

**United States Department of Labor
Employees' Compensation Appeals Board**

J.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Providence, RI, Employer**

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**Docket No. 14-785
Issued: September 3, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 25, 2014 appellant filed a timely appeal from the September 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$5,564.20 overpayment of compensation; (2) whether it properly found that she was at fault in creating the overpayment of compensation; and (3) whether OWCP properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every 28 days.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on September 21, 2005 appellant, then a 60-year-old rural carrier, sustained work-related sprains of her right shoulder and upper arm and abrasions/friction burns of her right elbow, forearm and wrist. Appellant received wage-loss compensation on the daily and periodic rolls.

In a June 1, 2012 letter, OWCP advised appellant that it had recently been determined that she had received Social Security Administration (SSA) benefits under Title 2 of the Social Security Act on account of age since May 1, 2011. It stated:

“The SSA has confirmed that a portion of your SSA benefits are attributed to your years of [f]ederal service as an employee under the [Federal Employees’ Retirement System (FERS)] program. That portion of your SSA benefits attributed to your federal service requires an offset of your FECA compensation benefits per applicable [f]ederal regulations at 20 C.F.R. § 10.421(d): Pursuant to 5 U.S.C. § 8116(d), a beneficiary may receive compensation under FECA for either the death or disability of an employee concurrently with benefits under Title 2 of the Social Security Act on account of the age or death of such employee. However, this provision of FECA also requires OWCP to reduce the amount of any such compensation by the amount of any Social Security Act benefits that are attributable to the federal service of the employee.

“According to the SSA your current monthly benefit amount is \$1,165.10. However, the SSA has also determined that if your federal service was not included in your social security computation, you would only be entitled to \$734.10. Therefore, your federal service has increased your monthly social security payment by \$431.00. This difference of \$431.00 is the portion of social security benefit amount attributed to federal services and is the amount that must be offset against your compensation benefits. Since social security benefits are paid monthly (12 payments per year) and compensation benefits are paid every 28 days (13 payments per year), the monthly offset amount of \$431.00 must be adjusted to a 28-day payment cycle of \$397.85. Accordingly, the offset of your compensation payments in the amount of \$397.85 will begin with your payment dated June 30, 2012. Your new net compensation payment will be \$2,061.67.”²

The record contains OWCP worksheets noting that SSA benefits in the amount of \$5,564.20 were not offset against FECA benefits for the period May 1, 2011 to June 2, 2012. The worksheets note that appellant had a “28-day FERS Offset” of \$384.09 for the period May 1 to November 30, 2011 and a “28-day FERS Offset” of \$397.85 for the period December 1, 2011 to June 2, 2012. The record also contains a form “FERS SSA Dual Benefits Calculations Fax Transmittal” which was completed on June 11, 2011 by an SSA official who stated, “[Appellant]

² The record contains EN1032 forms signed by appellant on May 11, 2010 and May 9, 2011. In these forms, appellant answered “No” in response to a question regarding whether she received benefits from the SSA as part of an annuity for federal service during the 15 months prior to the signing of each form. In a Form EN1032 signed on July 13, 2012, appellant answered “Yes” to the same question.

has not applied for benefits as of June 2011 -- no benefits payable.” Another form entitled “FERS SSA Dual Benefits Calculations Fax Transmittal” was completed on May 16, 2011 by another SSA official, but the form did not indicate any date of receipt of SSA benefits.

In a June 27, 2012 letter, OWCP notified appellant of its preliminary determination that she received a \$5,564.20 overpayment of compensation because she received dual benefits between May 1, 2011 and June 2, 2012 from FERS and SSA. It stated that the portion of the SSA benefits earned as a federal employee was part of FERS retirement package and that the receipt of FECA benefits and federal retirement benefits concurrently was a prohibited dual benefit.³ OWCP informed appellant of its preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. Regarding the finding of fault, it stated:

“On May 11, 2010 and May 11, 2011, the claimant signed and returned Form EN1032, including acknowledgement of the following statement: ‘I understand that I must immediately report to OWCP any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third party settlement, and any change in income from federally assisted disability or benefit programs.’ However, the claimant failed to notify this Office of the change in compensation status until....”⁴

In an overpayment action request form received by OWCP on July 13, 2012, appellant requested a prerecoupment hearing regarding the preliminary overpayment determination.⁵ She checked a box indicating that she believed the overpayment occurred through no fault of her own and that she sought waiver of recovery of the overpayment. Appellant asserted that when she went to apply for medicare in October 2011 she was told that she could collect FERS and SSA benefits at the same time. She completed the financial information questionnaire on July 13, 2012 indicating that she had \$1,065.00 in monthly income, \$1,955.00 in monthly expenses and no assets.

In an August 1, 2012 decision, OWCP found that appellant received a \$5,564.20 overpayment of compensation. Appellant was found at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. OWCP directed recovery of the overpayment by deducting \$125.00 from her compensation payments every 28 days.

³ OWCP stated, “If you are covered under FERS, OWCP must deduct from your compensation entitlement at least part of any Social Security Retirement Benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in Social Security Retirement Benefits. Therefore, advise OWCP immediately upon filing for or receiving Social Security Retirement Benefits.”

⁴ OWCP further advised appellant that she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing within 30 days of the date of its preliminary determination letter. It asked her to complete and return a financial information questionnaire regarding monthly income, monthly expenses and assets.

⁵ Appellant also checked a box indicating that she was open to the option of participating in a teleconference if OWCP deemed her case suitable for this form of hearing.

In a January 25, 2013 order remanding case,⁶ the Board set aside the August 1, 2012 decision and remanded the case to OWCP for a proper response to appellant's request for a prerecoupment hearing.

On remand, a prerecoupment hearing was held on June 11, 2013 with an OWCP hearing representative. Appellant alleged that the overpayment occurred because she on three occasions was advised by a person at SSA that she could receive both social security benefits and benefits under FECA since she worked at least 50 years and "it's owed to you." She stated that she had income of \$3,039.45 and expenses of \$1,165.35 for a first mortgage, \$135.00 for a second mortgage, \$200.00 for food, \$50.00 for clothing, \$400.00 for utilities, \$89.00 for student loans, \$100.00 for propane, \$180.00 for the house telephone, \$85.00 for the cell phone, \$70.00 for gasoline and \$20.00 for a vehicle repair loan. Appellant had four credit cards on which she owed varied balances and had \$109.00 in cash on hand and \$63.85 in savings. She stated that she had a certificate of deposit with \$5,000.00 which was in her name but which was intended to pay for funeral expenses for her 97-year-old father.

In a September 11, 2013 decision, an OWCP hearing representative found that appellant received a \$5,564.20 overpayment of compensation; that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery; and that recovery of the overpayment would be made by deducting \$200.00 from her compensation payments every 28 days. With respect to the finding of fault, he noted, "The claimant cannot be found to be without fault with regards to the creation of the overpayment at issue since she received numerous EN1032 forms advising her to report all benefits received from the SSA as part of an annuity received under the Federal Employees' Retirement System." The hearing representative found that appellant had \$3,039.45 in monthly income and \$2,494.35 in monthly expenses such that her monthly income exceeded monthly expenses by \$545.10.⁷

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 her duty.⁸ 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."⁹

⁶ Docket No. 12-1782 (issued January 25, 2013).

⁷ OWCP's hearing representative did not include appellant's credit card balances as they were deemed duplicative of other listed monthly expenses.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

Section 8116(d)(2) of FECA¹⁰ provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that -- ”

* * *

“(2) in the case of benefits received on account of age or death under title [2] of the [SSA,] compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title....”¹¹

OWCP procedure specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”¹² These requirements are supported by Board precedent.¹³

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$5,564.20 overpayment of compensation. With respect to the fact and amount of this claimed overpayment, OWCP has not provided adequate findings of facts or clear reasoning which would allow appellant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁴ It found that she received a \$5,564.20 overpayment of compensation because she received dual benefits from FERS and SSA between May 1, 2011 and June 2, 2012. OWCP did not adequately explain how this finding was supported by documents of record. The record does not appear to contain any document from the SSA establishing that appellant was receiving SSA benefits or indicating a start date, May 1, 2011 or otherwise, for such benefits. The record contains a form “FERS SSA Dual Benefits Calculations Fax Transmittal” which was completed on June 11, 2011 by an SSA official. It stated, “[Appellant] has not applied for benefits as of June 2011 -- no benefits

¹⁰ *Id.* at § 8116(d)(2).

¹¹ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (February 1995); FECA Bulletin No. 97-9 (issued February 3, 1997) (the portion of SSA benefits earned as a federal employee is part of FERS retirement package and the receipt of FECA benefits concurrently with federal retirement is a prohibited dual benefit).

¹² See *id.* at *Disallowances*, Chapter 2.1400.4 (March 1997).

¹³ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁴ See *supra* note 13.

payable.” Another form entitled “FERS SSA Dual Benefits Calculations Fax Transmittal” was completed on May 16, 2011 by another SSA official, but did not list any date of receipt of SSA benefits. The record contains OWCP worksheets indicating that SSA benefits in the amount of \$5,564.20 were not offset against FECA benefits for the period May 1, 2011 to June 2, 2012. The worksheets stated that appellant had a “28-day FERS Offset” of \$384.09 for the period May 1 to November 30, 2011 and a “28-day FERS Offset” of \$397.85 for the period December 1, 2011 to June 2, 2012. The calculations contained in the worksheets are not supported by the SSA documents of record. The basis for the determination of fact and amount of overpayment has not been adequately explained by OWCP.

The case will be remanded to OWCP for the purpose of providing adequate facts and findings, supported by appropriate documents, to support its determination that appellant received a \$5,564.20 overpayment of compensation. Given the Board’s determination regarding the fact and amount of the overpayment, it is premature to consider the matters of fault in the creation of the overpayment, waiver of recovery of the overpayment or the method of recovery. After completion and development directed by the Board, OWCP shall issue an appropriate decision regarding these overpayment matters.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$5,564.20; whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation; and whether it properly required repayment of the overpayment by deducting \$200.00 from her compensation payments every 28 days. The case is remanded to OWCP for further development.

IT IS HEREBY ORDERED THAT the September 11, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 3, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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