

FACTUAL HISTORY

OWCP accepted that on May 9, 2010 appellant, then a 64-year-old custodian, sustained lumbosacral radiculitis and cervical radiculitis when he lifted a heavy container of floor finish. Following a brief work absence, appellant returned to modified duty. OWCP accepted that he sustained a recurrence of disability commencing August 23, 2010. Appellant did not return to work. He received compensation on the daily and periodic rolls beginning August 29, 2010. On November 30, 2010 appellant underwent C5-6 and C6-7 fusions and fixation, authorized by OWCP.

Appellant reached 66 years of age on February 11, 2012, converting the Social Security Administration (SSA) disability benefits he received to age-related retirement benefits. In an affidavit of earnings and employment (Form CA-1032) dated February 14, 2012 in response to the question, "Do you receive benefits from the SSA as part of an annuity for federal service?" appellant answered "no."

On February 11, 2012 OWCP issued appellant a check for \$2,570.04 in compensation, covering the period January 15 to February 11, 2012. Appellant elected to receive FECA benefits by direct deposit effective March 9, 2012. The first payment after March 9, 2012 was issued by check dated March 10, 2012. OWCP issued the first payment by direct deposit on April 7, 2012, covering the period March 11 to April 7, 2012.

In an EN1032 form signed on April 10, 2013, appellant stated that he did not receive SSA benefits as part of an annuity for federal service.

In a January 24, 2014 letter, OWCP advised appellant that he had been receiving SSA age-related retirement benefits since February 1, 2012. The SSA confirmed that a portion of his SSA benefits were attributable to his federal service as an employee under the Federal Employees Retirement System (FERS) program. OWCP explained that the portion of appellant's SSA benefit attributable to his federal service required an offset. The offset would begin with the February 8, 2014 payment.

On January 15, 2014 SSA provided information to OWCP regarding appellant's age-related retirement benefits for the period February 1, 2012 to January 11, 2014. From February 1 to November 30, 2012 appellant's SSA rate was \$1,202.10 with FERS and \$751.00 without. From December 1, 2012 to November 30, 2013, his SSA rate with FERS was \$1,222.50 and \$763.80 without. From December 1, 2013 through January 11, 2014, appellant's SSA rate with FERS was \$1,240.80 and \$775.20 without. OWCP calculated that, based on these amounts, his FECA benefits should have been offset by \$10,684.11 from February 1, 2012 through January 11, 2014. It determined that, from February 1 to November 30, 2012, the daily FERS offset of \$14.87 multiplied by 304 days equaled \$4,519.91. From November 30 to December 1, 2012 to the daily FERS offset amount of \$15.12 multiplied by 365 days equaled \$5,519.52. For the period December 1, 2013 to January 11, 2014, the daily FERS offset amount of \$1.35 multiplied by 42 days equaled \$644.68. OWCP added the total amounts to equal \$10,684.11. As appellant's FECA benefits were not offset, the \$10,684.11 amount represented an overpayment of compensation.

By notice dated January 24, 2014, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$10,684.11 was created in his case as he received FECA benefits concurrently with SSA age-related retirement benefits from February 1, 2012 through January 11, 2014 without deduction of the FERS offset. It found him at fault because he was aware or reasonably should have been aware that he was not entitled to receive a retirement annuity for federal service under FERS and SSA age-related retirement benefits. The EN1032 forms appellant signed advised him to report “any change in income from federally-assisted disability or benefit programs.” OWCP noted that when he turned 66 years of age, his SSA disability benefits were converted to full retirement age benefits as part of his retirement package. However, appellant did not report this change in benefits on his EN1032 forms. OWCP afforded him 30 days to submit information regarding his income, assets, and expenses, and to request a preresoupment hearing.

In response, appellant submitted an overpayment recovery questionnaire (Form OWCP-20) signed on February 7, 2014. He listed \$2,213.31 in cash and checking accounts, monthly income of \$4,714.10 from his SSA benefits, his wife’s SSA benefits, FECA benefits, and payments from the Department of Veterans Affairs. Appellant contested the fact and amount of the overpayment, and asserted that he was without fault in its creation. He requested a preresoupment hearing.

In a February 11, 2014 letter, appellant, through counsel, contended that OWCP was well aware of the change in his SSA benefits, yet continued to pay compensation at an incorrect rate.

In a February 20, 2014 Form EN1032, appellant stated that he received SSA benefits as part of an annuity for federal service.

During the hearing, conducted telephonically on August 8, 2014, appellant confirmed that he reached 66 years of age on February 11, 2012 and began receiving SSA retirement benefits. He noted that he worked in the private sector prior to his federal employment. Appellant explained that he had filed for bankruptcy in 2011 or 2012, but withdrew the bankruptcy as an attorney was able to renegotiate his mortgage payment. He noted monthly expenses of \$2,150.00 for rent, \$800.00 for food for himself and his wife, \$300.00 for clothing, \$600.00 for utilities, and \$575.00 for medical and dental expenses. Appellant noted that he was in poor health due to the accepted cervical injury and fusion, as well as glaucoma. He asserted that he did not intend to deceive OWCP and that he was not at fault in creating the overpayment. Appellant requested waiver of the overpayment.

In an October 24, 2014 letter, OWCP advised appellant to complete a new OWCP-20 form, indicating any changes since he completed the questionnaire on February 7, 2014. It also requested documentation of his expenses, including bank statements and monthly bills.

Counsel responded by letter dated November 11, 2014 and an updated Form OWCP-20, imaged into the case record by OWCP on November 18, 2014. He noted that appellant was undergoing dental implants requiring a \$5,000.00 loan, with a monthly payment of \$277.00. Appellant noted monthly expenses of \$97.55 in automobile insurance, \$250.00 for electricity and gas, \$50.00 for water, \$194.00 for telephone, television and internet, \$157.08 for cell phones,

and \$60.00 for prescription medications. He provided monthly bills substantiating these payments.

By decision dated November 18, 2014, OWCP's hearing representative finalized the overpayment determination, finding a \$10,684.11 overpayment of compensation for the period February 1, 2012 to January 11, 2014, and that appellant was at fault in its creation as he knew or should have known that he was not entitled to receive SSA retirement benefits simultaneously with FECA benefits. She found that he provided incorrect or minimal information on EN1032 forms regarding his receipt of SSA benefits, and "continued to accept OWCP payments thus contributing to the creation of the overpayment." The hearing representative found that the record established that appellant's FERS benefits were based in part on his federal employment. Regarding the rate of recovery of the overpayment, she found that he "provided no specific information regarding his income and expenses to make a determination of his financial situation." Based on appellant's February 2014 overpayment recovery questionnaire, OWCP directed recovery of the overpayment by deducting \$300.00 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 her duty.² 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."³

Section 8116(d)(2) of FECA⁴ 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

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(d)(2).

that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title....”⁵

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶

ANALYSIS -- ISSUE 1

Appellant reached 66 years of age on February 11, 2012. He received FECA wage-loss compensation and SSA age-related retirement benefits concurrently from February 1, 2012 continuing through January 11, 2014. The receipt of concurrent FECA and FERS benefits attributable to federal employment is a prohibited dual benefit.⁷ OWCP requested, and SSA provided, information regarding appellant’s applicable SSA rates and their effective dates. Based on these rates, it determined that appellant received a prohibited dual benefit from February 1, 2012 through January 11, 2014 in the amount of \$10,684.11, thereby creating an overpayment of compensation.

The Board finds that OWCP properly found that appellant received an overpayment of compensation from February 1, 2012 through January 11, 2014 due to the prohibited dual benefit. The Board has reviewed its calculations of the dual benefits appellant received for the period February 1, 2012 through January 11, 2014 and finds that it properly determined that he received dual benefits totaling \$10,684.11, creating an overpayment of compensation in that amount. The Board notes that on appeal appellant does not contest the fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when 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. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁸

⁵ *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). *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

⁶ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a). See also *P.M.*, Docket No. 14-1832 (issued January 20, 2015).

⁷ *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

⁸ *C.V.*, Docket No. 13-2108 (issued June 17, 2014); *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations 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 he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”⁹

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹⁰ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹¹

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 dated February 14, 2012 and April 10, 2013, covering the relevant period between 2012 and 2014, appellant consistently reported that he was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as he was clearly receiving SSA benefits based on periods of his federal employment.

The Board finds that appellant was aware that he received SSA and FECA benefits simultaneously. Appellant inaccurately reported that he was not receiving SSA benefits on the EN1032 forms he completed. Based on the clear language of the forms which he knowingly signed, appellant made an incorrect statement as to a material fact. The Board, thus, finds that appellant was at fault in the creation of the overpayment and is therefore precluded from receiving a waiver.¹²

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.*

¹² *V.E.*, Docket No. 15-340 (issued April 1, 2015). *See also R.L.*, Docket No. 13-713 (issued August 15, 2013).

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹³

Section 10.441 of OWCP's 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 any hardship.¹⁴

ANALYSIS -- ISSUE 3

OWCP determined that it would collect appellant's overpayment by deducting \$300.00 from each compensation check. In its November 18, 2014 decision, it found that he "provided no specific information regarding his income and expenses to make a determination of his financial situation." However, appellant submitted extensive financial documentation on November 18, 2014, including an overpayment recovery questionnaire, copies of bills, and debt repayment statements.

In the case of *William A. Couch*,¹⁵ the Board held that when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by it before the final decision is issued. In the present case, OWCP determined a repayment schedule in its November 18, 2014 decision, but it did not consider the financial information that appellant submitted timely on November 18, 2014. Under these circumstances, the case will be remanded to OWCP for full consideration of appellant's financial information. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision in the case.

On appeal, appellant requests that OWCP adjust the repayment schedule as the \$300.00 deduction every 28 days was creating financial hardship. As stated above, the case will be remanded to OWCP for additional development on the issue of rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$10,684.11 overpayment of compensation for the period February 1, 2012 to January 11, 2014. The Board further finds that OWCP properly found appellant at fault in creating the overpayment of compensation for the period February 1, 2012 to January 11, 2014. The Board further finds that OWCP did not properly consider the financial information of record in determining the rate of

¹³ 20 C.F.R. § 10.436.

¹⁴ *Id.* at § 10.441(a).

¹⁵ 41 ECAB 548 (1990). See *Linda Johnson*, 45 ECAB 439, 440 (1994) (the Board remanded, directing OWCP to consider evidence received the same date it issued its final decision).

recovery of the overpayment. The case will be remanded for additional development on the issue of the rate of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2014 is affirmed in part, and set aside in part, and remanded for further actions consistent with this decision.

Issued: August 7, 2015
Washington, DC

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

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

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