

FACTUAL HISTORY

Appellant, a 70-year-old former pipe fitter helper, has an accepted traumatic injury claim for low back strain, which arose on May 6, 1986.² He did not return to work after his 1986 employment-related back injury. Appellant received continuation of pay followed by appropriate wage-loss compensation. The Office placed him on the periodic compensation rolls effective October 26, 1986, and he has been receiving wage-loss compensation for more than two decades.

Over the years, appellant periodically submitted Form EN1032; an Office financial disclosure statement that solicits information regarding employment, volunteer work, eligible dependents, other federal benefits and payments received and any third party injury-related settlements received.³ Part D of Form EN1032, entitled “Other Federal Benefits or Payments,” specifically inquires about whether the beneficiary has received any payments from the Office of Personnel Management (OPM), the Social Security Administration (SSA) and/or the VA.

With regard to SSA benefits, Form EN1032 instructs the beneficiary to “[r]eport any benefits received from the SSA ... which you receive as part of an annuity under the Federal Employees’ Retirement System (FERS).” Form EN1032 further states: “DO NOT report any benefits received from SSA on account of employment in the private sector.” These instructions are directly followed by the question: “Do you receive benefits from the SSA as part of an annuity for [f]ederal service?” On or about July 19, 2004 appellant signed and submitted Form EN1032 indicating, among other things, that he was receiving benefits from the SSA. In essence, he responded “Yes” to the above-noted question under Part D of Form EN1032.

In December 2004, the Office asked SSA to provide information regarding dual benefits appellant may have possibly received. It forwarded a form entitled “FERS SSA Dual Benefits Calculations.” Appellant’s name, date of birth and Social Security number were noted on the form. The Office also provided information regarding the date appellant was first eligible to receive benefits under the Federal Employees’ Compensation Act (FECA). The form asked SSA to provide information regarding the effective date of appellant’s social security benefits. It also asked for separate calculations of the SSA rate with FERS and without FERS. Essentially, the Office asked SSA to calculate appellant’s social security benefits based on his private sector employment contributions only and then provide a separate calculation that included both private sector and FERS employment contributions. An SSA representative responded on February 9, 2005 indicating “no offset apply.” From February 2006 through February 2008, appellant continued to report his receipt of SSA benefits on Form EN1032.

On March 7, 2008 the Office sent SSA another “FERS SSA Dual Benefits Calculations” form. The SSA responded on March 14, 2008, providing a breakdown of SSA rates with and without FERS contributions beginning October 2003. According to the SSA representative,

² Appellant had a preexisting lumbar condition related to his military service. The Department of Veterans Affairs (VA) had been compensating him for his service-connected lumbar condition since September 9, 1964.

³ The information solicited was intended to cover the 15-month period prior to the date when Form EN1032 was signed and returned to the Office.

appellant's SSA rate without FERS contributions was \$213.00 effective October 2003. The FERS inclusive rate at that time was \$479.40. The SSA also provided rate calculations effective December 2003, December 2004, December 2005, December 2006 and December 2007.⁴ Effective March 16, 2008, the Office reduced appellant's 28-day compensation rate by \$283.66 based on the recent information provided by SSA.

On May 12, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$15,366.22 during the period October 1, 2003 through March 15, 2008. It indicated that appellant had received a "FERS/SSA dual benefit" beginning October 1, 2003. The Office further indicated that the current amount of the dual benefit was \$283.66 every four weeks, and this amount had been offset from appellant's wage-loss compensation effective March 16, 2008. Appellant was not considered at fault in creating the overpayment.

On May 24, 2008 appellant requested a prerecoumpment hearing before the Branch of Hearings & Review. In contesting the overpayment, he explained that the amount of benefits he received from SSA was incorrectly reported. Appellant indicated that he received only \$150.00 per month from SSA. A hearing was held on October 29, 2008. Appellant did not submit an overpayment recovery questionnaire (Form OWCP-20) or any other financial information.

By decision dated February 10, 2009, the hearing representative found that appellant had received an overpayment of \$15,366.22 and that he was without fault in creating the overpayment. Appellant was denied waiver of recovery of the overpayment because he had not provided the requisite financial information. Furthermore, because he had not provided any evidence indicating that he could not repay the debt, the hearing representative instructed the Office to advise him that payment was due in full.⁵

In a decision dated February 13, 2009, the Office essentially reiterated the hearing representative's February 10, 2009 decision. It further advised appellant that, in accordance with the hearing representative's decision, he was to remit the full amount of the overpayment within 30 days.

LEGAL PRECEDENT

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ Wage-loss benefits are reduced by the amount of social security benefits attributable to the employee's federal service.⁷

⁴ As of December 2007, the FERS inclusive rate was purportedly \$552.80 and the SSA rate based solely on appellant's private sector employment was \$245.50. Although the Office's "FERS SSA Dual Benefits Calculations" form does not specify a daily, weekly or monthly rate, it is presumed that the rate information provided by SSA was calculated on a monthly basis. The Office did not request, nor has the SSA provided a complete payment history of the social security benefits appellant reportedly received beginning October 2003.

⁵ The hearing representative did not specifically address whether the overpayment should have been recovered by reducing appellant's continuing compensation as provided under 20 C.F.R. § 10.441(a).

⁶ See 5 U.S.C. § 8116(a), (d) (2006); 20 C.F.R. § 10.421(a).

⁷ 5 U.S.C. § 8116(d)(2).

ANALYSIS

The Office's overpayment determination is premised on appellant having reportedly received social security benefits for his federal service. According to the Office, appellant received a "FERS/SSA dual benefit" beginning October 1, 2003. The Office based its finding on information provided by SSA on March 14, 2008, which included SSA rate calculations based on appellant's purported FERS contributions. But this latest information from SSA is inconsistent with a previous report dated February 9, 2005 that indicated "no offset [applied]." The March 14, 2008 report of FERS contributions is also inconsistent with appellant's federal civilian employment history, all of which occurred prior to the January 1, 1987 effective date of FERS.⁸ The employing establishment indicated that appellant had 22½ years of civilian federal service prior to his accepted 1986 employment injury. As previously noted, appellant did not return to work following his May 6, 1986 injury. As such, his federal civilian service would have been covered under FERS' predecessor, the Civil Service Retirement System (CSRS).⁹

The offset provision of 5 U.S.C. § 8116(d)(2) applies to social security old-age benefits that are attributable to federal service covered by FERS. There is no indication in the record that appellant paid social security taxes (OASDI) as a federal civilian employee under FERS. Furthermore, there is no indication that appellant either elected or was even eligible to convert from CSRS to FERS.¹⁰ Apart from the March 14, 2008 SSA report, there is no separate record of payment corroborating appellant's reported receipt of FERS-based social security benefits at the rate of \$479.40 per month beginning October 2003. Appellant claimed that SSA paid him only \$150.00 per month.

Relying upon SSA's questionable March 14, 2008 rate information, the Office erroneously declared a \$15,366.22 overpayment and improperly reduced appellant's wage-loss compensation effective March 16, 2008. Because of the paucity of credible evidence regarding appellant's receipt of age-related SSA benefits, the Board finds that the Office has not established that appellant received an overpayment of \$15,366.22 for the period October 1, 2003 through March 15, 2008.

CONCLUSION

The record does not establish that appellant received an overpayment of \$15,366.22 for the period October 1, 2003 through March 15, 2008.

⁸ *Id.* at § 8402(b)(2)(B).

⁹ Under CSRS, federal employees were generally exempt from paying social security taxes; Old-age, Survivors and Disability Insurance (OASDI). 5 U.S.C. §§ 8331- 8351.

¹⁰ *See* 5 U.S.C. § 8402.

ORDER

IT IS HEREBY ORDERED THAT the February 13 and 10, 2009 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 6, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board