

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

F.F., Appellant)	
)	
and)	Docket No. 16-0063
)	Issued: June 24, 2016
DEPARTMENT OF TRANSPORTATION,)	
FEDERAL AVIATION ADMINISTRATION,)	
Rosedale, NY, Employer)	

Appearances:
Appellant, pro se
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 October 14, 2015 appellant filed a timely appeal from an April 27, 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 this case.

ISSUES

The issues are: (1) whether appellant received a \$5,168.92 overpayment of compensation for the period August 1, 2011 to November 15, 2014, for which he was at fault; (2) whether appellant was at fault in the creation of the overpayment; and (3) whether OWCP properly recovered the overpayment by withholding \$430.00 from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on July 17, 1997 appellant, then a 51-year-old telecommunications specialist, sustained cervical and lumbar sprains in a work-related motor vehicle accident. Appellant returned to light-duty work on August 25, 1997, stopped work on July 13, 1998, and did not return.

Appellant received compensation on the daily rolls beginning on July 14, 1998.²

Appellant began federal employment in September 1968 as a radar instructor. Appellant worked as an air traffic controller from September 1973 to August 1981.

On September 25, 1998 OWCP notified appellant that he would receive compensation for temporary total disability on the periodic rolls beginning September 13, 1998. It informed him of his obligation to report “any retirement income, disability income, or compensation benefits from any [f]ederal agency.” Appellant signed the notice on October 4, 1998. He executed a direct deposit authorization on October 6, 1998.³ Appellant completed affidavits of earnings and employment (Form EN1032) annually from June 1999 through September 2010.

On September 10, 2011, August 23, 2012, and August 17, 2013 appellant signed a Form EN1032 indicating that he had not received Social Security Administration (SSA) benefits as part of an annuity for federal service in the previous 15 months.

On September 24, 2013 OWCP requested information from SSA regarding appellant’s SSA age-related benefits. It forwarded a form entitled Federal Employees’ Retirement System (FERS) SSA Dual Benefits Calculation, which requested the effective date of his social security benefits, as well as separate calculations of SSA rate with FERS and without FERS. SSA provided the requested information on November 27, 2013, noting the pay rates for the following periods with and without FERS: August through November 2011, \$807.10 with FERS and \$682.70 without; December 2011 through November 2012, \$836.10 with FERS and \$707.20 without; and December 2012 through November 2013, \$850.30 with FERS and \$719.20 without. As of December 2013, the rates were \$863.00 with FERS and \$729.80 without.

On August 24, 2014 appellant signed a Form EN1032 indicating that he had not received SSA benefits as part of an annuity for federal service in the previous 15 months.

In a November 6, 2014 memorandum, OWCP calculated that, based on the fiscal information provided by SSA on November 27, 2013, a \$5,168.92 overpayment of compensation was created in appellant’s case for the period August 1, 2011 to November 15, 2014.⁴

² OWCP approved an anterior C5-6 discectomy, performed on October 29, 1998.

³ On July 28, 2003 appellant signed a form electing to continue his postretirement basic life insurance coverage, with no reduction in benefits, under the Federal Employees’ Group Life Insurance (FEGLI) as a compensation. He elected three multiples of Option B, and one unit of Option C.

⁴ OWCP calculated the overpayment as follows: \$500.33 from August 1 to November 30, 2011; \$1,555.30 from December 1, 2011 to November 20, 2012; \$1,577.52 from December 1, 2012 to November 30, 2013; \$1,535.77 from December 1, 2013 to November 15, 2014.

By notice dated November 12, 2014, OWCP advised appellant of its preliminary determination that he had received a \$5,168.92 overpayment of compensation because he received FECA benefits simultaneously with FERS retirement payments from August 1, 2011 through November 15, 2014. It provided a calculation of the overpayment, noting that appellant was at fault in its creation as he failed to report his SSA benefits received as part of his retirement annuity under FERS on EN1032 forms signed on September 10, 2011, August 23, 2012, August 17, 2013, and August 24, 2014. OWCP requested that appellant provide financial information within 30 days or indicate if he contested that an overpayment occurred.

Appellant responded by letter received on December 30, 2014, contending that there was no overpayment of compensation because his retirement coverage was under Civil Service Retirement System (CSRS), not FERS. He attached May 27, 1997 and January 4, 1998 personnel action forms (Form SF-50) documenting his enrollment in the CSRS offset system. Appellant requested a telephonic prerecoupment hearing, but noted that he did not request waiver as he believed there was no overpayment.

In a March 25, 2015 letter, OWCP advised appellant to submit the requested financial information to hold the requested telephonic prerecoupment hearing. Appellant did not respond.

By decision dated April 27, 2015, OWCP finalized that appellant had received an overpayment of compensation in the amount of \$5,168.92 for the period August 1, 2011 to November 15, 2014 as he received FERS retirement benefits simultaneously with FECA benefits. It found that he was at fault in the creation of the overpayment. OWCP noted that, as appellant did not submit financial information as requested, it directed recovery of the overpayment by deducting \$430.00 every 28 days from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁵ 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.⁶ 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 be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁷

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, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁸ 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

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *Id.* at § 8102.

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

paid on the basis of age and attributable to the employee's federal service.⁹ Section 8116(d)(2) provides that the receipt of SSA benefits "does not affect the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained cervical and lumbar sprains in a work-related motor vehicle accident. Appellant stopped work on July 13, 1998. His May 27, 1997 and January 4, 1998 personnel action forms (Form SF-50) documented his enrollment in the CSRS offset retirement plan.

The Board finds that appellant received an overpayment of compensation from August 1, 2011 to November 15, 2014 because he received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to SSA benefits that are attributable to federal service. Appellant paid social security and Medicare taxes (FICA) as a federal civilian employee under the CSRS Interim/Offset system, a precursor to FERS that required contributions to both CSRS and for social security. It generally applied to certain new hires or former CSRS-covered employees who had been separated from service for at least one year and rehired after December 31, 1983.¹¹ Appellant received age-based SSA benefits after retirement as a result of his contributions to SSA under the CSRS interim system. As he received SSA benefits based in part of his federal service concurrently with disability compensation from OWCP without an appropriate offset, he received an overpayment of compensation.

The Board further finds, however, that the case is not in posture for decision regarding the amount or period of the overpayment. SSA provided OWCP with information regarding appellant's rate of SSA benefits beginning August 1, 2011 both with and without FERS. As discussed, however, he was not covered by FERS, but was instead under the CSRS offset retirement plan. It is not clear from the record whether the rates under the CSRS offset plan are the same as the rates in the FERS plan. Given appellant's pre-1987 employment history, OWCP should have further inquired regarding the accuracy of this information. However, it did not seek clarification from OPM. Therefore, the case will be remanded for further development.

On remand, OWCP should obtain additional information from SSA and OPM regarding appellant's retirement system and his SSA rate with and without any offset required based on his federal civilian service.¹² It will then recalculate the period and amount of the overpayment. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e)(2) (January 1997); Chapter 2.1000.11(a)-(b) (February 1995).

¹⁰ 5 U.S.C. § 8116(d)(2).

¹¹ See *A.P.*, Docket No. 12-122 (issued May 7, 2012).

¹² *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

On appeal appellant contends that he was not a FERS employee, but covered under CSRS as of the date of injury. As set forth above, the case will be remanded for additional development regarding appellant's retirement program and any benefits received.

ISSUES 2 & 3

As the case is not in posture regarding the fact of overpayment, the issues of fault and recovery are moot.

CONCLUSION

The Board finds that the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 27, 2015 is set aside, and the case remanded for further development consistent with this decision and order.

Issued: June 24, 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