

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

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**J.M., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Stockton, CA, Employer**

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**Docket No. 15-1604  
Issued: May 23, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On July 21, 2015 appellant filed a timely appeal of a June 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$8,628.99 for the period June 1, 2012 through July 26, 2014; (2) whether it abused its discretion in denying waiver of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$206.77 from appellant's continuing compensation payments.

Appellant contends that OWCP erred in finding an overpayment because it improperly determined that she had been receiving Federal Employees Retirement System (FERS)/SSA dual

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

benefits since June 1, 2012. She asserts that she was not enrolled in the FERS program and that her SSA earnings were from a private, nongovernmental employer and therefore not subject to the FERS offset. Accordingly, she requests that the Board reverse the June 22, 2015 overpayment decision.

### **FACTUAL HISTORY**

Appellant, then a 60-year-old mail processor, filed a claim for occupational disease (Form CA-2), alleging that on September 12, 1990 she developed a bilateral wrist condition causally related to employment factors. OWCP accepted the claim for bilateral carpal tunnel syndrome. In 1991 appellant stopped work and began receiving compensation for temporary total disability on the periodic rolls. On June 14, 1991 she noted on a claim for continuing compensation on account of disability form that since filing her claim for compensation with OWCP she had not applied for, received, or been eligible for compensation from the Veterans Administration or received an annuity under the Civil Service Retirement Act (CSRA) or other federal retirement or disability law. On the same forms dated July 12, 1991, and on annual affidavits of earnings and employment (Form EN1032), appellant denied receipt of any other federal benefits or payments. In appellant's EN1032 dated June 11, 2012, appellant answered "no" in response to the question, "Do you receive benefits from the SSA as part of an annuity for federal service?"

On July 29, 2014 however, SSA provided information to OWCP regarding appellant's age-related retirement benefits for the period June 1, 2012 to July 29, 2014.

By letter dated September 11, 2014, OWCP advised appellant that it had been informed by SSA that she had been receiving FERS/SSA along with compensation on the periodic rolls since June 1, 2012. It advised her that the portion of her SSA benefits earned as a federal employee were part of the FERS retirement package and, as such, the receipt of benefits under FECA concurrently with federal retirement benefits was a prohibited dual benefit. OWCP informed appellant that her benefits under FECA needed to be adjusted for the FERS portion of her SSA benefits.<sup>2</sup> It further informed her that an overpayment of compensation had resulted from the nondeduction of the FERS offset.

On September 11, 2014 OWCP made a preliminary determination that appellant had received an overpayment in the amount of \$8,628.99 due to her receipt of dual benefits from SSA and from OWCP during the period June 1, 2012 through July 26, 2014. It found that she was at fault in the creation of the overpayment because she had failed to provide information which she knew or should have reasonably known to be material and accepted payments which she knew or should have reasonably known to be incorrect. OWCP advised appellant that she could request a telephone conference, a final decision based on the written evidence, or a hearing within 30 days if she disagreed that the overpayment occurred or with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. It requested

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<sup>2</sup> From June to December 2012, appellant's monthly SSA rate was \$941.80 with FERS and \$614.60 without. From December 2012 to December 2013, her monthly SSA rate with FERS was \$957.80 and \$625.00 without. From December 2013 through June 29, 2014, appellant's monthly SSA rate with FERS was \$972.10 and \$634.30 without.

that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In a letter dated September 29, 2014, appellant stated that her SSA earnings were from a private, nonfederal employer and that when she became disabled in September 1990 from the employing establishment she had not been and was currently not under the FERS program. She contended that, as she was a civil service employee, she was not subject to the FERS offset and that she had not filed for retirement with OPM. Appellant stated that she was not subject to overpayment and requested that the issue of FERS/SSA offset be reexamined and reconsidered. She submitted a Civil Service Retirement System (CSRS) worksheet dated November 22, 1991 which indicated that she was enrolled in the CSRS program.

Appellant contested the fact and amount of overpayment and requested that OWCP make a decision on her alleged overpayment based on the written evidence.

In a decision dated June 22, 2015, OWCP finalized the preliminary determination regarding overpayment. It calculated that appellant's FECA benefits should have been offset by \$8,627.84 from June 1, 2012 through June 29, 2014. OWCP further found that appellant was not at fault in the creation of the overpayment, but that the overpayment could not be waived as appellant had not submitted financial documentation in support of waiver.

### **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 his duty.<sup>3</sup> Section 8129(a) of FECA provides, in pertinent part, that 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.<sup>4</sup>

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.<sup>5</sup>

OWCP's procedures thus 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.<sup>6</sup> The offset of FECA benefits by SSA benefits attributable to employment under FERS

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<sup>3</sup> 45 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> *Id.* at § 8116(d); *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

is calculated as follows: where a claimant had received SSA benefit, OWCP will obtain information from SSA on 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. 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.<sup>7</sup>

OWCP does not require an election between FECA and SSA benefits, except when the SSA benefits are attributable to the employee's federal service.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

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

The record does not contain evidence to support a finding that appellant was in receipt of FERS benefits. Appellant contends that the record supports that her SSA earnings were from a private, nonfederal employer and there is no evidence to establish that she was subject to the FERS offset.<sup>9</sup> OWCP premised its finding of an overpayment solely on the July 29, 2014 letter it had received from the SSA regarding appellant's age-related retirement benefits for the period June 1, 2012 to July 29, 2014. The Board finds, however, that the July 29, 2014 letter does not establish that appellant was in receipt of, or eligible for, FERS benefits. OWCP's preliminary determination of an overpayment cites to no other documentation to establish that she was in receipt of dual benefits from the SSA and from OWCP. Thus, OWCP has failed to establish fact of overpayment.

The Board will therefore set aside the June 22, 2015 overpayment decision. On remand OWCP should obtain additional information from SSA and the Office of Personnel Management (OPM) regarding appellant's retirement status. Only when such information is obtained is it possible to determine whether an overpayment has occurred. Following this, and any other development deemed necessary, OWCP shall issue an appropriate decision in this case.

Based upon the findings and resolution as to the first issue, the remaining issues need not be addressed as they are moot.

### **CONCLUSION**

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

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<sup>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997).

<sup>8</sup> *Supra* note 6 at Chapter 2.1000.11 (February 1990).

<sup>9</sup> *Id.*; see also *J.M.*, Docket No. 12-954 (issued November 26, 2012)

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2015 is set aside and the case is remanded for further development consistent with this decision and order.

Issued: May 23, 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