

FACTUAL HISTORY

On November 7, 1995 appellant, then a 60-year-old registered nurse, injured her low back when lifting a patient. OWCP accepted her claim for lumbosacral strain and subluxation at L5. Appellant worked intermittently thereafter. She retired on December 23, 1995.

In a letter dated June 10, 1997, the Office of Personnel Management (OPM) advised that appellant elected to receive OWCP benefits effective December 23, 1995. It noted appellant's Federal Employees Retirement System (FERS) annuity commencement date was November 26, 1995.

Appellant completed and signed a Form EN1032 on August 8, 2008, August 5, 2009, August 5, 2010, August 4, 2011, August 8, 2012, August 7, 2013, and August 7, 2014 indicating that she 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. This form stated:

“PART D -- OTHER FEDERAL BENEFITS OR PAYMENTS

* * *

“2. SSA Benefits. Report any benefits received from the Social Security Administration (SSA) which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector.

a. Do you receive benefits from the SSA as part of an annuity for federal service? Yes or No: _____

* * *

PART H -- CERTIFICATION

“I know that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under FECA may be subject to criminal prosecution, from which a fine or imprisonment, or both, may result....

“I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third party settlement, and any change in income from federally assisted disability or benefit programs.

“I certify that all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief. I have placed ‘Not Applicable’ (N/A) or ‘None’ next to those questions that do not apply to me or my claim.”

In a facsimile (fax) transmittal dated August 14, 2014, OWCP requested SSA to provide information regarding any dual benefits appellant received.

An SSA representative responded that effective December 2007, appellant's SSA rate with FERS was \$1,177.00 a month and without FERS it was \$960.00 a month. Beginning December 2008, the amounts increased to \$1,245.20 with FERS and \$958.40 without FERS. In December 2011, appellant's SSA rate with FERS was \$1,290.00 and \$992.80 without FERS. In December 2012, her SSA rate with FERS was \$1,311.80 and \$1,009.60 without FERS. In December 2013, appellant's SSA rate with FERS was \$1,331.40 and \$1,024.80 without FERS. Effective September 21, 2014, OWCP reduced her 28-day compensation rate based on the recent information provided by SSA.

In a memorandum dated September 17, 2014, OWCP noted that SSA retirement began December 1, 2007 and the FERS offset period was December 1, 2007 to September 20, 2014.

On September 22, 2014 OWCP issued a preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$23,817.05 for the period December 1, 2007 to September 20, 2014. It explained that part of her SSA retirement benefits were subject to offset. OWCP noted that appellant's compensation had not been reduced effective December 1, 2007 and thus, an overpayment existed. For the period December 1, 2007 to November 30, 2008, the overpayment amount equaled \$3,269.87. For the period December 1, 2008 through November 30, 2011, the FERS offset was \$9.4549 a day for 1,095 days equaling \$10,353.15.² For the period December 1, 2011 to November 30, 2012, the overpayment amount equaled \$3,586.00. For the period December 1, 2012 to November 30, 2013, the overpayment amount equaled \$3,636.36. For the period December 1, 2013 to September 20, 2014, the overpayment amount equaled \$2,971.63. This created a \$23,817.05 overpayment. OWCP found that appellant was at fault in creating the overpayment because she was aware or should have reasonably been aware that she made an incorrect statement as to a material fact which she knew or should have known to be incorrect and she accepted a payment that she knew or should have known to be incorrect. It advised her of her right to either request a telephone conference, request a decision on the written record, or to request a preresumption hearing. Appellant was afforded 30 days to respond in writing to the preliminary determination.

In a letter dated September 22, 2014, OWCP informed appellant that as she had been receiving FERS/SSA, the portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits and federal retirement benefits concurrently is a prohibited dual benefit. It advised that SSA benefits which are attributable to the federal service of an employee covered under FECA must be adjusted for the FERS portion of SSA benefits and, in compliance, the correct compensation rate was being offset by \$283.02 based on recent information from SSA.

² This appears to be a typographical error as the FERS offset calculation fiscal worksheet shows this amount as \$10,353.16. Since the total overpayment amount shown on the preliminary overpayment determination is correct, the Board finds that to be harmless error.

On October 1, 2014 appellant requested that OWCP issue a decision based on the written record. She noted that she disagreed that the overpayment occurred and believed the overpayment occurred through no fault of hers. Appellant explained that when she spoke with SSA about switching from survivor benefits to her own earnings, she inquired as to whether there was a conflict with FECA and was told that there was no conflict since she would be drawing on her social security earnings and not on civil service. She believed she was drawing on the social security money that she had contributed prior to obtaining FECA benefits. Appellant further noted that she did not receive FERS or disability benefits from SSA. She submitted an overpayment questionnaire which noted monthly income as \$4,253.10, monthly expenses of \$3,866.00, cash on hand of \$100.00, a checking account balance of \$800.00, and a savings account balance of \$1,155.00.

By decision dated November 19, 2014, OWCP finalized the overpayment decision. 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 \$366.42 from her 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 compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.³

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.⁴ 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 in 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. 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.⁵

³ 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).

⁴ *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.

⁵ 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.

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits from December 1, 2007 to September 20, 2014. 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 she received from December 1, 2007 to September 20, 2014, created an overpayment of compensation in the amount of \$23,817.05.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period December 1, 2007 to September 20, 2014 and finds that it properly determined that she was overpaid benefits totaling \$23,817.05 for this period, thus creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁶ 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.⁷

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).⁸

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.⁹

⁶ 5 U.S.C. § 8129(b).

⁷ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

OWCP applied the first standard in determining that appellant was at fault in creating the overpayment. It found that she was at fault in the creation of the overpayment because she made an incorrect statement as to a material fact that she knew or should have known to be incorrect. In her EN1032 forms completed from 2007 to 2014, specifically on August 8, 2008, August 5, 2009, August 5, 2010, August 4, 2011, August 8, 2012, August 7, 2013 and August 7, 2014 appellant indicated that she did not receive benefits from SSA as part of an annuity for federal service. This was not an accurate statement as the record establishes that appellant was clearly receiving SSA benefits for her federal employment at these times. The EN1032 forms provided information to appellant regarding receipt of these federal benefits.

Appellant was advised as to the requirements for reporting other federal benefits, specifically, the EN1032 provided:

“PART D -- OTHER FEDERAL BENEFITS OR PAYMENTS

* * *

“2. SSA Retirement Benefits. Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector....

a. Do you receive benefits from the SSA as part of an annuity for federal service? Yes or No: _____”

* * *

The Board finds that appellant was aware that she received SSA and FECA benefits simultaneously. Appellant either failed to inform OWCP that she was receiving SSA benefits or inaccurately indicated that she did not receive SSA benefits on the EN1032 forms she completed. Based on the clear language of the forms which appellant knowingly signed, she 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.¹⁰

Appellant contends that she spoke with SSA about switching from widows benefits to her own earnings and inquired as to whether there was a conflict with FECA and was told that there was no conflict since she would be drawing on her social security earnings and not on civil service benefits.¹¹ She believed she was drawing her social security money that she contributed prior to obtaining FECA benefits. However, the EN1032 forms sent to appellant clearly advised her of the requirement for reporting SSA benefits. Appellant did not submit any evidence to corroborate her assertions regarding her conversations with SSA.

¹⁰ See *R.L.*, Docket No. 13-713 (issued August 15, 2013).

¹¹ See 5 U.S.C. 8116(a) (a FECA beneficiary may not receive wage-loss compensation concurrently until a federal retirement or survivor annuity).

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹² Section 10.441(a) of the regulations¹³ provides:

“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 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

The Board notes that with regard to compensation payments for the period December 1, 2007 to September 20, 2014 appellant was found to be at fault in the creation of this overpayment. The record reflects that she continues to receive wage loss compensation under FECA. The record supports that, in requiring repayment of the overpayment by deducting \$366.42 every 28 days from appellant's continuing compensation payments, OWCP took into consideration the financial information submitted by her, as well as the factors set forth in section 10.441 of the regulations, and found that this method of recovery would minimize any resulting hardship on her. The overpayment questionnaire indicates that appellant has monthly income of \$4,253.10 and total monthly expenses of \$3,866.00. OWCP considered the amount of appellant's assets and the extent her monthly income exceeded her monthly expenses which was \$387.10. Therefore, it properly required repayment of the overpayment by deducting \$366.42 from her continuing compensation payments every 28 days.

On appeal appellant reiterates her contention that she spoke with SSA about switching from widows benefits to her own earnings and inquired as to whether there was a conflict with FECA and was assured that there was not. As noted, she did not submit any documentation from SSA to support this assertion. Appellant further asserts that she did not intentionally make an error and recovery of the overpayment would be a hardship. As noted above, the EN1032 forms sent to her clearly advised her of the requirement for reporting SSA benefits. The Board further notes that OWCP considered the amount of appellant's assets and the extent her monthly income exceeded her monthly expenses and properly required repayment of the overpayment by deducting \$366.42 from appellant's continuing compensation payments every 28 days.

¹² *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez* 51 ECAB 295 (2000).

¹³ 20 C.F.R. § 10.441(a).

¹⁴ *Id.*

CONCLUSION

The Board finds that appellant received an overpayment of compensation from December 1, 2007 to September 20, 2014 and that she was at fault not in the creation of the overpayment and therefore not eligible for wavier. Additionally, OWCP properly recovered the overpayment by withholding \$366.42 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2014 decision of the Office of Worker's Compensation Programs is affirmed.

Issued: June 25, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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