

FACTUAL HISTORY

OWCP accepted that on April 20, 1995 appellant, then a 47-year-old custodial foreman, sustained a hematoma of the right arm, right shoulder sprain, a concussion, and right arm and leg lacerations when he was struck by a cab while in the performance of duty. Appellant stopped work and was placed on the periodic rolls.

On July 3, 1996 OWCP granted appellant a schedule award for 11 percent permanent impairment of the right arm and 12 percent permanent impairment of the right leg. The award ran for 68.88 weeks from March 7, 1996 to July 2, 1997.

In a letter dated August 10, 2009, OWCP advised appellant that FECA required that a claimant's continuing compensation benefits be reduced if he or she began to receive SSA retirement benefits based upon his or her age and federal service. It noted that, because he was approaching the minimum age for retirement and to receive SSA retirement benefits, he was notified of this requirement. OWCP informed appellant that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation.

In Forms CA-1032 completed and signed on September 5, 2009 and August 30, 2011 appellant responded "No" to the question whether he received SSA benefits as part of an annuity under Federal Employees Retirement System (FERS) for federal service. In CA-1032 forms completed and signed on August 20, 2010, July 24, 2012, July 19, 2013, and July 25, 2014, appellant responded "Yes" to the question whether he received SSA benefits as part of an annuity under FERS for federal service.

On August 15, 2014 OWCP requested that SSA provide information regarding dual benefits appellant received and included a form entitled FERS SSA Dual Benefits Calculations. The form asked SSA to provide separate benefit calculations of SSA with FERS and SSA without FERS. On September 5, 2014 an SSA representative responded to OWCP's request. It noted that, effective September 1, 2009, appellant's SSA rate with FERS was \$1,269.20 a month and without FERS was \$1,093.00. Effective December 1, 2011, his SSA rate with FERS was \$1,314.80 a month and without FERS was \$1,132.30. Effective August 1, 2013, appellant's SSA rate with FERS was \$1,775.40 a month and \$1,527.00 without FERS. Effective December 1, 2013 his SSA rate was \$1,802.00 with FERS a month and \$1,549.90 without FERS.

By letter dated September 19, 2014, OWCP advised appellant that because he had been receiving both FERS and SSA benefits and he was not entitled to receive both, his FECA benefits would be adjusted to reflect the FERS portion of his SSA benefits. It noted that \$232.71 would be offset from his compensation every month.

On September 21, 2014 OWCP reduced appellant's compensation to reflect the FERS offset.

By notice dated November 20, 2014, OWCP advised appellant of its preliminary determination that an overpayment of \$11,875.55 of compensation was created for the period September 1, 2009 to September 20, 2014 as he was paid dual compensation under FECA and SSA without an appropriate offset. It found that he was with fault in the creation of the

overpayment because he knew or reasonably should have known that he was accepting compensation to which he was not entitled. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified him that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecoumpment hearing. OWCP mailed the preliminary determination to appellant's address of record.

An OWCP worksheet indicated that from September 1 to November 30, 2009 appellant's SSA rate with FERS offset was \$162.65 every 28 days. OWCP divided this amount by 28 to convert the 28-day difference to a daily difference and multiplied it by 91 days for this period for a total dual benefit amount of \$528.60 during this period. From December 1, 2009 through November 30, 2011, appellant's SSA rate with FERS offset was \$162.65 every 28 days. OWCP divided this amount by 28 to convert the 28-day difference to a daily difference and multiplied it by 730 days for this period for a total dual benefit amount of \$4,240.42. From December 1, 2011 to July 31, 2013 appellant's SSA rate with FERS offset was \$168.46 every 28 days. OWCP divided this amount by 28 to convert the 28-day difference to a daily difference and multiplied it by 609 days for this period for a total dual benefit amount of \$3,664.04 during this period. From August 1 to November 30, 2013 appellant's SSA rate with FERS offset was \$229.29 every 28 days. OWCP divided this amount by 28 to convert the 28-day difference to a daily difference and multiplied it by 122 days for this period for a total dual benefit of \$999.06. From December 1, 2013 to September 20, 2014 appellant's SSA rate with FERS offset was \$232.71 every 28 days. OWCP divided this amount by 28 to convert the 28-day difference to a daily difference and multiplied it by 294 days for this period for a total dual benefit amount of \$2,443.43 during this period. It concluded that appellant received a total overpayment of \$11,875.55 from September 1, 2009 to September 20, 2014.²

In a decision dated December 31, 2014, OWCP finalized the fact and amount of the preliminary overpayment determination and noted that appellant did not provide any information to refute the amount of the overpayment. It denied waiver of recovery of the overpayment because he was at fault in its creation. OWCP directed recovery of the overpayment by deducting \$580.00 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 duty.³

Section 8116(d)(2) 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

² The Board notes that OWCP improperly noted the date of January 30, 2009 instead of November 30, 2009. OWCP also indicated that the number of days for the period December 1, 2013 to September 20, 2014 was 210 instead of 294. As the FERS SSA Dual Benefits Calculations contained the proper dates and OWCP's calculations followed the proper dates and amounts, the Board finds that these incorrect notations constitute harmless error.

³ 5 U.S.C. § 8102(a).

an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits to his or her federal service.⁴

OWCP 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.⁵ 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 on 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.⁶

ANALYSIS -- ISSUE 1

The record reveals that appellant received FECA wage-loss compensation and SSA benefits from September 1, 2009 to September 20, 2014. As previously stated, 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.⁷ 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 he received from September 1, 2009 to September 20, 2014, created an overpayment of compensation in the amount of \$11,875.55.

The Board has reviewed OWCP calculations of the dual benefits appellant received for the period September 1, 2009 to September 20, 2014 and finds that it properly determined that he received benefits totaling \$11,875.55 for this period, thus creating an overpayment in that amount.

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

⁴ *Id.* at § 8116(d). See *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George*, 54 ECAB 201 (2002).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.1.11(a)(b) (February 1995); see also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁶ FECA Bulletin No. 97-9 (February 3, 1997); see *P.G.*, Docket No. 13-589 (issued July 9, 2013).

⁷ *Id.*

would defeat the purpose of FECA or be against equity and good conscience.⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP 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....”¹⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payment which he knew or should have known to be incorrect. The record contains an August 10, 2009 letter where OWCP informed appellant that FECA required that a claimant’s continuing compensation benefits be reduced if he or she began to receive SSA retirement benefits based upon his or her age and federal service. Appellant was advised that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation. Accordingly, the Board finds that appellant knew or should have known at the time that he began to receive SSA retirement benefits he should have received an offset in his FECA benefits.¹¹

On appeal, appellant’s representative contends that appellant faithfully submitted the Forms CA-1032 every year. She noted that the forms only asked for information regarding FERS and not SSA benefits. The representative alleges that the form was unclear as to what information to provide and that there was no intent to defraud or deceive OWCP. The Board notes, however, that the CA-1032 form clearly asks under Part D, Question 2 for information regarding SSA benefits which were received as part of an annuity under FERS. Accordingly, the Board finds that OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

⁸ 5 U.S.C. § 8129(b).

⁹ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ The Board notes that appellant correctly answered “yes” that he received SSA benefits in CA-1032 form signed on August 20, 2010. OWCP did not begin to make adjustments to his FECA benefits until September 21, 2014. OWCP’s error, however, does not excuse appellant’s acceptance of checks which he knew or should have known to be incorrect. *See Larry D. Strickland*, 48 ECAB 669 (1997).

Appellant's representative also alleges that she never received the November 20, 2014 preliminary determination of overpayment and therefore did not know that she was supposed to submit financial documentation. The Board notes, however, that in the absence of evidence to the contrary, a letter properly addressed and mailed in the course of due business is presumed to have arrived at the mailing address in due course if not returned. This is known as the mailbox rule.¹² As the November 20, 2014 preliminary determination was sent to the addresses of record of appellant as well as separately to his representative it is presumed to have been received by them both absent any notice of nondelivery. There is no evidence on the record to rebut this presumption.

LEGAL PRECEDENT -- ISSUE 3

Section 10.321(a)¹³ provides that, if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual. When an individual fails to provide requested information on income, expenses, and assets OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP did not abuse its discretion in following the guidelines in this case. OWCP determined that the overpayment should be recovered from appellant's continuing compensation payments at the rate of \$580.00. The Board notes that appellant failed to provide any information on his income, expenses, and assets as requested by the hearing representative. OWCP followed collection guidelines by requiring installments large enough to collect the debt promptly. The Board will affirm OWCP's determination regarding rate of recovery.

On appeal, appellant's representative alleges that the deduction would be a hardship and burden for appellant. She did not, however, submit any financial documents or evidence to support her contention that appellant would face hardship due to the withholding of this amount every month. As stated, above when an individual fails to provide requested information on income, expenses, and assets OWCP should follow minimum collection guidelines which would allow for prompt collection of the debt.¹⁵ Because appellant failed to provide the requested financial information, the Board finds that OWCP properly determined that the overpayment

¹² *Kenneth E. Harris*, 54 ECAB 502 (2003); *James A. Gray*, 54 ECAB 277 (2002).

¹³ 20 C.F.R. § 10.321(a).

¹⁴ *See Gail M. Roe*, 47 ECAB 268 (1995).

¹⁵ *Id.*

should be recovered from appellant's continuing compensation payments at the rate of \$580.00 per month.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$11,875.55 from September 1, 2009 to September 20, 2014 because his benefits were not properly reduced by FERS offset amount. The Board further finds that he was at fault in the creation of the overpayment and that OWCP properly set the rate of recovery of the overpayment at \$580.00 from continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2014 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2015
Washington, DC

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

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

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