

FACTUAL HISTORY

Appellant, a 54-year-old migratory bird coordinator, injured her left shoulder on October 5, 2000 while pulling files from a drawer. She filed a claim for benefits, which OWCP accepted for left shoulder tendinitis. OWCP commenced payment of compensation for temporary total disability.

By letter dated January 9, 2001, OWCP advised appellant that she would be paid temporary total disability compensation. It stated, under the heading "DUAL BENEFITS," that "Compensation for wage loss includes payments for temporary total disability and for loss of wage-earning capacity. You may not receive [f]ederal retirement benefits and compensation for wage loss for the same periods of time."

Appellant retired and began to receive Social Security Administration (SSA) retirement benefits in April 2008. In EN1032 forms dated October 25, 2008, October 31, 2009 and October 31, 2010, she responded "No" in "Part D -- OTHER FEDERAL BENEFITS OR PAYMENTS, (2) SSA Benefits" which states: "Report any benefits received from the SSA which you receive as part of an annuity under the Federal Employees' Retirement System (FERS)," and asks (a) "Do you receive benefits from the SSA as part of an annuity for Federal Service?"

In a February 11, 2011 memorandum, OWCP noted that appellant had received FERS/SSA dual benefits since April 1, 2008.

By letter dated February 15, 2011, OWCP notified appellant that it had recently been notified by SSA that she had been receiving FERS/SSA dual benefits. It advised her that the portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and that the receipt of FECA benefits and federal retirement benefits concurrently is a prohibited dual benefit.

On February 24, 2011 OWCP issued a preliminary determination that an overpayment had occurred in the amount of \$14,484.12 because her compensation payments for the period April 1, 2008 through February 12, 2011 were not reduced based on the SSA/FERS offset amount. It found that she began to receive SSA retirement benefits in April 2008 and noted that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package. The receipt of OWCP benefits concurrently was a prohibited dual benefit for the period April 1, 2008 through February 12, 2011.

OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material to her receipt of benefits. On October 25, 2008, October 31, 2009 and October 31, 2010 appellant completed EN1032 forms that required her to report any change in income from federally assisted disability or benefit programs; however, she failed to notify OWCP of her receipt of SSA benefits. The overpayment was calculated to be comprised of \$3,228.12 for the period April 1 to November 30, 2008 (SSA 28-day-offset amount of \$370.34); \$5,110.00 for the period December 1, 2008 to November 30, 2009 (28-day-offset amount of \$392.03); \$5,110.00 for the period December 1, 2009 to November 30, 2010 (28-day-offset

amount of \$392.03); and \$1,036.00 for the period December 1, 2010 to February 12, 2011 (28-day-offset amount of \$392.03).² OWCP directed appellant to complete an enclosed financial information questionnaire within 30 days of February 24, 2011.

In a March 21, 2011 letter, appellant contended that she was not at fault in the creation of the \$14,484.12 overpayment because she was not aware that her SSA benefits were part of her federal annuity or that receiving both SSA and OWCP benefits would constitute the receipt of dual benefits. She asserted that FERS was an annuity separate from social security that she could receive along with social security. Appellant related that, shortly before her retirement, she withdrew all of her thrift savings and assumed that there would be no FERS annuity. In the financial information questionnaire completed on March 21, 2011, appellant stated that she had \$4,575.00 in monthly income and \$4,827.00 in monthly expenses. She submitted supporting financial documents. On March 21, 2011 appellant requested a precoupment hearing which was held by telephone on September 15, 2011. She reiterated that she did not realize that when she began receiving SSA benefits in 2008 there would be a reduction in her compensation because of the SSA/FERS offset. Appellant also stated that paying the overpayment would pose a financial hardship for her and her family.

In a November 29, 2011 decision, an OWCP hearing representative determined that appellant received a \$14,484.12 overpayment of compensation because her compensation payments for the period April 1, 2008 to February 12, 2011 were not reduced based on the SSA/FERS offset. He found that she was at fault in creating the overpayment of compensation, thereby precluding waiver, and that it would be recovered by deducting \$150.00 from her ongoing compensation payments every 28 days. The hearing representative considered the financial information questionnaire submitted by appellant and found that her household expenses totaled \$4,500.00. He also found that there was some duplication between some of the listed expenses and the amount paid for credit card payments and that some of the expenses would not be considered necessary living expenses. The hearing representative concluded that deduction of \$150.00 a month from appellant's compensation benefits would represent a fair and equitable recovery.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under FECA is payable when the employee starts to lose pay.³ Section 8116(a) of FECA states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁴ The implementing regulations provide that a beneficiary may not receive wage-

² The record contains documents from the SSA delineating the offset figures that OWCP used to calculate the overpayment.

³ 20 C.F.R. § 10.401(a) (2003).

⁴ 5 U.S.C. § 8116(a).

loss compensation concurrently with a federal retirement or survivor annuity.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶

Section 8129(a) of FECA provides, 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 be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$14,484.12 overpayment of compensation because her compensation payments for the period April 1, 2008 through February 12, 2011 were not reduced based on the SSA/FERS offset. Receiving both SSA and OWCP compensation for this period constituted an impermissible receipt of dual benefits. The record contains documents from the SSA delineating the offset figures that OWCP used to calculate the overpayment. It found that the \$14,484.12 overpayment was comprised of \$3,228.12 for the period April 1 to November 30, 2008 (SSA 28-day-offset amount of \$370.34); \$5,110.00 for the period December 1, 2008 to November 30, 2009 (28-day-offset amount of \$392.03); \$5,110.00 for the period December 1, 2009 to November 30, 2010 (28-day-offset amount of \$392.03); and \$1,036.00 for the period December 1, 2010 to February 12, 2011 (28-day-offset amount of \$392.03). The Board will affirm the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁸ provides that an overpayment must be recovered unless “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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁹

In determining whether an individual is with fault, section 10.433(a) of OWCP’s regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

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

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ 5 U.S.C. § 8129(a)-(b).

⁸ *Id.*

⁹ *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect.”¹⁰

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide in relevant part:

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹¹

ANALYSIS -- ISSUE 2

An OWCP hearing representative found that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material. In EN1032 forms completed on October 25, 2008, October 31, 2009 and October 31, 2010, appellant failed to report her SSA benefits as requested. On each form, she responded “No” in response to a specific question regarding whether she had received benefits from SSA as part of an annuity for federal service. Each form covered the 15 months prior to its completion and had a certification clause which required appellant to report any change in income from federally-assisted disability or benefit programs. On appeal, appellant contends that she did not know that SSA benefits were an annuity for federal service or were considered to be part of her FERS retirement package. She also claimed that she did not know that receiving the two forms of benefits constituted a double recovery under FECA. The EN1032 form states, “Report any benefits received from SSA which you receive as part of an annuity under the FERS.” The forms advised appellant specifically that she had a FERS annuity which included SSA benefits and, through a clearly worded certification clause, of the materiality of omitting to report such benefits. Appellant failed to provide information which she knew or should have known to be material. OWCP properly found her at fault in the creation of the \$14,484.12 overpayment. Therefore, it is not subject to waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provide 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 the same. If

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

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.”¹²

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$150.00 from appellant’s compensation payments every 28 days, OWCP’s hearing representative took into consideration the financial information submitted by appellant 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. Therefore, OWCP properly required repayment of the overpayment by deducting from appellant’s compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$14,484.12 for the period April 1, 2008 through February 12, 2011 because she 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 \$150.00 per month from appellant’s continuing compensation benefits.

¹² See *id.* at § 10.441(a); see also *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2013
Washington, DC

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

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

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