

compensation; and (3) whether OWCP properly recovered the overpayment by deducting \$150.00 from appellant's compensation payments every 28 days.

FACTUAL HISTORY

OWCP accepted that on March 26, 1991 appellant, then a 55-year-old licensed practical nurse at the employing establishment since September 25, 1989, sustained left hand and forearm contusions when a patient pushed her to the floor. Appellant stopped work on May 31, 1991 and claimed total disability compensation at the augmented rate as she was married and resided with her husband. She underwent a left trapezial implant on July 3, 1991. Appellant did not return to work. She continued to claim total disability compensation at the augmented rate.³

The Office of Personnel Management (OPM) began paying appellant's Federal Employees' Retirement System (FERS) retirement annuity on August 24, 1991.⁴ OWCP paid compensation on the daily rolls beginning on August 25, 1991, and on the periodic rolls beginning on May 31, 1992.⁵ Health benefit premiums were withheld from appellant's compensation payments from August 25, 1991 onward.

OPM approved appellant's request for disability retirement benefits on January 3, 1993. Appellant completed an affidavit of earnings and employment (Form EN1032) on February 3, 1994. She indicated that she had received monthly Social Security Administration (SSA) benefit payments since November 1991. Appellant asserted that SSA offset her benefits based on her FECA benefits. She noted that her monthly SSA benefit payment "started at \$153.00 per month in November 1991." As of January 1994, appellant received \$217.00 a month in SSA benefits. She also provided her civil service annuity number.

In a Form EN1032 signed on February 5, 1995, appellant asserted that OPM suspended her FERS retirement benefits as she received FECA benefits. She stated that she received SSA benefits as part of a FERS retirement annuity for federal service.

On August 16, 1996 appellant elected to receive her FECA benefits by direct deposit.

Appellant reached 62 years of age on January 4, 1998. As of February 1, 1998, SSA converted her disability benefits to age-related retirement benefits.

In EN1032 forms dated from February 3, 1998 through January 19, 2015, in response to the question, "Do you receive benefits from the SSA as part of an annuity for Federal service?"

³ On July 16, 1993 appellant signed a Form EN1049, which advised her to inform OWCP immediately of "any change in the status of any dependents claimed by you to establish entitlement to additional compensation."

⁴ The employing establishment terminated appellant effective February 25, 1992.

⁵ Appellant remained under medical care. Treating physicians found her totally disabled for work as of August 1992 due to the accepted injuries as well as systemic, nonoccupational conditions.

appellant answered “no.”⁶ In the January 19, 2015 form, appellant explained that her SSA benefits were based on her earnings from 1955 to 1991. She noted that her survivor’s benefit was added in January 2005 due to the death of her husband on November 20, 2004.

On June 13, 2014 SSA provided information to OWCP regarding appellant’s age-related retirement benefits for the period February 1998 to December 2013. Beginning in February 1998, appellant’s SSA rate with FERS contributions was \$482.00 per month, and her SSA without FERS was \$444.10; as of November 2004, appellant’s SSA rate with FERS was \$1,189.00, and her SSA rate without FERS was \$506.80; effective December 2013, appellant’s SSA rate with FERS was \$1,520.10, and the rate without FERS was \$647.40.

By notice dated August 20, 2014, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$103,158.42 was created because she received FECA benefits concurrently with SSA age-related retirement benefits from February 1, 1998 to August 23, 2014 without deduction of the FERS offset.⁷ It found appellant at fault because she was aware or reasonably should have been aware her retirement payments from social security were based in part on her federal earnings. Appellant failed to indicate on the EN1032 forms that she was in receipt of SSA benefits as part of her annuity under FERS. OWCP noted that, when appellant turned 62 years of age on January 4, 1998, her SSA disability benefits were converted to full retirement age benefits as part of her retirement package. Since 1998 appellant has responded “no” as to whether she had received SSA benefits. OWCP afforded appellant 30 days to submit information regarding her income, assets, and expenses, and to request a prereducement hearing.

In response, appellant submitted an overpayment recovery questionnaire (Form OWCP-20) and attached statement, signed on September 3, 2014. She contended that there was no overpayment as OPM suspended her FERS retirement annuity benefits. Appellant explained that she received SSA benefits based on private-sector earnings from 1955 to 1989, unrelated to her federal employment. She listed monthly income of \$1,710.00 in compensation and \$1,414.00 in SSA benefits, totaling \$3,124.00. Appellant noted monthly expenses for rent, food, clothing, and

⁶ Appellant answered “no” on forms she signed on the following dates: February 5, 1996, February 24, 1997, February 3, 1998, February 5, 2000, February 4 and 12, 2001, January 29, 2002, February 10, 2003, February 3, 2004, February 1, 2005, January 12, 2007, January 28, 2008, January 17, 2009, January 16, 2010, January 12, 2011, January 14, 2012, January 11, 2013, January 14, 2014, and January 19, 2015. Beginning in 2009, appellant’s daughter, S.M., assisted her mother in completing the EN1032 forms as her power of attorney.

⁷ OWCP calculated FERS offset amounts for the following periods: \$378.58 from February 1 to November 30, 1998; \$460.86 from December 1, 1998 to November 30, 1999; \$474.19 from December 1, 1999 to November 30, 2000; \$41.49 from December 1 to 31, 2000; \$987.54 from January 1 to June 30, 2001; \$835.78 from July 1 to November 30, 2001; \$2,054.60 from December 1, 2001 to November 30, 2002; \$2,074.48 from December 1, 2002 to November 30, 2003; \$1,949.54 from December 1, 2003 to October 31, 2004; \$674.40 from November 1 to 30, 2004; \$689.22 from December 1 to 31, 2004; \$7,720.91 from January 1 to November 30, 2005; \$8,782.86 from December 1, 2005 to November 30, 2006; \$9,072.86 from December 1, 2006 to November 30, 2007; \$9,307.66 from December 1, 2007 to November 30, 2008; \$29,460.31 from December 1, 2008 to November 30, 2011; \$10,202.95 from December 1, 2011 to November 30, 2012; \$10,345.95 from December 1, 2012 to November 30, 2013; \$7,652.91 from December 1, 2013 to August 23, 2014. OWCP totaled these amounts to equal \$103,158.42. The Board calculates this amount to be \$103,167.09.

utilities of \$1,450.00, with an additional \$1,500.00 for unspecified “[a]ssistance with daily living.” She did not provide documentation of her expenses.

Appellant submitted a September 16, 1992 SSA letter stating that she was “entitled to monthly disability benefits from Social Security beginning November 1991” based on her earnings from 1986 through 1991. SSA explained that appellant’s SSA benefits would be offset by the amount of her FECA benefits of \$304.36 a week. This reduced her weekly SSA benefit from \$476.60 to \$134.80 beginning in November 1991.

Appellant provided a February 25, 1992 letter from the employing establishment, stating that, if she was approved for disability retirement benefits, her “disability retirement annuity would begin immediately following expiration of OWCP benefits, thereby preventing a total loss of income.” In a December 15, 1997 letter, SSA advised appellant that if she filed for retirement benefits she could receive a higher monthly amount as “retirement benefits are not affected by workers’ compensation.”

A September 20, 2014 FECA benefits statement showed no deduction for overpayments. Appellant asserted that this proved that there was no overpayment of compensation. In a September 26, 2014 letter, SSA stated that she was “entitled to monthly retirement benefits” based on her earnings from 1955 through 1991. Appellant asserted that this letter also established her entitlement to all benefits paid.

By decision dated October 17, 2014, OWCP finalized its preliminary overpayment determination, finding a \$103,158.42 overpayment of compensation and that appellant was at fault in its creation. It found that the record established that appellant’s FERS benefits were based in part on her federal employment from 1989 to 1991. OWCP noted that there was “no apportionment for SSA benefits paid in the private sector and SSA benefits paid under FERS.” It further found that appellant did not provide the requested documentation of her monthly expenses. Based on the partial information submitted, OWCP directed recovery of the overpayment by deducting \$150.00 from appellant’s 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.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

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 [T]itle [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

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹²

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits concurrently from February 1, 1998 through August 23, 2014. As noted, the portion of the SSA benefits she earned as a federal employee as part of her FERS retirement package and the receipt of benefits under FECA and FERS benefits concurrently is a prohibited dual benefit.¹³ OWCP requested and SSA provided information regarding appellant’s applicable SSA rates and their effective dates. Based on these rates, the Board finds that it properly determined that appellant received prohibited dual benefit from February 1, 1998 through August 23, 2014, which created an overpayment of compensation in the amount of \$103,158.42.¹⁴

On appeal appellant argues that there was no overpayment of compensation, and that she should not be blamed for OWCP’s misinterpretation of the facts. She acknowledged that her SSA benefits were based, in part, on a FERS annuity for her federal employment from 1989 to 1991. Yet, appellant contended that she did not receive FERS payments and that her SSA

¹⁰ *Id.* at § 8116(d)(2).

¹¹ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e)(2) (February 1995) (the portion of SSA benefits earned as a federal employee as part of a FERS retirement package and the receipt of FECA benefits concurrently is a prohibited dual benefit). *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

¹² 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).

¹³ *B.L.*, *supra* note 11.

¹⁴ The Board notes that its calculation found a slightly higher overpayment amount of \$103,167.09.

benefits were based solely on private-sector employment from 1955 through 1991. The Board notes that appellant's assertions confirm that she received a prohibited dual benefit. Appellant admits that her FERS annuity was based on her federal employment, and that she received this annuity simultaneously with total disability compensation under FECA.

Additionally, appellant asserts that her SSA survivor benefits following her husband's death should not have been included in the overpayment because they were unrelated to employment. However, as stated above, a FECA beneficiary may not receive a federal survivor annuity concurrently with FECA benefits.¹⁵ Therefore, OWCP properly included the amount of the survivor annuity in calculating 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.¹⁶

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.”¹⁷

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹⁸ 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.¹⁹

¹⁵ 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

¹⁶ *C.V.*, Docket No. 13-2108 (issued June 17, 2014); *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

¹⁷ 5 U.S.C. § 8129(b)

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *Id.*

The Board has held that an employee who received payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.²⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment under the first standard, because she made repeated statements that she knew or should have known to be incorrect. Section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.²¹

The Board finds that appellant was at fault in the creation of the overpayment. Appellant acknowledged in a February 5, 1995 Form EN1032 that she received SSA benefits as part of a FERS annuity for federal service. She thus demonstrated that she had knowledge of the basis for her compensation payments as of February 5, 1995. However, in EN1032 forms dated from February 3, 1998 through January 19, 2015, appellant denied that she received SSA retirement benefits as part of an annuity for federal service.

In submitting the completed forms, appellant certified that she read and understood the basis on which her benefits were made. The Board finds that appellant is at fault in creating the overpayment of benefits.²² Because appellant was at fault, she is not eligible for a waiver of recovery of the overpayment.

The Board notes that appellant elected to receive her compensation payments through direct deposit as of August 16, 1996. An employee who receives OWCP compensation payments by direct deposit may not be at fault the first time incorrect funds are deposited into his or her account if the acceptance of the overpaid funds lacked the requisite knowledge.²³ However, in this case, appellant understood as of February 5, 1995 that she was receiving FECA compensation benefits simultaneously with a FERS annuity for federal service, a prohibited dual benefit. Therefore, it also found that OWCP properly included the first payment made during the period of the overpayment.

²⁰ *W.P.*, 59 ECAB 514 (2008); *S.C.*, Docket No. 14-1730 (issued April 13, 2015).

²¹ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

²² *See C.A.*, Docket No. 08-1889 (issued June 17, 2009); *Julia M. Butler*, Docket No. 04-1107 (issued November 15, 2004).

²³ *W.P.*, and *S.C.*, *supra* note 20.

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.²⁴

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 any hardship.²⁵

ANALYSIS -- ISSUE 3

OWCP determined that it would collect appellant's overpayment by deducting \$150.00 from each compensation check.

The Board notes that the financial information submitted by appellant was insufficient to give OWCP a clear picture of her finances. Appellant did not submit detailed documentation of her assets or expenses. OWCP's procedures provide that, when an individual fails to provide requested financial information, it should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁶ Because appellant failed to provide all of the necessary financial documentation, OWCP did not abuse its discretion in directing recovery by withholding \$150.00 from appellant's continuing compensation payments.²⁷

CONCLUSION

The Board affirms OWCP's finding that appellant received a \$103,158.42 overpayment of compensation for the period February 1, 1998 through August 23, 2014. The Board further finds that OWCP properly found appellant at fault in creating the overpayment of compensation. The Board further finds that OWCP properly required repayment of the overpayment by deducting \$ 150.00 from appellant's compensation payments every 28 days.

²⁴ 20 C.F.R. § 10.436.

²⁵ *Id.* at § 10.441(a).

²⁶ C.S., Docket No. 13-1423 (issued October 23, 2013).

²⁷ *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2014 is affirmed.

Issued: June 26, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board