

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an \$83,388.25 overpayment of compensation for the period May 1, 2009 through August 23, 2014; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

OWCP accepted that on January 7, 1999 appellant, then a 55-year-old city letter carrier, sustained a lumbosacral sprain due to a fall at work. Appellant received disability compensation on the daily rolls beginning June 18, 2007 and on the periodic rolls effective July 8, 2007.⁴

On August 6, 2007 a Form CA-1049 was issued notifying appellant of her placement on the periodic rolls, effective July 8, 2007, which advised her: “You must also report any retirement income, disability income, or compensation benefits from any federal agency. This is because a recipient of compensation benefits under [FECA] is not permitted to receive benefits under certain other federal programs, including the Civil Service retirement program.” The Form CA-1049 also advised, “If you are receiving or have filed [Social Security Administration (SSA)] disability benefits, please contact your local [SSA] office about this award.” On August 10, 2007 appellant certified that she had read and understood the terms and conditions under which she could receive compensation.

Appellant began receiving SSA retirement benefits on May 1, 2009. In EN1032 forms signed by appellant on April 15, 2009 and May 12, 2011, she responded “No” to the question of whether she received benefits from SSA as part of an annuity for federal service.⁵ By signing the forms, appellant certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief. In May 10, 2012, May 6, 2013, and May 5, 2014 letters accompanying EN1032 forms, appellant was advised that she “must inform this office immediately if you receive benefits from [SSA], and that agency converts you from SSA Disability Retirement to SSA Regular Retirement, as this will affect your benefits from this office.”

In August 2014, SSA provided documents showing SSA rates with a Federal Employees’ Retirement System (FERS) offset and without a FERS offset from May 1, 2009 through August 23, 2014. Effective August 24, 2014, OWCP reduced appellant’s 28-day compensation payment by \$1,269.88, the amount of her SSA retirement benefits attributable to her federal service. The record includes an OWCP worksheet containing a calculation showing that appellant received an \$83,388.25 overpayment of compensation for the period May 1, 2009 to August 23, 2014 due to the failure to offset SSA benefits.

⁴ In a February 6, 2009 decision, OWCP reduced appellant’s compensation based on its determination that the constructed position of information clerk represented her wage-earning capacity.

⁵ Each form covered the 15-month period preceding the date appellant signed each form. In EN1032 forms signed on May 16, 2012, May 16, 2013, and May 22, 2014, appellant responded “Yes” to the question of whether she received benefits from SSA as part of an annuity for federal service.

In a September 16, 2014 notice, OWCP advised appellant of its preliminary determination of an overpayment of compensation in the amount of \$83,388.25 for the period May 1, 2009 to August 23, 2014. OWCP also made a preliminary determination that she was at fault in the creation of the overpayment because she had not accurately reported her receipt of SSA benefits. It advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. OWCP informed her that she could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of the overpayment. It requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant requested a telephonic prerecoupment hearing with an OWCP hearing representative. During the hearing held on July 14, 2015, appellant's representative indicated that she was not contesting the fact or amount of the \$83,388.25 overpayment of compensation. However, appellant took issue with OWCP's preliminary determination that she was at fault in the creation of the overpayment. She testified that she called OWCP in 2009 to advise that she was receiving SSA benefits, that she received incorrect advice about completing EN1032 forms, and that she did not realize that she could not receive SSA and FECA benefits at the same time.⁶ Appellant testified regarding her monthly income, monthly expenses, and assets. After the hearing, she submitted a Form OWCP-20, completed on July 27, 2015, in which she listed her monthly income, monthly expenses, and assets.

In a September 30, 2015 decision, an OWCP hearing representative determined that appellant received an \$83,388.25 overpayment of compensation. She found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The hearing representative found that appellant had \$3,996.00 in monthly income, \$3,037.00 in monthly expenses, and \$273,465.00 in assets and required repayment of the overpayment through payments of \$700.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits 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.⁷

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.⁸ The

⁶ The record (Form CA-110) indicates that appellant called OWCP on May 8, 2009 and advised that she "received a social security award letter." OWCP advised appellant to fax a copy of her award letter.

⁷ 5 U.S.C. § 8116(d). *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000(e)(2) (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. *See R.C.*, Docket No. 09-2131 (issued April 2, 2010).

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.⁹

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation beginning in June 2007 and that she received SSA benefits beginning on May 1, 2009. The portion of the SSA 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 August 24, 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 benefit appellant received from May 1, 2009 to August 23, 2014 which yielded an overpayment of compensation in the amount of \$83,388.25. The record includes an overpayment worksheet explaining the overpayment calculation. Therefore, the evidence of record establishes that appellant received an overpayment of compensation in the amount of \$83,388.25.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where 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.¹¹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."¹² No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹³

⁹ FECA Bulletin No. 97-09 (issued February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

¹⁰ *See P.G.*, Docket No. 13-0589 (issued July 9, 2013).

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ *L.J.*, 59 ECAB 264 (2007).

In determining whether an individual is “at fault” in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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; 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....”¹⁴

Section 10.433(b) of OWCP’s regulations provides:

“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.”¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$83,388.25 overpayment of compensation. The record reflects that appellant accepted payments covering the period May 1, 2009 to August 23, 2014 which she knew or should have known to be incorrect and, therefore, she was at fault in the creation of the \$83,388.25 overpayment of compensation on this basis.¹⁶

Appellant was advised on several occasions that receipt of SSA benefits would affect her entitlement to FECA compensation, but she continued to accept full FECA benefits during the period May 1, 2009 to August 23, 2014 in addition to her SSA benefits. On August 6, 2007 a Form CA-1049 was issued notifying appellant of her placement on the periodic rolls effective July 8, 2007 and advising her of her entitlement to ongoing disability payments. The Form CA-1049 further advised, “You must also report any retirement income, disability income, or compensation benefits from any federal agency. This is because a recipient of compensation benefits under [FECA] is not permitted to receive benefits under certain other federal programs, including the Civil Service retirement program.”¹⁷ On August 10, 2007 appellant certified that

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.433(b).

¹⁶ *See supra* note 15.

¹⁷ The Form CA-1049 also advised, “If you are receiving or have filed [SSA] disability benefits, please contact your local [SSA] office about this award.”

she had read and understood the terms and conditions under which she could receive compensation. Moreover, in May 10, 2012, May 6, 2013, and May 5, 2014 letters accompanying EN1032 forms, appellant was repeatedly advised that she “must inform this office immediately if you receive benefits from [SSA], and that agency converts you from SSA Disability Retirement to SSA Regular Retirement, as this will affect your benefits from this office.”

Despite being given notice that receipt of SSA benefits would reduce her entitlement to FECA compensation, appellant continued to accept full FECA benefits during the period May 1, 2009 to August 23, 2014. In addition, appellant also failed to provide information which she knew or should have known to be material for a portion of the period May 1, 2009 to August 23, 2014.¹⁸ In a Form EN1032 signed on May 12, 2011, appellant responded “No” to the question of whether she received benefits from the SSA as part of an annuity for federal service, despite the fact that she had received such benefits in the 15-month period preceding her signing of the form. By signing the form, appellant certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief.

On appeal, appellant argues that she was not at fault in the creation of the \$83,388.25 overpayment of compensation because she reported her receipt of SSA benefits to OWCP in May 2009. However, the fact that appellant reported receipt of SSA benefits for portions of the period of overpayment does not negate the fact that she accepted monies during that period which she knew or should have known to be incorrect.

Appellant’s representative also provides argument on appeal challenging OWCP’s determination of an \$83,388.25 overpayment of compensation. He indicates that OWCP procedures provide that, where an equally valid argument can be made both for without fault and with fault, the benefit of the doubt should go to the claimant, and a finding of without fault should be made consistent with the nature of FECA as social legislation designed to benefit entitled employees.¹⁹

Appellant’s representative indicates that OWCP’s hearing representative, in her September 30, 2015 decision, essentially argued that appellant was at fault in the creation of the \$83,388.25 overpayment of compensation, because she knew of the possibility of a dual benefit offset in 2009 when she advised OWCP of the approval for SSA benefits. He contends that this argument ignores the failure of OWCP to take any action after being advised by appellant of SSA’s approval of her application for benefits. However, even though OWCP may have been negligent in continuing to issue checks to appellant for compensation to which she was not fully entitled to receive, this does not excuse appellant’s acceptance of such checks which she knew or should have been expected to know were incorrect.²⁰ Given the facts of the present case, it

¹⁸ See *supra* note 15.

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5 (June 2009).

²⁰ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

cannot be said that an equally valid argument can be made both for without fault and with fault in the creation of the \$83,388.25 overpayment of compensation.²¹

Appellant's representative further contends that appellant's signing of a Form EN1032 on April 15, 2009 could not serve as a basis for finding fault in the creation of the overpayment of compensation for the period May 1, 2009 to August 23, 2014. As explained above, other evidence of record establishes appellant's fault in the creation of the \$83,388.25 overpayment of compensation for the period May 1, 2009 to August 23, 2014, including the fact that she accepted payments during this period which she knew or should have known were incorrect.

Appellant's representative notes that appellant testified that she was provided incorrect advice prior to the time she completed the EN1032 forms, including the form completed on May 12, 2011, and answered "No" to the question of whether she received benefits from SSA as part of an annuity for federal service. However, he has failed to explain how the evidence of record establishes this assertion.²²

For these reasons, OWCP properly determined that appellant was at fault in the creation of the \$83,388.25 overpayment of compensation and found that, therefore, she did not qualify under FECA for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$83,388.25 overpayment of compensation for the period May 1, 2009 through August 23, 2014. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.²³

²¹ See *supra* note 20.

²² The record contains a document indicating that appellant called OWCP on May 8, 2009 and advised that she "received a social security award letter." However, the document (Form CA-110) does not provide any further details about this telephone call apart from OWCP having advised appellant to submit a copy of her SSA award letter.

²³ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. See *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2016
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