

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

_____)	
T.M., Appellant)	
)	
and)	Docket No. 20-1332
)	Issued: February 19, 2021
U.S. POSTAL SERVICE, GATLINBURG POST OFFICE, Gatlinburg, TN, Employer)	
_____)	

Appearances:
T. Scott Jones, Esq., for the appellant¹
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 June 9, 2020 appellant, through counsel, filed a timely appeal from a May 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 20, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUE

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$32,335.88 for which he was without fault because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period December 1, 2014 through March 29, 2020 without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$563.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On July 26, 1991 appellant, then a 42-year-old rural mail carrier, filed an occupational disease claim (Form CA-2). He noted that he first became aware of his condition and realized its relationship to his federal employment on October 27, 1988. Appellant stopped work on February 15, 1991. In an attached statement, he alleged that he developed "mental and emotional stress and conflict" due to factors of his federal employment. Appellant contended that he was unable to keep up with his daily duties as a rural mail carrier because the employing establishment changed its casing methods, was forced to work when he was sick, and was subjected to hazardous work conditions. He provided a chronological list of the employment factors, which he believed supported his claim for a work-related emotional condition.

OWCP accepted appellant's claim for conversion disorder and single episode of major depression. It paid him wage-loss compensation on the periodic rolls beginning December 11, 1994.

In a letter dated February 3, 1994, OWCP advised appellant that employees entitled to both OWCP and Office of Personnel Management (OPM) retirement benefits must elect which benefit to receive. It also advised appellant that, if he elected FECA benefits in lieu of OPM benefits, his FECA benefits would be reduced by the SSA age-related retirement benefits paid that were attributable to his federal service.

On February 23, 1994 appellant completed and signed a form, indicating that he elected to receive FECA benefits in lieu of OPM benefits effective February 19, 1991.

On February 7, 2020 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form. It listed the computation period as October 27, 1988 to current.

On March 6, 2020 an SSA representative completed the dual benefits calculation form. The SSA representative provided corresponding monthly SSA benefits rates beginning December 2014 that both included and excluded appellant's FERS contributions. The form indicated that: beginning December 2014, his SSA rate with FERS was \$1,208.90 and without FERS was \$713.90; beginning December 2016, his SSA rate with FERS was \$1,212.00 and without FERS was \$716.00; beginning December 2017, his SSA rate with FERS \$1,237.00 and without FERS was \$731.00; beginning December 2018, his SSA rate with FERS was \$1,271.50 and without FERS was \$751.50; and beginning December 2019, his SSA rate with FERS was \$1,291.60 and without FERS was \$762.60.

Effective March 29, 2020, OWCP paid appellant at the adjusted amount of \$2,552.63 to include the offset of his SSA age-related retirement benefits attributable to his federal service.

OWCP completed a FERS offset calculation worksheet dated April 8, 2020. It calculated the overpayment amount by determining the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$32,335.88. The form indicated that from December 1, 2014 through November 30, 2016, appellant received an overpayment in the amount of \$11,928.96, from December 1, 2016 through November 30, 2017, he received an overpayment in the amount of \$5,968.35, from December 1, 2017 through November 30, 2018, he received an overpayment in the amount of \$6,088.68, from December 1, 2018 through November 30, 2019, he received an overpayment in the amount of \$6,257.14, and from December 1, 2019 through March 29, 2020, he received an overpayment in the amount of \$2,092.75.

In a preliminary determination dated April 8, 2020, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$32,335.88 because it had failed to reduce his wage-loss compensation benefits for the period December 1, 2014 through March 29, 2020 by the portion of his SSA age-related retirement benefits that were attributable to federal service. It further advised him of its preliminary determination that he was not at fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20), with supporting financial documentation, to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. Additionally, it notified him that, within 30 days of the date of the letter, he could request a teleconference, a final decision based on the written evidence, or a precoupment hearing.

On May 6, 2020 appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review. He noted his disagreement with the fact and the amount of the overpayment and requested waiver of recovery of the overpayment. Appellant asserted that he had correctly reported his SSA benefits to OWCP and that any errors were solely attributable to OWCP. He also submitted a completed Form OWCP-20, which included financial information for consideration of waiver.

By decision dated May 20, 2020, OWCP finalized the April 8, 2020 preliminary determination, finding that appellant had received an overpayment of compensation in the amount of \$32,335.88 for the period December 1, 2014 through March 29, 2020 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset. It also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP determined that recovery of the overpayment would require deducting \$563.00 from appellant's continuing compensation payments every 28 days.

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.⁴ Section 8116 limits the right of an employee to receive

⁴ 5 U.S.C. § 8102(a).

compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

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 attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the concurrent receipt of FECA benefits and federal retirement is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset.

As noted, a claimant cannot receive concurrent FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service without an appropriate offset.⁸ The evidence of record has established that, beginning December 1, 2014, appellant received SSA age-related retirement benefits that were attributable to his federal service during a period of time that he also received FECA wage-loss compensation. The Board finds that fact of overpayment is, therefore, established.

The Board further finds, however, that OWCP improperly calculated the amount of the overpayment for the period December 1, 2014 through March 29, 2020.

The evidence of record indicates that, beginning March 29, 2020, appellant began to receive FECA wage-loss compensation at the adjusted amount of \$2,552.63 to include the offset of his SSA age-related retirement benefits attributable to his federal service. As he was no longer receiving dual benefits as of March 29, 2020, this date should not have been included in the overpayment calculation. OWCP improperly calculated appellant's overpayment based on his dual SSA and FECA benefits through March 29, 2020, rather than the appropriate date of March 28, 2020.⁹

On remand OWCP shall determine the exact amount of the overpayment of compensation for the period December 1, 2014 through March 28, 2020. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and

⁵ *Id.* at § 8116.

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

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *Id.* *See also A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁹ *See R.L.*, Docket No. 20-0539 (issued September 15, 2020); *L.B.*, Docket No. 19-1322 (issued January 27, 2020).

instructions for appellant to provide supporting financial documentation. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period December 1, 2014 through March 28, 2020 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 further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2020 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.

Issued: February 19, 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

¹⁰ In light of the Board's disposition of issue 1, issues 2 and 3 are rendered moot.