

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

E.S., Appellant

and

**DEPARTMENT OF DEFENSE, SHINNEN
ARMY BASE, Shinnen, Netherlands, Employer**

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**Docket No. 20-0919
Issued: February 8, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2020 appellant filed a timely appeal from a March 19, 2020 merit decision 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,087.60 for which he was without fault because he concurrently received FECA wage-loss compensation and Social Security Administration

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 19, 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.*

(SSA) age-related retirement benefits for the period October 1, 2015 through February 1, 2020, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$419.16 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 23, 1992 appellant, then a 39-year-old meat cutter, filed a traumatic injury claim (Form CA-1) alleging that on June 21, 1992 he sustained a right hand injury when the saw he was using pulled his hand into the blade and cut the bone in his right hand, while in the performance of duty.

OWCP accepted the claim for severe laceration of the right hand, complete traumatic metacarpophalangeal amputation of the right index finger, and right carpal tunnel syndrome. It also authorized several surgeries to include: bone repair with screw and suture of the tendon and nerve on June 21, 1992; removal of screws on December 1, 1992; tendon nerve exploration and release on January 1, 1993; removal of neuroma of the right hand on May 27, 1993; chase amputation of the right index finger and distal half of the second metacarpal on October 13, 1993; excision of neuroma with transposition of proximal stump on June 13, 1995; and right carpal tunnel release on May 13 1997. Appellant intermittently returned to work. The record reflects that OWCP paid him wage-loss compensation on the periodic rolls as of June 16, 2002.

A notification of personnel action, Standard Form (SF)-50, dated September 3, 1995, indicated that appellant's service computation date was June 9, 1986 and that he was under a Federal Employees Retirement System (FERS) retirement plan.

Appellant completed EN1032 forms dated September 26, 2016, September 22, 2017, September 18, 2018, and September 23, 2019. In each he responded "Yes" as to whether he received SSA retirement benefits as part of an annuity for federal service and he noted the specific monthly amounts he received.

On December 19, 2019 OWCP forwarded a FERS/SSA dual benefits calculation transmittal to the SSA to determine whether an offset of compensation benefits was required.

On January 14, 2020 OWCP received a completed FERS/SSA dual benefits calculation form dated January 2, 2020 from SSA. The information provided indicated that appellant had been in receipt of SSA age-related retirement benefits since October 2015 and provided his SSA benefits with and without a FERS offset. Beginning October 2015, the SSA rate with FERS was \$826.00 and without FERS was \$618.00, and beginning December 2016, the SSA rate with FERS was \$828.00 and without FERS was \$619.80.

OWCP completed a FERS offset calculation worksheet on February 12, 2020. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from October 1, 2015 through February 1, 2020, resulting in a total overpayment of \$11,087.60. OWCP related that from October 1 to November 30, 2015, appellant received an overpayment in the amount of \$418.29; from December 1, 2015 to November 30, 2016, appellant received an overpayment in the amount of \$2,509.71; from December 1, 2016 to

November 30, 2017, appellant received an overpayment in the amount of \$2,505.26; from December 1, 2017 to November 30, 2018, appellant received an overpayment of \$2,560.62; from December 1, 2018 to November 30, 2019, appellant received an overpayment in the amount of \$2,631.61; and from December 1, 2019 to February 1, 2020, appellant received an overpayment in the amount of \$462.12.

On February 18, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$11,087.60 had been created because appellant's wage-loss compensation payments for the period October 1, 2015 through February 1, 2020, had not been reduced to offset his SSA age-related retirement benefits that were attributable to federal service. It determined that he was without fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP explained that appellant reported on his EN1032 forms filed since 2016 that he was receiving SSA retirement benefits. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment schedule, and advised that he could request waiver of recovery. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. 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 prerecoument hearing.

No response was received.

By decision dated March 19, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$11,087.60, for the period October 1, 2015 through February 1, 2020, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without the required offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that no response had been received to the preliminary overpayment documentation and appellant had not requested waiver of recovery. It required recovery of the overpayment by deducting \$419.16 every 28 days from his 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.³ 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.⁴

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

attributable to the employee's federal service.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,087.60, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2015 through February 1, 2020, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss under FECA, he also was receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage loss under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁷ The information provided by SSA established that during the period October 1, 2015 through February 1, 2020, appellant received SSA age-related retirement benefits that were attributable to federal service while he also received FECA benefits that were not reduced by the appropriate offset. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's 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 specific periods from October 1, 2015 through February 1, 2020. OWCP provided its calculations for each relevant period based on SSA's worksheet which showed that appellant received an overpayment in the amount of \$11,087.60. The Board thus finds that appellant received prohibited dual benefits for the period October 1, 2015 through February 1, 2020 in the amount of \$11,087.60.⁸

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.⁹ Thus, a finding that appellant was without fault does not automatically result in waiver of the

⁵ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

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

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 5; *L.J.*, *supra* note 5.

⁸ *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).

⁹ 5 U.S.C. § 8129(a)-(b).

overpayment, OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹¹ 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 \$50.00.¹²

Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹³

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 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.¹⁴ Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP.¹⁵

Although appellant had been advised to submit Form OWCP-20 and documentation substantiating his income and expenses, he failed to do so, as required by section 10.438 of OWCP's regulation. In its preliminary determination dated September 20, 2019, OWCP explained the importance of providing the completed Form OWCP-20 and financial information, including

¹⁰ *L.S.*, 59 ECAB 350 (2008).

¹¹ 20 C.F.R. § 10.436. OWCP's procedures provide that the assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a (3) (September 2018).

¹² Federal (FECA) Procedure Manual *id.* at Chapter 6.400.4(a)(3) (September 2018).

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.* at § 10.436.

¹⁵ *Id.* at § 10.438.

copies of income tax returns, bank account statements, bills, pay slips, and any other records to support reported income and expenses. It advised appellant that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. Appellant did not timely submit a completed Form OWCP-20 or otherwise submit financial information necessary for OWCP to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.¹⁶

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁷

Section 10.441(a) of OWCP's regulations¹⁸ provides in pertinent part:

“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 soon as the error is discovered or his or her attention is called to 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.”¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$419.16 every 28 days from appellant's continuing compensation payments.

OWCP provided appellant a Form OWCP-20 with its February 18, 2020 preliminary determination and afforded him the opportunity to provide appropriate financial information and documentation to OWCP.²⁰ Appellant did not complete Form OWCP-20 and provide the necessary financial documentation to support his income and expenses prior to the March 19, 2020 final overpayment decision. The overpaid individual is responsible for providing information

¹⁶ *Id.*; *M.R.*, Docket No. 20-0427 (issued October 30, 2020).

¹⁷ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

¹⁸ *Id.* at § 10.441(a).

¹⁹ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁰ 20 C.F.R. § 10.438.

about income, expenses, and assets as specified by OWCP.²¹ When an individual fails to provide requested financial information, OWCP shall follow minimum collection guidelines designed to collect the debt promptly and in full.²² The Board, therefore, finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$419.16 every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,087.60, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2015 through February 1, 2020. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$419.16 every 28 days from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2021
Washington, DC

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

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

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

²¹ *Id.* at § 10.438(a); *see M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²² *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.400.3 (September 2018).