount of that overpayment. With regard to the July 1, 2019 decision, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,594.07 for the period January 1 through April 27, 2019.<sup>26</sup>

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<sup>21</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a); Federal (FECA) Procedure Manual, *supra* note 19.

<sup>22</sup> *See V.B.*, Docket No. 19-1874 (issued June 4, 2020); *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

<sup>23</sup> *Id.* *See also B.H.*, Docket No. 13-1955 (issued January 29, 2014).

<sup>24</sup> *R.R.*, Docket No. 18-0032 (issued May 3, 2018) (the election form signed by appellant on December 21, 2018 was insufficient to show that he actually began receiving OPM retirement benefits). *See also E.R.*, Docket No. 18-0084 (issued July 27, 2018).

<sup>25</sup> *See V.B.*, *supra* note 22; *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

<sup>26</sup> In light of the Board's disposition of Issue 3, Issue 4 is rendered moot.



**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board. The July 1, 2019 decision of the Office of Workers' Compensation Programs is reversed.<sup>27</sup>

Issued: February 22, 2021  
Washington, DC

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

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

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<sup>27</sup> Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.