

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

I.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE, KELLY
AIR FORCE BASE, San Antonio, TX, Employer**

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**Docket No. 15-1578
Issued: November 19, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 15, 2015 appellant filed a timely appeal from a June 22, 2015 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,416.09 because she concurrently received Social Security Administration (SSA) benefits for the period December 1, 2005 to December 13, 2014 while receiving FECA benefits; (2) whether it properly found her at fault and thus she was not entitled to waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$110.00 every 28 days from appellant's continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant asserts that the only additional federal benefits she received was a survivor annuity after her husband's death in November 2009.

FACTUAL HISTORY

OWCP accepted that on May 19, 1998 appellant, then a 56-year-old electronic technician, sustained contusions and sprain of the right knee, right hip, and a lumbosacral spine strain. It adjudicated the claim under file number xxxxxx656. On March 18, 1999 appellant sustained left leg and lumbar strains, which were accepted by OWCP. She stopped work that day and was placed on the periodic compensation rolls. Appellant retired on disability effective July 10, 1999.

By decision dated May 2, 2000, OWCP reduced appellant's compensation benefits based on her capacity to earn wages as a school secretary. On May 2, 2000 it also denied her claim for a fractured right elbow, contusion of the right shoulder, and a mid-left foot sprain. In a July 6, 2001 decision, an OWCP hearing representative affirmed both May 2, 2000 decisions.

By letter dated November 26, 2001, OWCP advised that it had been informed that appellant was receiving or was entitled to retirement benefits provided by the Office of Personnel Management (OPM). It informed her that benefits from both OPM and FECA were not payable for the same period, and she would have to elect the benefits she preferred. The correspondence continued that appellant could receive benefits from Thrift Savings Plan (TSP) and survivor benefits provided by the Social Security Administration (SSA) but that her FECA compensation would be reduced by the amount of benefits paid under SSA that were attributable to her federal service. On December 3, 2001 appellant elected FECA benefits, effective May 21, 2000.²

Appellant completed OWCP EN1032 forms on April 14, 2006, April 14, 2007, April 20, 2008, and April 2009.³ In each of these reports, she indicated that she was receiving no SSA benefits which were part of a federal retirement benefit under the Federal Employees Retirement System (FERS). In an unsigned EN1032 dated April 7, 2010 and received by OWCP on April 20, 2010, appellant indicated that her husband died on November 24, 2009. She again reported no SSA benefits as part of a FERS annuity. On EN1032 forms signed by appellant on April 18, 2011, April 14, 2012, and April 15, 2013, she indicated that she was receiving an OPM death benefit but no SSA annuity. On an EN1032 form signed on April 16, 2014, appellant indicated that she was receiving an OPM death benefit and SSA benefits as part of an annuity for federal service. She attached a statement of survivor annuity paid from OPM, stating that this was a death benefit.

In an August 26, 2014 letter to appellant, OWCP noted that she had reached the age of 65 and it was unclear whether she was receiving retirement under FERS or the Civil Service Retirement System (CSRS). Appellant was asked to forward within 14 days a copy of her SSA

² In July 2010, appellant repaid an overpayment of compensation in the amount of \$885.15 that was created because she continued to receive augmented compensation through April 10, 2010, after her husband's death on November 24, 2009.

³ The date in the EN1032 signed in 2009 does not include a complete date, merely indicating "April 2009."

award notice, a statement regarding her SSA benefit and, if applicable, submit documentation that she was under the CSRS retirement system. The letter concluded that, even if appellant was not currently receiving SSA benefits, she must still submit documentation and/or a written statement indicating the system under which she was receiving retirement benefits she was under. Appellant did not respond to the August 26, 2014 letter.

In September 2014, OWCP began development of whether appellant was receiving dual benefits from FECA and SSA. On November 17, 2014 SSA provided information regarding appellant's SSA retirement benefits beginning May 2005 through December 2014, with and without FERS offset.⁴ On December 16, 2014 OWCP informed appellant that her FECA benefits were being reduced to reflect the contribution to her SSA benefits. FECA compensation was reduced effective December 14, 2014. On an EN1032 form dated April 7, 2015, appellant indicated she was receiving SSA benefits as part of a federal annuity.

On May 19, 2015 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$54,416.09 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, that she received from May 1, 2005 to December 13, 2014, was based on credits earned while working in the federal government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found her at fault

⁴ The FERS offset calculation was as follows. For the period May 1 through November 30, 2005, SSA rate with FERS was \$708.00; SSA rate without was \$297.70; the monthly FERS offset was \$410.30; and the 28 days FERS offset was \$378.74, resulting in an overpayment of compensation in the amount of \$2,894.64 for the 214-day period. For the period December 1, 2005 through November 30, 2006, SSA rate with FERS was \$737.00; SSA rate without was \$427.10; the monthly FERS offset was \$427.10; and the 28 days FERS offset was \$394.25, resulting in an overpayment of compensation in the amount of \$5,139.28 for the 365-day period. For the period December 1, 2006 through November 30, 2007, SSA rate with FERS was \$761.30; SSA rate without was \$320.10; the monthly FERS offset was \$441.20; and the 28 days FERS offset was \$407.26, resulting in an overpayment of compensation in the amount of \$5,308.95 for the 365-day period. For the period December 1, 2007 through November 30, 2008, SSA rate with FERS was \$778.70; SSA rate without was \$327.40; the monthly FERS offset was \$451.30; and the 28 days FERS offset was \$416.58, resulting in an overpayment of compensation in the amount of \$5,445.36 for the 365-day period. For the period December 1, 2008 through November 30, 2009, SSA rate with FERS was \$823.90; SSA rate without was \$346.40; the monthly FERS offset was \$477.50; and the 28 days FERS offset was \$440.77, resulting in an overpayment of compensation in the amount of \$5,745.74 for the 365-day period. For the period December 1, 2009 through November 30, 2010, SSA rate with FERS was \$823.90; SSA rate without was \$346.40, the monthly FERS offset was \$477.50; and the 28 days FERS offset was \$440.77, resulting in an overpayment of compensation in the amount of \$5,745.74 for the 365-day period. For the period December 1, 2010 through November 30, 2011, SSA rate with FERS was \$823.90; SSA rate without was \$346.40, the monthly FERS offset was \$477.50; and the 28 days FERS offset was \$440.77, resulting in an overpayment of compensation in the amount of \$5,745.74 for the 365-day period. For the period December 1, 2011 through November 30, 2012, SSA rate with FERS was \$853.50; SSA rate without was \$358.80; the monthly FERS offset was \$494.70; and the 28 days FERS offset was \$456.65, resulting in an overpayment of compensation in the amount of \$5,969.02 for the 366-day period. For the period December 1, 2012 through November 30, 2013, SSA rate with FERS was \$868.00; SSA rate without was \$364.80; the monthly FERS offset was \$503.20; and the 28 days FERS offset was \$464.49, resulting in an overpayment of compensation in the amount of \$6,054.99 for the 365-day period. For the period December 1, 2013 through November 30, 2014, the SSA rate with FERS was \$880.90; SSA rate without was \$370.30; the monthly FERS offset was \$510.60; and the 28 days FERS offset was \$471.32, resulting in an overpayment of compensation in the amount of \$6,144.03 for the 365-day period. For the period December 1 through 13, 2014, SSA rate with FERS was \$895.90; SSA rate without was \$376.50; the monthly FERS offset was \$519.40; and the 28 days FERS offset was \$479.45, resulting in an overpayment of compensation in the amount of \$222.60 for the 13-day period. Thus, the total overpayment of compensation was \$54,416.09.

because beginning on April 14, 2006 and continuing until April 6, 2014, appellant had failed to report on EN1032 forms that she was in receipt of SSA benefits. The preliminary determination provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire. She was informed of the actions she could take and was afforded 30 days to respond. An overpayment worksheet indicated that the FERS offset for the period May 5, 2005 to December 13, 2014 totaled \$54,416.09.⁵

Appellant did not respond to the preliminary overpayment determination and did not submit a completed overpayment action request and/or an overpayment questionnaire.

By decision dated June 22, 2015, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$54,416.09. The decision further found that she was at fault because she had failed to submit information which she knew or should have known to be material. Repayment in the amount of \$110.00 was to be deducted every 28 days from her continuing compensation.

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 duty.⁶ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-9 explains that FECA benefits would be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation commencing in 1999. Appellant's compensation was reduced on May 2, 2000 based on her capacity to earn wages as a school secretary. She began receiving SSA retirement benefits on May 1, 2005.

⁵ The Board notes that the preliminary determination and the overpayment worksheet noted that the overpayment period began December 1, 2005. The calculations provided, however, used May 1, 2005, in accordance with the SSA report.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-9 (issued February 3, 1997).

The portion of the SSA retirement benefits appellant earned as a federal employee was part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.¹⁰ Appellant's FECA compensation was not offset until December 14, 2014. The SSA notified OWCP of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP was able to calculate the dual benefits appellant received from May 1, 2005 through December 13, 2014, which yielded an overpayment of compensation in the amount of \$54,416.09. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period May 1, 2005 through December 13, 2014 and finds that she received dual benefits totaling \$54,416.09 as noted in the calculations of the SSA. Thus, an overpayment of compensation in that amount was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "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."¹¹

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay consider waiving an overpayment 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 receives 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 in 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; or (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)."¹²

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹³

¹⁰ 5 U.S.C. § 8116; FECA Bulletin No. 97-9, *id.*

¹¹ *Id.* at § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹² 20 C.F.R. § 10.433(a); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹³ *Id.* at 10.433(b); see *Neill D. Dewald*, 57 ECAB 451 (2006).

ANALYSIS -- ISSUE 2

The Board agrees with OWCP's determination that appellant was at fault in the creation of the overpayment. OWCP based the fault finding under the second standard described, that appellant failed to provide information which she knew or should have known to be material. In her EN1032 forms signed from April 14, 2006 to April 15, 2013, covering periods from May 1, 2005 to April 15, 2013, appellant consistently reported that she was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as, by SSA records, she was in receipt of SSA retirement benefits effective May 1, 2005. The EN1032 forms provide:

"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 inaccurately failed to report that she was receiving SSA benefits on EN1032 forms she completed from 2006 to 2013. Based on the clear language of the forms which she signed, she failed to provide information she knew or should have known to be material. The Board thus finds that appellant was at fault in the creation of an overpayment for this period.¹⁴

As to the period from April 15, 2013 to December 13, 2014, appellant reported on EN1032 forms in April 2014 and April 2015 that she was receiving SSA benefits as part of a federal annuity. However, as early as November 2001, OWCP advised her that it had been informed that she was receiving or was entitled to retirement benefits provided by OPM. It informed appellant that benefits from both OPM and FECA were not payable for the same period, and she would have to elect the benefits which were most advantageous. The correspondence continued that she could receive benefits from TSP and survivor benefits provided by the SSA, but that her FECA compensation would be reduced by the amount of benefits paid under SSA that were attributable to her federal service. Moreover, in its August 26, 2014 letter, OWCP clearly informed appellant that, as she had attained the age of 65, she needed to provide additional information. Appellant was asked to forward a copy of her SSA award notice, a statement regarding her SSA benefit and, if applicable, submit documentation that she was under the CSRS retirement system. The letter concluded that, even if appellant was not currently receiving SSA benefits, she must still submit documentation and/or a written statement **her retirement. Appellant did not respond to the August 26, 2014 letter yet she continued to receive FECA compensation through December 13, 2014 that was not reduced by the offset.

¹⁴ V.E., Docket No. 15-340 (issued April 1, 2015).

The Board, therefore, finds appellant at fault in the creation of an overpayment for this period under the second standard, that she failed to provide information which she knew or should have known to be material.¹⁵ Appellant is therefore at fault for the entire period of May 1, 2005 through December 13, 2014 and is thus not entitled to waiver of recovery of the overpayment.¹⁶

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides 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.¹⁷

ANALYSIS -- ISSUE 3

Although OWCP provided an overpayment recovery questionnaire with the May 19, 2015 preliminary finding, appellant did not submit a completed questionnaire or other financial information that OWCP requested prior to the final June 22, 2015 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁸ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁹ As appellant did not submit any financial information to OWCP as requested, the Board finds that there is no evidence in the record to dispute OWCP's decision to direct recovery at a rate of \$110.00 each 28 days from her continuing compensation.

¹⁵ *Supra* note 11.

¹⁶ Furthermore, even had appellant been found entitled to waiver, because she did not respond to the May 19, 2015 preliminary overpayment finding, she did not provide a basis on which waiver could be granted. *See W.P.*, 59 ECAB 514, 2008.

¹⁷ 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁸ *Id.* at § 10.438.

¹⁹ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4.c(2) (June 2009).

CONCLUSION

The Board finds that OWCP properly determined that appellant was at fault in the receipt of an overpayment of compensation in the amount of \$54,416.09 and that OWCP properly required recovery of the overpayment by deducting \$110.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board