

FACTUAL HISTORY

On September 6, 1983 appellant, then a 44-year-old pipefitter, filed an occupational disease claim alleging that he sustained chronic obstructive pulmonary disease causally related to factors of his federal employment. OWCP accepted the claim for asbestosis, lung cancer, a pulmonary embolism and colon cancer. Appellant retired from the employing establishment on September 21, 1983 but returned to work on October 2, 1985. He retired again on January 31, 1996.

A January 31, 1996 notification of personnel action (SF-50) advised that appellant retired effective that date with a retirement plan of Federal Insurance Contributions Act (FICA) and partial Civil Service Retirement System (CSRS).² It listed his retirement plan as Code C, applicable to those under the CSRS offset retirement plan.

By decision dated January 31, 2001, OWCP granted appellant a schedule award for a 45 percent permanent impairment of the lungs. The period of the award ran from October 25, 2000 to July 4, 2003. On July 21, 2003 OWCP granted him a schedule award for a 47 percent loss of use of the lower extremities. The period of the award ran from July 5, 2003 to February 6, 2006. At the conclusion of the schedule award, OWCP paid appellant compensation for total disability.

By letter dated March 15, 2007, the employing establishment noted that appellant, now 68, was receiving retirement benefits from SSA. It related, "Since this claimant is a FERS employee, his compensation payments must be now offset by any part of his SSA benefit that was calculated by using his [f]ederal employment earnings."

On August 28, 2007 the employing establishment informed appellant that his compensation from OWCP must be offset for FERS' portion of his retirement benefits from SSA.³ In an October 1, 2007 response, appellant stated that he was receiving SSA benefits calculated using his federal service earnings.

By letter dated July 10, 2009, OWCP requested that SSA complete a form showing appellant's SSA benefits with and without FERS and the effective date that his benefits began.

In a memorandum of telephone call dated September 9, 2009, OWCP advised the employing establishment that appellant was under CSRS not FERS so his retirement was not subject to offset.

On September 11, 2009 and March 2, 2011 OWCP again requested that SSA provide information to determine whether appellant's compensation should be offset for FERS.

² FICA is a payroll tax withheld from an employee's pay to fund social security and Medicare.

³ On June 4, 2008 the employing establishment again asked OWCP to offset appellant's compensation for his FERS retirement benefits from SSA. On April 3, 2009 the employing establishment telephoned OWCP to inquire whether his compensation was being offset.

In a worksheet completed March 24, 2011, SSA advised OWCP that appellant's SSA rate with FERS was \$558.00 beginning June 2004 and without FERS was \$92.40. It further provided his applicable rates from June 2004 until December 2010 with and without FERS.

On June 7, 2011 OWCP notified appellant that his compensation must be offset by a portion of SSA benefits attributable to FERS. By letter dated June 24, 2011, appellant related that he was not under FERS but instead under a CSRS offset retirement plan. He maintained that he never received SSA benefits as part of FERS.

By letter dated September 15, 2011, OWCP notified appellant of its preliminary determination that he received a \$42,864.92 overpayment of compensation because he received retirement benefits from SSA and FECA benefits without FERS' offset. It calculated the overpayment by adding together the amount that it should have offset from his compensation payments for the period June 1, 2004 through April 9, 2011. OWCP further advised appellant of its preliminary determination that he was not at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents in support of any request for waiver. Additionally, OWCP notified appellant 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 precoupment hearing.

On October 10, 2011 appellant requested a decision based on the written evidence. He asserted that the overpayment was not his fault and requested waiver of recovery of the overpayment. Appellant provided his monthly income as \$5,252.00 and his monthly expenses as \$5,138.31.

By decision dated October 26, 2011, OWCP found that appellant received an overpayment of \$42,864.92 because he received benefits from SSA and OWCP without FERS' offset from June 1, 2004 through April 9, 2011. It further found that he was without fault in creating the overpayment but was not entitled to waiver of recovery of the overpayment as his income exceeded his expenses by \$113.69 per month. OWCP determined that it would recover the overpayment by deducting \$250.00 from appellant's continuing compensation benefits.

On appeal appellant contends that he was hired before FERS began and did not elect FERS. He did receive SSA. Appellant maintains that he was without fault. He relates that his expenses had changed and that repaying the overpayment constituted a hardship.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of FECA provides that, in pertinent part, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Id.* at § 8102.

be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee received SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁷

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply. In disability cases, FECA benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁸

Section 8116(d)(2) provides that the receipt of SSA benefits "does not affect the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained asbestosis, lung cancer, a pulmonary embolism and colon cancer due to factors of his federal employment. Appellant retired from work on September 21, 1983 but was rehired on October 2, 1985. He again retired on January 31, 1996. Appellant's SF-50 indicated that his retirement plan was a combination of FICA and partial CSRS. The form designated appellant's retirement as Code C, applicable to those under the CSRS offset retirement plan.

OWCP determined that appellant received an overpayment of compensation from June 1, 2004 through April 9, 2011 because he received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to SSA benefits that are attributable to federal service. Appellant paid social security and Medicare taxes (FICA) as a federal civilian employee under the CSRS Interim/Offset system, a precursor to FERS that required contributions to both CSRS and for social security. It generally applied to certain new hires or former CSRS-covered employees who had been separated from service for at least one year and rehired after December 31, 1983.¹⁰ Appellant received age-based SSA benefits after retirement as a result of his contributions to SSA under the CSRS interim system. As he received SSA benefits based in part of his federal service concurrently with disability compensation from OWCP without an appropriate offset, he received an overpayment of compensation.

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁹ 5 U.S.C. § 8116(d)(2).

¹⁰ *See A.P.*, Docket No. 12-122 (issued May 7, 2012).

The Board finds, however, that the case is not in posture for decision regarding the amount or period of the overpayment. SSA provided OWCP with information regarding appellant's rate of SSA benefits beginning June 2004 both with and without FERS. As discussed, however, he was not covered by FERS but was instead under the CSRS offset retirement plan. It is not clear from the record whether the rates under the CSRS offset plan are the same as the rates in FERS' plan. On remand, OWCP should obtain additional information from SSA and the Office of Personnel Management (OPM) regarding appellant's retirement system and his SSA rate with and without any offset required based on his federal civilian service.

Additionally, OWCP found that appellant received an overpayment of compensation from June 1, 2004 through April 9, 2011. However, it paid him schedule award compensation from July 5, 2003 to February 6, 2006. Section 8116(d)(2) of FECA provides that an employee can receive SSA benefits and a schedule award under section 8107(c). OWCP's procedures also provide that SSA benefits can be paid concurrently with FECA benefits except that, in cases of disability, "FECA benefits will be reduced by the Social Security Act benefits paid on the basis of age and attributable to the employee's federal service."¹¹ Appellant was receiving compensation for a schedule award rather than disability compensation until February 6, 2006, and thus OWCP erred in finding that he received an overpayment of compensation prior to that date. Accordingly, the Board will remand the case for OWCP to recalculate the period and amount of the overpayment.¹²

CONCLUSION

The Board finds that appellant received an overpayment of compensation for which he was without fault but that the case is not in posture for decision regarding the period or amount of the overpayment.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e (January 1997).

¹² In view of the Board's finding regarding the period and amount of the overpayment, it is premature to address the issues of waiver and recovery.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2011 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: November 26, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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