

FACTUAL HISTORY

This case has previously been before the Board. Appellant has several claims for injury beginning on October 8, 1996. OWCP accepted his claims for right wrist sprain, right carpal tunnel syndrome and surgical release (File No. xxxxxx143); lesion of the ulnar nerve, contusion of the shoulder and depressive disorder (File No. xxxxxx149); severe osteoarthritis of the right shoulder (File No. xxxxxx149); reflex sympathetic dystrophy, depressive disorder, reflux esophagitis, lesion of the right ulnar nerve (File No. xxxxxx197); and radial collateral ligament tear on June 1, 2000 (File No. xxxxx197).

On November 7, 2007 OWCP granted appellant a schedule award for 11 percent of the right arm. The period of the schedule award was from October 30, 2005 through June 27, 2006.

Appellant completed EN1032 forms on November 14, 2006, November 24, 2007, November 15, 2008 and November 9, 2009. The forms required him to report any retirement benefits from any federal disability or retirement system except for benefits under FECA. Appellant stated that he had not received any benefits from SSA as part of an annuity under the Federal Employees' Retirement System.

Appellant received compensation on the periodic rolls from February 14 through March 13, 2010. By decision dated March 22, 2010, OWCP granted him a schedule award for seven percent impairment of his left arm. The period of the award ran from March 14 through August 13, 2010. OWCP again entered appellant on the periodic rolls on August 19, 2010 beginning August 29 through September 25, 2010. It noted that his schedule award expired on August 13, 2010. Appellant completed a Form EN1032 on November 7, 2010 and noted that he was not receiving benefits from SSA as part of an annuity for federal service.

In a dual benefits calculation, SSA stated that appellant was entitled to disability from February 2001 through April 2006 and became entitled to retirement benefits effective May 2006. On November 25, 2011 OWCP made a preliminary determination that he received an overpayment of compensation as he accepted compensation to which he was not entitled.

By decision dated May 30, 2012, OWCP's hearing representative found that appellant received an overpayment in the amount of \$13,419.62 during the period May 1, 2006 through September 24, 2011 as he received both FECA benefits and SSA benefits. He noted that appellant failed to report SSA benefits to OWCP on the CA-1032 forms that he completed. Appellant was not without fault in the creation of the overpayment. The hearing representative reviewed the financial information supplied by appellant and noted that his household was currently realizing \$301.80 of income over expenses every month as well as maintaining \$295.00 in his checking account and personal property or other funds valued at approximately \$8,000.00. He found that appellant had an excess of \$301.80 of income over expenses every month and that a reasonable repayment plan would entail the claimant's payment of \$250.00 every 28 days.

The Board found on prior appeal that appellant received an overpayment of compensation due to dual SSA and FECA benefits. It noted that he received two schedule awards during the period covered by OWCP's finding of overpayment, the November 7, 2007 schedule award from October 30, 2005 through June 27, 2006 overlapped the overpayment period May 1 through June 27, 2006 and the March 22, 2010 schedule award from March 14 through August 13, 2010,

overlapped the period of overpayment of May 1, 2006 through September 24, 2011. The Board remanded the case for OWCP to recalculate the period and amount of the overpayment and issue a *de novo* decision regarding the dual SSA and FECA disability benefits without including the periods during which he received schedule awards.² The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

Following the Board's remand, OWCP recalculated the amount of the overpayment by exempting the periods of the schedule awards. It determined that appellant had an overpayment of \$11,974.43. In a memorandum to file dated January 25, 2013, the claims examiner noted the new amount of the overpayment and noted that appellant's compensation payments had been deducted at the rate of \$250.00 since June 30, 2012 resulting in a balance of \$10,038.62.

By decision dated January 30, 2013, OWCP found an overpayment of compensation in the amount of \$11,974.43. It noted that appellant was at fault in the matter of the creation of the overpayment. OWCP noted that the periods of overpayment were from June 28, 2006 to March 13, 2010 and from August 14, 2010 through September 24, 2011. It explained how the amount of the overpayment was calculated and noted that the recovery of the overpayment had been adjusted to reflect a continuing withholding from appellant's ongoing compensation in the amount of \$175.00 beginning February 9, 2013 rather than the \$250.00 previously withheld. OWCP further noted that his previous withholdings of \$250.00 since June 30, 2012 were applied to the overpayment, reducing the amount to \$10,038.62.

LEGAL PRECEDENT -- ISSUE 1

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.³ If an employee receives 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.

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 SSA benefits paid on the basis of age and attributable to the employee's federal service.⁴ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount

² Docket No. 12-1383 (issued December 28, 2012).

³ 5 U.S.C. § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received SSA benefits attributable to his federal employment and disability compensation from June 28, 2006 through March 13, 2010 and from August 14, 2010 through September 24, 2011. This constituted a prohibited dual payment. The record contains documents from SSA delineating the offset figures that OWCP used to calculate the overpayment. It found that the \$11,974.43 overpayment was comprised of \$176.58 per week for the period June 28 through November 30, 2006 in the amount of \$983.80; \$182.40 per week for the period December 1, 2006 through November 30, 2007 in the amount of \$2,377.71; \$186.65 per week for the period December 1, 2007 through November 30, 2008 in the amount of \$2,439.78; \$197.54 per week for the period December 1, 2008 through March 13, 2010 in the amount of \$3,301.75; and \$197.54 per week for the period August 14 2010 through September 24, 2011 in the amount of \$2,871.39. OWCP noted that payments in the amount of \$250.00 had been applied to the previously determined amount since June 30, 2012 and the balance of the debt was \$10,038.62. The Board previously affirmed the fact of overpayment in the prior appeal. The recalculated amount of the overpayment will be affirmed.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b). Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁷ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

⁵ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

⁶ 5 U.S.C. § 8129.

⁷ *Id.* at § 8129(b).

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations⁸ provide in relevant part:

“An individual is with fault in the creation of an overpayment who:

Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

Failed to furnish information which the individual knew or should have known to be material; or

With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

ANALYSIS -- ISSUE 2

OWCP applied the first standard, that appellant made an incorrect statement as to a material fact which he knew or should have known to be incorrect. It noted that he denied receiving benefits from SSA on the EN1032's submitted to the record. The EN1032 forms advised appellant that he must immediately report to OWCP any change in income from federally assisted disability or benefits programs.

The Board finds that the evidence establishes that appellant was aware that he received SSA and FECA benefits simultaneously. Appellant failed to inform OWCP that he was receiving SSA benefits on the EN1032 forms he completed. As noted, the Form EN1032 not only requests that he indicate whether he received an annuity from SSA, but also whether he had a change in income from any federally assisted benefit program. Based on the clear language of the forms which appellant knowingly signed, appellant made an incorrect statement as to a material fact. The Board finds that he was at fault in the creation of the overpayment and is precluded from receiving a waiver.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship on the individual.⁹

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of compensation by deducting \$175.00 from appellant's compensation payments every 28, days, OWCP took into consideration the

⁸ 20 C.F.R. § 10.320(b).

⁹ *Id.* at § 10.441(a). See *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

financial information submitted by him as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. OWCP's hearing representative had previously considered appellant's financial situation and instituted a repayment plan of \$250.00 every 28 days. OWCP, on remand from the Board, reduced this repayment by \$75.00 per month to reflect the reduced amount of the overpayment. Therefore, it properly required repayment of the overpayment by deducting from appellant's compensation payments every 28 days at \$175.00.

CONCLUSION

The Board finds that appellant received an overpayment of \$11,974.43 for the periods June 28, 2006 to March 13, 2010 and from August 14, 2010 through September 24, 2011 because he received dual compensation benefits from SSA and under FECA. The Board further finds that OWCP properly found that appellant was at fault in the creation of the overpayment and that recovery should be made in the amount of \$175.00 per month from his continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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