

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

C.B., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, PANGBORN MEMORIAL)
AIRPORT, East Wenatchee, WA, Employer)

**Docket No. 15-1407
Issued: October 21, 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 June 16, 2015 appellant, through her representative, filed a timely appeal from a June 3, 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 \$431.46 because she concurrently received Social Security Administration (SSA) benefits for the period December 1, 2014 through April 4, 2015 while receiving FECA benefits; (2) whether OWCP properly found her at fault and thus not entitled to waiver of recovery of the overpayment; and (3) whether OWCP properly required

¹ 5 U.S.C. §§ 8101-8193.

repayment of the overpayment by deducting \$71.91 every 28 days from appellant's continuing compensation.

On appeal appellant disputes the fault determination, noting that the June 3, 2015 decision contains inconsistent language.

FACTUAL HISTORY

On June 24, 2010 appellant, then a 61-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that repetitively lifting heavy baggage caused right shoulder and arm pain. She did not stop work and was placed on modified duty. On July 27, 2010 OWCP accepted right rotator cuff strain. Appellant continued to work modified duty until October 27, 2010 when she had authorized right shoulder surgery. She stopped work at that time, received compensation, and was placed on the periodic compensation rolls.

Appellant returned to modified duty on February 27, 2011. Effective June 5, 2011, the employing establishment could no longer accommodate her restrictions. Appellant was returned to the periodic compensation rolls, and in July 2011 was referred for vocational rehabilitation.

On November 28, 2011 appellant informed OWCP that she had been awarded SSA disability benefits effective January 2012. OWCP informed her that FECA benefits would be offset by SSA benefits, not by disability benefits, but that when she reached full retirement age, her SSA benefit would convert to a retirement benefit, which would be offset. Appellant forwarded an SSA notice of award letter dated November 7, 2011 informing her that she was entitled to monthly SSA disability benefits beginning December 2011.

In an October 22, 2012 decision, OWCP finalized its August 14, 2012 proposed reduction of appellant's compensation based on her capacity to earn wages as a security officer, effective October 21, 2012.

In January 2013 OWCP began development of whether appellant was receiving dual benefits from FECA and SSA. On January 28, 2013 and April 18, 2014 SSA informed OWCP that appellant received SSA disability benefits which were not subject to offset. On March 25, 2015 it advised that, effective December 2014, appellant's SSA benefits were now subject to offset. On April 3, 2015 OWCP informed appellant that her FECA benefits were being reduced to reflect the federal contribution to her SSA benefits.

On April 15, 2015 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$431.46 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, that she received from December 1, 2014 through April 4, 2015, 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 appellant at fault because she accepted a payment that she knew or should have known was incorrect. 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 allotted 30 days to respond. An overpayment worksheet indicated that the FERS offset for the period December 1, 2014 through

April 4, 2015 totaled \$431.46. On April 2, 2015 we received a report from SSA showing effective December 2014, the claimant's SSA rate with FERS is \$1,461.20 and SSA rate without FERS is \$1,356.50. Based on this information, the monthly offset is \$104.70 (\$1,461.20-\$1,356.50). \$104.70 x 12 months/13 months based on the 28-day cycle = \$96.65. \$96.65/28 = \$3.4517 per day x 125 days covering the period December 1, 2014 to April 4, 2015 = \$431.46.

Appellant requested a telephone conference and submitted an overpayment questionnaire, signed on April 20, 2015. She reported monthly income of \$1,991.00 and expenses totaling \$1,295.00. Checking and savings accounts totaled \$17,958.21.

A telephone conference was held on June 2, 2015. Appellant reported receiving SSA disability benefits on November 28, 2011, and that, after previous inquiries, SSA notified OWCP on March 25, 2015 that retirement offset became effective December 1, 2014. At the conference she maintained that she was not at fault because she informed OWCP that she was receiving SSA benefits. Appellant stated that she would like to repay the overpayment by deductions from her continuing compensation.

By decision dated June 3, 2015, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$431.46. The decision further stated that she was at fault because "you would have not been reasonably aware of the cause of the overpayment." Repayment in the amount of \$71.91 was to be deducted from her continuing compensation, per compensation period.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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.² 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.³

Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay.⁴ FECA Bulletin No. 97-9 states that FECA benefits have to 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

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

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

dual benefit.⁵ When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.⁶

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation commencing in 2011 that was reduced on October 21, 2012, based on her capacity to earn wages as a security officer. Appellant began receiving SSA disability benefits in January 2012 that converted to SSA retirement benefits on December 20, 2014, when she reached full retirement age.⁷

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.⁸ Appellant's FECA compensation was not offset until April 4, 2015. 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 benefit appellant received from December 1, 2014 through April 4, 2015 which yielded an overpayment of compensation in the amount of \$431.46. 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 December 1, 2014 through April 4, 2015 and finds that appellant received dual benefits totaling \$431.46. 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."⁹

Section 10.433(a) of OWCP regulations provide 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

⁵ See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000, Exhibit 1 (February 1995).

⁶ *Id.* at Chapter 2.1000.17.d(4) (April 1996).

⁷ For individuals born from 1943 to 1954, full retirement age is 66 years, which in appellant's case was December 20, 2014.

⁸ 5 U.S.C. § 8116; *supra* note 5.

⁹ *Id.* at § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

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).”¹⁰

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.¹¹

ANALYSIS -- ISSUE 2

The Board finds appellant at fault in the creation of the overpayment under the third standard described above, that appellant accepted a payment she knew or should have known to be incorrect.

On November 28, 2011 appellant informed OWCP that she had been awarded SSA disability benefits effective January 2012. OWCP informed her that SSA disability benefits would not be offset by FECA benefits but that, when she reached full-retirement age, her SSA benefit would convert to a retirement benefit, which would be offset. Appellant reached full-retirement age on December 20, 2014.¹² Thus, she knew or should have known after November 11, 2011 that SSA retirement benefits would be subject to offset when she reached full retirement age. As appellant continued to receive FECA compensation through April 4, 2015 that were not reduced by the offset, the Board finds that she was at fault in the creation of the overpayment for the period December 1, 2014 through April 4, 2015 and is not entitled to waiver of recovery for this period.¹³

As to appellant’s assertion on appeal, the Board notes that the final overpayment decision dated June 3, 2015, which found that appellant received an overpayment of compensation in the amount of \$431.46, included contradictory language, stating that she was at fault because “you would have not been reasonably aware of the cause of the overpayment.” However, the decision also states that it was determined “that the preliminary finding that you were at fault in the matter

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

¹¹ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹² *Supra* note 7.

¹³ *L.L.*, Docket No. 12-1724 (issued March 26, 2013).

of the overpayment was correct.”¹⁴ The Board finds the contradictory statement a scrivener’s error as the June 3, 2015 decision clearly reflects that appellant was found at fault.¹⁵

LEGAL PRECEDENT -- ISSUE 3

OWCP’s implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.¹⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$431.46 overpayment by deducting \$71.91 from appellant’s compensation payments every four weeks, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441(a) of its regulations and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP properly required repayment of the overpayment by deducting \$71.91 from appellant’s compensation payments every four weeks.¹⁷

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 \$431.46 and that OWCP properly required recovery of the overpayment by deducting \$71.91 every 28 days from her continuing compensation payments.¹⁸

¹⁴ The April 15, 2015 preliminary overpayment finding clearly found appellant at fault in creating the overpayment because she accepted a payment that she knew or should have known was incorrect.

¹⁵ See *J.H.*, Docket No. 08-2432 (issued June 15, 2009).

¹⁶ 20 C.F.R. § 10.441(a).

¹⁷ *Id.*; see *C.P.*, Docket No. 13-1341 (issued January 6, 2014).

¹⁸ The Board notes that the overpayment has been repaid in full.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 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