

ISSUES

The issues are: (1) whether OWCP properly found a \$51,005.68 overpayment of compensation for the period February 1, 2002 to February 11, 2012 as he received wage-loss compensation and Social Security Act (SSA) benefits without an appropriate offset; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$230.80 every 28 days from appellant's continuing compensation payments.

On appeal, appellant contends that he accurately reported his SSA benefits from 2002 onward. He contends that OWCP alone is responsible for any overpaid compensation from the time it discovered the dual benefit in 2010, as it delayed taking action until 2012. Appellant asserts that he is unable to repay the overpaid compensation due to financial hardship, noting that he is still making payments on a prior overpayment. He also asserts that SSA overstated the amount of his earnings, but acknowledged that he could not recall all periods of employment.

FACTUAL HISTORY

OWCP accepted that on or before January 3, 1997 appellant, then a 59-year-old construction representative, sustained depressive disorder due to supervisory harassment. Appellant had intermittent work absences from February to October 1997, then applied for disability retirement on November 12, 1997 and did not return to work. He received compensation on the daily rolls effective December 1, 1997. OWCP adjusted appellant's benefits retroactively to May 10, 1997 to reflect his marriage. On January 4, 1999 appellant elected FECA benefits as of May 10, 1997. OWCP adjusted his compensation from the 2/3 rate to the 75 percent rate retroactive to May 10, 1997 as he was married but had been erroneously paid at the 66 2/3 percent rate for an unmarried individual. It placed appellant on the periodic compensation rolls effective January 31, 1999. Appellant received compensation through electronic funds transfer effective March 28, 1999.³

On annual affidavits of earnings and employment (Form CA-1032) submitted from March 31, 2000 to February 27, 2012,⁴ appellant stated that he was in receipt of SSA retirement annuity benefits and had a CSA number.

In an April 22, 2010 memoranda, SSA advised OWCP that appellant received monthly benefits beginning in February 2002 at the following monthly rates: \$1,003.50 from February to December 2002; \$1,017.50 from December 2002 to December 2003; \$1,038.80 from December 2003 to December 2004; \$1,066.80 from December 2004 to December 2005; \$1,110.50 from December 2005 to December 2006; \$1,147.10 from December 2006 to

³ On April 15, 2003 OWCP and OPM determined that appellant received simultaneous FECA compensation and OPM Civil Service Retirement System (CSRS) retirement annuity benefits from January 31, 1999 to April 1, 2003, creating an overpayment to OPM of \$73,348.57. OPM recovered the overpayment by deducting \$500.00 from his continuing monthly compensation benefits effective June 10, 2006.

⁴ Appellant signed the forms on the following dates: March 31, 2000; April 24, 2001; May 15, 2002; February 5, 2003; July 14, 2004; February 19, 2006; March 13, 2007; February 16, 2008; February 25, 2009; February 25, 2010; February 27, 2011; February 27, 2012.

December 2007; \$1,173.40 from December 2007 to December 2008; \$1,241.40 from December 2008 to December 2009. On February 29, 2012 OWCP applied the December 2011 3.6 percent cost-of-living allowance (COLA) to appellant's monthly SSA payments to determine an offset amount of \$427.11 every 28 days from December 2009 to November 30, 2011, and a \$442.49 offset from December 1, 2011 to February 11, 2012. It noted that increasing the offset by 3.6 percent was "much easier than going back to SSA." OWCP found that appellant had been overpaid \$51,005.68 in compensation for the period February 1, 2002 to February 11, 2012. Effective February 12, 2012, OWCP adjusted his wage-loss compensation under FECA to reflect the appropriate offset of his SSA benefits.

By notice dated February 29, 2012, OWCP advised appellant of its preliminary finding that a \$51,005.68 overpayment of compensation was created as he was paid dual compensation under FECA and SSA for the period February 1, 2001 to February 11, 2012 without an appropriate offset. It found that he was without fault in creating the overpayment.

On March 20, 2012 appellant completed an Overpayment Recovery Questionnaire (Form OWCP-20) listing \$5,721.00 in monthly income, \$5,888.00 in monthly expenses and assets of \$484.24 in a checking account. He did not provide complete information regarding his wife's income, assets and expenses. Appellant contested the fact and amount of the overpayment and requested waiver. He requested a decision based on a review of the record.

In an April 12, 2012 letter, appellant noted intermittent lapses in federal employment prior to January 1, 1984 when OPM changed from the CSRS to Federal Employees' Retirement System (FERS). He returned to federal employment from July 1985 until he stopped work in 1997.

In an April 16, 2012 letter, OWCP explained that, if appellant "rejoined career [f]ederal service on or after January 1, 1984," the employing establishment likely placed him in CSRS-offset status rather than FERS, which required him to continue to pay into social security. OWCP noted that the record established that he "paid into [s]ocial [s]ecurity as a [f]ederal employee on or after January 1, 1984."

By decision February 26, 2013, OWCP finalized the fact and amount of the preliminary overpayment finding. It found that appellant was without fault in creating the overpayment, but that waiver could not be granted as he did not submit required financial information. OWCP found that, according to a report from a vocational rehabilitation counselor early in the claim, appellant was federally employed by the U.S. Air Force from 1965 to 1970, by another agency from 1978 to 1982, then worked in the private sector until he began new federal employment in 1985. Therefore, he had a break in service of more than one year after December 31, 1983. "While [appellant] previously was a CSRS employee, by law all newly hired and rehired career federal employees had mandatory SSA coverage."⁵ Also, he reached full retirement age under social security in February 2002. OWCP denied waiver as appellant failed to provide the requested financial information regarding his wife's income, assets and expenses. It further

⁵ CSRS Interim/Offset was a precursor to FERS that required contributions to both CSRS and OASDI. 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.

found that recovery would not be against equity and good conscience as there was no indication that he changed his position for the worse in reliance on the overpaid compensation. OWCP directed recovery of the overpayment by deducting \$230.80 from his 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 duty.⁶ Section 8129(a) of FECA provides, in pertinent part, that 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

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.⁸

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.⁹ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefit, OWCP will obtain information from SSA on the amount of the claimant’s SSA 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 of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained depressive disorder due to work factors on or before January 3, 1997. Appellant received total disability compensation on the periodic rolls beginning on January 31, 1999. He received SSA retirement annuity benefits beginning on February 1, 2002, when he reached retirement age. Appellant disclosed these payments on

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(d); *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

¹⁰ FECA Bulletin No. 97-09 (issued February 3, 1997).

annual affidavits of earnings and employment (Form CA-1032) from March 31, 2000 to February 27, 2012. However, OWCP did not begin to offset appellant's FECA benefits by the amount of his SSA benefits attributable to his federal employment under FERS until February 12, 2012.¹¹ As appellant is not entitled to receive both FECA benefits and that portion of his SSA benefits attributable to his federal employment, OWCP properly determined that an overpayment was created for the period February 1, 2002 to February 11, 2012.¹²

The Board finds, however, that the case is not in posture regarding the amount of overpayment. The SSA memorandum listing the amount appellant received only covers the period February 1, 2002 through December 2009. In a February 29, 2012 memorandum, OWCP noted that it did not obtain payment information from SSA for the period December 2009 to February 11, 2012. Therefore, the actual amount of the overpayment is not of record. OWCP has not established that the correct amount of the overpayment is \$51,005.68. The case will be remanded to OWCP to obtain complete payment information from SSA regarding the payments appellant received from February 1, 2002 to February 11, 2012, the entire period of the overpayment. OWCP shall then recalculate the amount of the overpayment, based on the SSA payment information. Following this development and any other action deemed necessary, OWCP shall issue an appropriate decision in the case.

ISSUES 2 and 3

As the case is not in posture for a decision degrading the amount of the overpayment, it is premature to address the issues of waiver and recovery. The second and third issues are therefore moot.

CONCLUSION

The Board finds that, although OWCP has established that appellant received an overpayment of compensation from February 1, 2002 to February 11, 2012, the case is not in posture for a decision as to the amount of the overpayment.

¹¹ 5 U.S.C. § 8116(d).

¹² *Janet K. George (Angelos George)*, *supra* note 8. *See G.B.*, Docket No. 11-1568 (issued February 15, 2012).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2013 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further development consistent with this decision.

Issued: May 15, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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