

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

E.H, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 16-1465
Issued: December 19, 2016**

Appearances:
*Lenin V. Perez, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 7, 2016 appellant, through her representative, filed a timely appeal from a March 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$38,168.89 because OWCP failed to offset the portion of her Social Security Administration (SSA) retirement

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

benefits attributable to her federal service from July 1, 2007 through April 4, 2015; (2) whether appellant was at fault in creating the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$200.00 per month from continuing compensation payments.

FACTUAL HISTORY

On August 31, 2002 appellant, then a 54-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained spinal stenosis, a herniated disc, and difficulties with both legs due to factors of her federal employment. She stopped work on August 16, 2002. OWCP accepted the claim for a temporary aggravation of spinal stenosis.³ It paid appellant compensation for total disability beginning September 7, 2002.

Appellant completed EN1032 forms none of forms from 2007 to 2014 and reported that she did not receive benefits from SSA. On a Form EN1032 dated February 6, 2015, she advised that she received a widow's pension from SSA.

On March 24, 2015 SSA provided the entire amount that appellant received in SSA retirement benefits including the part attributable to her federal service under Federal Employees' Retirement System (FERS) and the hypothetical amount that she would have received without FERS. Including FERS, it indicated that she was entitled to a monthly payment rate of \$683.40 effective July 2007, \$699.10 effective December 2007, \$739.60 effective December 2008 to 2010, \$766.20 effective December 2011, \$779.20 effective December 2012, \$790.80 effective December 2013, and \$804.20 effective December 2014. Without FERS, appellant was entitled to a monthly payment of \$311.00 effective July 2007, \$318.10 effective December 2007, \$336.50 effective December 2008 to 2010, \$348.60 effective December 2011, \$354.50 effective December 2012, \$359.80 effective December 2013, and \$365.90 effective December 2014.

By letter dated April 13, 2015, OWCP advised appellant that it was adjusting her compensation to offset the portion of her SSA retirement benefits attributable to her federal service.⁴ It informed her that the portion of the SSA benefits she received due to her work as a federal employee was part of the FERS retirement program.

On April 24, 2015 OWCP notified appellant of its preliminary determination that she received an overpayment of \$38,168.89 because it had not reduced her compensation benefits from July 1, 2007 to April 4, 2015 by the portion of her SSA benefits based on her federal service. It calculated the overpayment by determining the difference between her SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the

³ In a decision dated September 5, 2008, OWCP denied appellant's claim for a schedule award. It found that she had not submitted medical evidence sufficient to establish permanent impairment due to her accepted work injury.

⁴ In a decision dated April 16, 2015, OWCP found that appellant received an overpayment of \$7,751.14 because she received augmented compensation from February 21, 2012 to December 13, 2014 when she had no dependent. It further found that she was at fault in the creation of the overpayment and that it would recover the overpayment by deducting \$50.00 from her continuing compensation payments. This overpayment decision is not presently before the Board.

number of days in each period to find a total overpayment of \$38,168.89. It further advised appellant of its preliminary determination that she was at fault in creating the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

Appellant submitted a completed overpayment recovery questionnaire dated May 4, 2015. She noted monthly income of \$2,441.96 and expenses of \$2,390.22. Appellant related that she advised OWCP on EN1032 forms beginning in 2007 that she received SSA benefits. She indicated that in 2011 her former husband died and SSA switched her over to his benefits. On May 15, 2015 appellant submitted supporting financial documentation and requested a precoupment hearing.

In a Form EN1032 dated October 12, 2015, appellant indicated that beginning September 2011 she received a widow's pension from SSA for her deceased spouse of \$950.00 monthly.

At the telephone hearing, held on December 17, 2015, appellant's representative advised that she had not included all of her monthly expenses on the overpayment recovery questionnaire.

In a FERS/SSA dual benefits calculations form dated January 13, 2016, SSA provided revised calculations for appellant's SSA rate with FERS as \$634.00 effective July and September 2007, \$648.60 effective December 2007, \$686.20 effective December 2008 to 2010, \$970.10 effective September 2011, \$1,005.00 effective December 2011, \$1,022.00 effective December 2012, \$1,037.30 effective December 2013, \$1,054.90 effective December 2014, and \$1,054.90 effective December 2015. It also provided her rate without FERS, which ranged from \$288.50 effective July 2007 to \$339.40 effective December 2014.

By decision dated March 2, 2016, OWCP's hearing representative found that appellant received an overpayment of \$38,168.89 for the period July 1, 2007 to April 4, 2015 as OWCP failed to offset the portion of her SSA retirement benefits attributable to her federal service. She further determined that appellant was at fault in creating the overpayment and that it would be recovered by deducting \$200.00 per month from continuing compensation.

On appeal appellant, through her representative, contends that she indicated on the EN1032 forms that she was receiving SSA. She believed that OWCP was offsetting the SSA amount from her compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of FECA provides that, in pertinent part, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall

⁵ 5 U.S.C. § 8102.

be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶

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 received SSA benefits based on federal service, her compensation benefits shall be reduced by the amount of SSA benefits attributable to 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 the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁸ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefit, OWCP will obtain information from SSA regarding the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It 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

OWCP accepted that appellant sustained a temporary aggravation of spinal stenosis causally related to factors of her federal employment. It paid her compensation for total disability as of September 7, 2002.

The Board finds that the case is not in posture for decision. SSA, in a form dated March 24, 2015, specified the amount that appellant received in monthly retirement benefits with and without federal service from July 2007 to December 2014. It indicated that with FERS she received a monthly amount ranging from \$683.40 effective July 2007 to \$804.20 effective December 2014. Without FERS, appellant would receive a monthly payment ranging from \$311.00 effective July 2007 to \$365.90 effective December 2014. Based on the March 24, 2015 form provided by SSA, OWCP determined that she received a \$38,168.90 overpayment of compensation as it failed to deduct the amount that she received in retirement benefits attributable to her federal service from her compensation payments.

Prior to OWCP's overpayment determination, SSA submitted another form dated January 13, 2016 that provided different amounts for appellant's monthly SSA rate with and without FERS. It indicated that her monthly SSA benefits with FERS ranged from \$634.00

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁹ *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

effective July 2007 to \$1,054.90 effective December 2014, and her monthly SSA rate without FERS ranged from \$288.50 in July 2007 to \$339.40 in December 2014.

Given the discrepancy in the amounts provided by SSA on two different forms covering the same benefit period, OWCP should have further developed the evidence by obtaining clarification from SSA as to appellant's SSA rate with and without any offset from FERS.¹⁰ In view of the conflicting information, it should also request that SSA verify that she received retirement benefits based on her federal employment. Without accurate information from SSA advising whether appellant was in receipt of retirement benefits based in part on federal service and providing reliable figures of her monthly benefits, the Board is unable to determine whether an overpayment exists and the amount of any overpayment. Additionally, appellant maintained that beginning in 2011 she received SSA benefits based on her deceased husband's employment rather than her own.

On remand, OWCP should request that SSA confirm that appellant received SSA retirement benefits based in part on her federal service, resolve the conflicting FERS offset information provided, and address whether her benefits were her own or from her husband. Following any further development as deemed necessary, OWCP shall issue an appropriate decision.¹¹

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.

¹⁰ See *K.G.*, Docket No. 16-0553 (issued June 21, 2016).

¹¹ Based on the Board's disposition of whether appellant received an overpayment of compensation, the issues of fault and recovery are moot.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board