

precluding waiver of recovery; (3) whether OWCP properly required repayment of the overpayment by deducting \$450.00 every 28 days from appellant's continuing compensation.

On appeal, appellant argues that he was unaware that he was receiving dual benefits as he did not realize that his Federal Employees' Retirement System (FERS) benefits were considered to be SSA benefits.

FACTUAL HISTORY

On September 3, 1994 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim alleging that on that day he had lower right side and upper muscle pain due to pulling a heavy box to the door and handing it to the customer. OWCP accepted the claim for lumbosacral joint strain, lumbar strain, sacroiliac ligament strain, lumbago, and backache. By letter dated August 6, 1996, it placed appellant on the periodic rolls for temporary total disability.

In a letter dated December 16, 2009, OWCP informed appellant that it needed to determine if he was in receipt of SSA benefits going back to when he turned 65. It informed him that compensation benefits under FECA must be adjusted for any FERS benefits paid by SSA (the portion of SSA benefits attributable to federal service of the employee) pursuant to section 8116(d) of FECA. OWCP informed appellant that "[a]ll SSA retirees age 65 or older, who are covered by FERS, are subject to the FERS offset. It stated that he must submit either a written statement or documentation indicating which retirement system he was under.

In response to OWCP's request, appellant submitted a letter from SSA informing him that he was no longer entitled to receive SSA disability benefits beginning November 1, 2009 as he had reached the full retirement age. He also informed OWCP that he reached the retirement age of 65 on November 15, 2008 and that he was covered under the retirement system of FERS.

Appellant completed and signed EN1032 forms on November 12, 2010, November 17, 2011, November 26, 2012,³ and November 14, 2013 indicating that he had not worked for the previous 15 months, was not self-employed and had not received either retirement benefits or SSA benefits as part of an annuity under FERS. He responded "No" to the question of whether he received benefits from SSA as part of an annuity for federal service. This form stated, "I understand that I must immediately report to OWCP any improvement or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs."

In a facsimile (fax) transmittal dated May 16, 2014, OWCP requested that SSA provide information regarding the dual benefits appellant received. It forwarded a form entitled "FERS SSA DUAL BENEFITS CALCULATIONS FAX TRANSMITTAL." Appellant's name, date of birth, and social security number were noted on the form. OWCP also provided information regarding the date he was first eligible to receive benefits under FECA. The form requested SSA to provide separate benefit calculations of SSA with FERS, and SSA without FERS.

³ An undated, but signed EN1032 form was received on November 30, 2012.

An SSA representative responded on May 20, 2014.⁴

On June 3, 2014 OWCP issued a preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$12,088.11 for the period November 1, 2009 through May 31, 2014. It explained that part of his SSA retirement benefits were subject to offset. For the period November 1 through 30, 2009, the FERS offset (based on 28 days) was \$7.04 a day for 30 days equaling \$211.05. For the period December 1, 2009 through November 30, 2010, the FERS offset (based on 28 days) was \$7.04 a day for 365 days equaling \$2,567.84. For the period December 1, 2010 through November 30, 2011, the FERS offset (based on 28 days) was \$7.04 a day for 365 days equaling \$2,567.84. For the period December 1, 2011 through November 30, 2012, the FERS offset (based on 28 days) was \$7.29 a day for 366 days equaling \$2,667.78. For the period December 1, 2012 through November 30, 2013, the FERS offset (based on 28 days) was \$7.41 a day for 365 days equaling \$2,705.01. For the period December 1, 2013 through May 31, 2014, 2010, the FERS offset (based on 28 days) was \$7.52 a day for 182 days equaling \$1,368.60. This created an overpayment of compensation in the amount of \$12,088. OWCP noted that appellant's compensation had not been reduced effective November 1, 2009 for the FERS offset and, thus, an overpayment existed. It found that he was at fault in the creation of the overpayment because he should have known or reasonably been aware that he was not entitled to receive SSA retirement benefits and FECA benefits at the same time. OWCP advised appellant of his right to either request a telephone conference, request a decision on the written record, or to request a precoupment hearing with the Branch of Hearings and Review. Appellant was afforded 30 days to respond in writing to the preliminary determination but did not respond.

By decision dated July 7, 2014, OWCP finalized the preliminary overpayment determination. It denied waiver of recovery of the overpayment because appellant was at fault in the creation of the overpayment. OWCP directed recovery of the overpayment by deducting \$450.00 from his continuing compensation payments every 28 days.

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 and that, if an employee receives SSA benefits based on federal service, his or her disability compensation benefits under FECA shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁵

⁴ Effective November 2009, appellant's SSA rate with FERS was \$1,219.79 a month. Excluding his FERS contributions, he would have received only \$1,006.30 in SSA benefits each month. Beginning December 2010, the amounts increased to \$1,263.60 (with FERS) and \$1,042.50 (without FERS). In December 2012, the amounts increased to \$1,285.60 (with FERS) and \$1,060.20 (without FERS). Beginning December 2013, the amounts increased to \$1,304.20 (with FERS) and \$1,076.19 (without FERS). Effective June 1, 2014, OWCP reduced appellant's 28-day compensation rate by \$210.55 based on the recent information provided by SSA.

⁵ 5 U.S.C. § 8116(d). *See D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

OWCP's 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.⁶ 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 as to 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. It 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.⁷

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits from November 1, 2009 to May 31, 2014. The portion of SSA benefits he earned as a federal employee as part of his FERS retirement package and the receipt of benefits under FECA and FERS benefits concurrently is a prohibited dual benefit.⁸ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefits appellant received from November 1, 2009 through May 31, 2014 created an overpayment of compensation in the amount of \$12,088.11.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period November 1, 2009 through May 31, 2014 and finds that it properly determined that he received benefits totaling \$12,088.11 for this period, thus creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁹ provides: "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."¹⁰

⁶ See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010); 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.

⁷ 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.

⁸ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁹ 5 U.S.C. § 8129(d).

¹⁰ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

OWCP may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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 he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she 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 (this provision applies only to the overpaid individual).¹¹

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.¹²

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he made an incorrect statement as to a material fact that he knew or should have known to be incorrect. In his EN1032 forms completed on November 12, 2010, November 17, 2011, November 26, 2012, and November 14, 2013, appellant reported that he had not received benefits from SSA as part of an annuity for federal service. This was not an accurate statement as he was clearly receiving SSA benefits for his federal employment at these times. In a December 16, 2009 letter, OWCP advised appellant that his FECA compensation benefits would be offset by any FERS benefits received as part of SSA. On January 11, 2010 it received evidence from him indicating that SSA had converted his disability benefits to retirement benefits effective November 1, 2009 and that he was covered under the FERS retirement system. Appellant had responded "No" to the question regarding SSA benefits on the EN1032 form he completed on July 22, 2012.

The Board finds that appellant was aware that he received SSA and FECA benefits simultaneously. Appellant informed OWCP that he was receiving FERS benefits under SSA benefits, but inaccurately failed to report that he received SSA benefits on the EN1032 forms he completed. Based on the clear language of the forms which appellant knowingly signed, he made an incorrect statement as to a material fact. The Board finds that appellant was at fault in the creation of the overpayment and is therefore precluded from receiving a waiver.¹³

On appeal appellant argues that he was unaware that his benefits from SSA were for disability and not for his retirement. The evidence of record does not support this contention. OWCP informed appellant on December 16, 2009 that compensation benefits under FECA

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ *See R.L.*, Docket No. 13-713 (issued August 15, 2013).

compensation benefits must be adjusted for any FERS benefits paid by SSA (the portion of SSA benefits attributable to federal service of the employee) pursuant to section 8116(d). On January 11, 2010 appellant informed OWCP that he was covered under FERS and submitted a letter from SSA informing him that he would no longer be receiving disability benefits from SSA and that as of November 1, 2009 he would be receiving retirement benefits.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP regulations provide that, 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 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 hardship.¹⁴

ANALYSIS -- ISSUE 3

OWCP determined that \$450.00 would be withheld from each of appellant's continuing compensation payments until the overpayment was recovered. In making this determination, it noted that he failed to submit supporting financial documentation. Because appellant failed to submit the requested financial documentation, OWCP properly determined that withholding \$450.00 from each of appellant's continuing compensation benefits was reasonable. The Board will affirm OWCP's decision on rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,088.11, properly denied waiver of recovery of the overpayment and acted within its discretion when it required that he repay the overpayment by deducting \$450.00 from his continuing compensation.

¹⁴ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez, supra* note 9; *see also J.M., Docket No. 10-1913* (issued July 11, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2014 is affirmed.

Issued: August 6, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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