

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

A.S., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
SUPPLY CENTER, Columbus, OH, Employer**

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**Docket No. 16-0538
Issued: September 14, 2016**

Appearances:
Stanley R. Stein, Esq., for the appellant¹
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 January 29, 2016 appellant, through counsel, filed a timely appeal from a September 4, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

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 Appellant timely requested oral argument before the Board. By order dated June 8, 2016, the Board exercised its discretion and denied the request as the arguments on appeal could be adequately addressed in a decision based on a review of the record. *Order Denying Request for Oral Argument*, Docket No. 16-0538 (issued June 8, 2016).

³ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$29,789.36 for the period July 1, 2006 through October 31, 2011 because OWCP failed to reduce her benefits by the Federal Employees Retirement System (FERS) offset amount; (2) whether she was at fault in creating the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$300.00 from continuing compensation benefits.

FACTUAL HISTORY

On March 9, 1994 appellant, then a 49-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 1994 she injured her left knee in the performance of duty. She stopped work on March 8, 1994. OWCP accepted the claim for left knee strain, a tear of the left medial meniscus, an aggravation of arthritis, and a left knee amputation. Appellant returned to her regular employment on March 6, 1995, but stopped work on July 29, 1999 and did not return. OWCP paid her compensation for total disability.

Appellant signed a Form CA-1032 on May 10, 2002 indicating that she received benefits from the Social Security Administration (SSA) beginning January 2003 as part of an annuity under FERS. She continued to submit CA-1032 forms dated 2003 to 2014 disclosing the receipt of benefits from SSA based at least in part on a FERS annuity.

On February 16, 2007 OWCP advised appellant that if she received compensation under FERS from SSA for an annuity based on age and federal service her benefits would be reduced.

On May 4, 2007 counsel indicated that appellant wanted to receive retirement benefits during the period of her schedule award. He enclosed a form she completed electing retirement benefits effective May 1, 2007. The election form provided that appellant was not entitled to receive retirement benefits concurrently with FECA benefits, except for a schedule award.

OWCP paid appellant wage-loss compensation on the periodic rolls until June 9, 2007. In a letter dated June 12, 2007, it noted that she could receive benefits from the Office of Personnel Management (OPM) and schedule award compensation.

By decision dated June 12, 2007, OWCP granted appellant a schedule award for 80 percent permanent impairment of the left lower extremity. The period of the award ran for 230.40 weeks from June 10, 2007 to November 8, 2011. OWCP paid appellant compensation beginning June 10, 2007 for her schedule award.

Counsel, by letter dated November 15, 2011, advised OWCP that appellant wanted to elect FECA benefits for total disability at the expiration of her schedule award. On November 9, 2011 OWCP began paying wage-loss compensation benefits.

In a decision dated December 21, 2012, OWCP determined that appellant received an overpayment of compensation in the amount of \$4,972.50 for the period November 1, 2011 through June 30, 2012 because it failed to offset from her compensation for the portion of her

SSA benefits which were based on her FERS service.⁴ It further found that she was at fault in the creation of the overpayment and that it would recover the overpayment by deducting \$100.00 from her continuing compensation benefits.

SSA, in a form dated March 27, 2014, advised OWCP of appellant's SSA rate with and without FERS from July 2006 to December 2013.⁵ SSA advised OWCP that prior to July 2006 appellant received disability benefits that were not subject to an offset.

On October 15, 2014 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$29,789.36 as she received compensation benefits for the period July 1, 2006 through May 1, 2010 that were not reduced by the portion of the SSA benefits that she received based on her federal service.⁶ It described how it calculated the overpayment based on her SSA rate with and without FERS. OWCP further made a preliminary determination that appellant was at fault in creating the overpayment as she knew or should have known that the portion of her retirement based on her federal service constituted a prohibited dual benefit. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP 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 prerecoupment hearing.

On October 26, 2014 appellant requested a decision on the written evidence and also indicated that she wanted a telephone prerecoupment hearing. She submitted a completed overpayment recovery questionnaire.

At the telephone hearing, held on June 11, 2015, counsel questioned whether OWCP had the authority to find an overpayment based on FERS benefits. He maintained that she received disability benefits from SSA until May 29, 2010 and subsequently received retirement benefits.

On July 9, 2015 appellant submitted an updated overpayment recovery questionnaire. She related that she believed that she could receive a schedule award and FERS payments, but not FERS payments and total disability.

Counsel, on July 9, 2015, contended that appellant was not at fault in creating the overpayment and challenged OWCP's jurisdiction over the overpayment. He noted that she had

⁴ SSA, on June 12, 2012, provided appellant's SSA rate with and without FERS from November 2011 to December 2011.

⁵ Including federal employment, appellant was entitled to a rate of \$562.20 effective July 2006, \$580.70 effective December 2006, \$594.00 effective December 2007, \$628.50 effective December 2008, \$828.80 effective May 2010, \$858.60 effective December 2011, \$873.10 effective December 2012, and \$886.10 effective December 2013. Without counting appellant's federal earnings, she was entitled to a rate of \$169.90 effective July 2006, \$175.40 effective December 2006, \$179.40 effective December 2007, \$189.90 effective December 2008, \$250.40 effective May 2010, \$259.40 effective December 2011, \$263.80 effective December 2012, and \$267.70 effective December 2013.

⁶ OWCP indicated that the overpayment was for the period July 1, 2006 to May 1, 2010, but calculated the overpayment for the period July 1, 2006 to October 31, 2011.

not completed high school and did her best to understand correspondence from OPM and OWCP.

By decision dated September 4, 2015, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$29,789.36 for the period July 1, 2006 to October 31, 2011. She further found that appellant was at fault in the creation of the overpayment as she knew or should have known she was not entitled to receive retirement benefits from SSA and FECA benefits and thus accepted a payment that she knew or should have known was incorrect. The hearing representative determined that the overpayment would be recovered by deducting \$300.00 from continuing compensation benefits.

On appeal counsel questions OWCP's jurisdiction over the overpayment. He also challenges the overpayment and fault finding. Counsel asserts that appellant was not aware that she was receiving FERS benefits beginning July 1, 2006 and notes that she did not have a high level of education.

LEGAL PRECEDENT -- ISSUE 1

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 Schedule awards payable under 5 U.S.C. § 8107 for the permanent loss or loss of use of specified members, organs, or functions of the body, are the only FECA monetary compensation benefits payable concurrently with an OPM annuity.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant's claim for a left knee strain, a tear of the left medial meniscus, an aggravation of arthritis, and a left knee amputation. It paid her compensation for total disability from July 29, 1999 to June 9, 2007. From June 10, 2007 until November 8, 2011, OWCP paid appellant compensation for a schedule award for 80 percent permanent impairment of the left lower extremity.

The Board finds that appellant received an overpayment of compensation, but that the case is not in posture for decision regarding the amount of the overpayment. For the period July 1, 2006 to June 9, 2007, OWCP paid her compensation for total wage-loss disability without

⁷ 5 U.S.C. § 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(e) (January 1997); Chapter 2.1000.11(b) (February 1995).

⁹ *Id.* at Chapter 2.1000.6b (February 1995).

offsetting her compensation by the portion of her SSA retirement benefits based on age and attributable to her federal service. As discussed, the portion of SSA benefits she earned as a federal employee and the receipt of disability compensation under FECA is a prohibited dual benefit.¹⁰ SSA confirmed that she received retirement benefits based in part on her federal service beginning in July 2006. Consequently, appellant received an overpayment of compensation during the period July 1, 2006 to June 9, 2007.

The Board finds, however, that OWCP erred in determining that appellant received an overpayment of compensation from June 10, 2007 until October 31, 2011. Section 8116(d)(2) of FECA provides that an employee can receive SSA benefits and a schedule award under section 8107(c). OWCP's procedures also provide that schedule awards payable under 5 U.S.C. § 8107 can be paid concurrently with an OPM annuity.¹¹ Appellant received compensation for a schedule award rather than wage-loss compensation from June 10, 2007 to November 8, 2011, and thus OWCP erred in finding that she received an overpayment of compensation from June 10, 2007 to October 31, 2011.¹²

On remand OWCP should determine the amount of the overpayment received for the period July 1, 2006 to June 9, 2007.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹³ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹⁴ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. 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; (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁵

¹⁰ 5 U.S.C. § 8116(d)(2); *see also* *R.C.*, Docket No. 14-1383 (issued December 5, 2014).

¹¹ *See supra* note 9.

¹² *See R.L.*, Docket No. 12-1382 (issued December 28, 2012); *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.* at § 10.435(a).

¹⁵ *Id.* at § 10.433(a); *see Kenneth E. Rush*, 51 ECAB 116 (1999).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in creating the overpayment as she accepted a payment that she knew or should have known was incorrect. It must thus establish that, at the time she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁶ The Board finds that OWCP did not, however, sufficiently explain its fault determination. Appellant received SSA disability benefits until July 2006, when SSA converted her payments to retirement benefits. OWCP did not explain why she should have been aware that her SSA disability payments had been converted to retirement benefits.¹⁷ Appellant indicated on CA-1032 forms beginning May 10, 2002 that she was receiving benefits from SSA based on a FERS annuity; however, she was receiving SSA compensation for disability rather than retirement from 2002 to July 2006. OWCP has not established that she knew or should have known from July 6, 2006 to June 9, 2007 that she was erroneously accepting both SSA retirement benefits based in part on FERS and FECA compensation.¹⁸ The Board will set aside the finding of fault. On remand OWCP should determine whether appellant is entitled to waiver of recovery of the overpayment for the period July 6, 2006 to June 9, 2007.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation from July 1, 2006 to June 9, 2007, but that the case is not in posture for decision regarding the amount of the overpayment. The Board further finds that she did not receive an overpayment of compensation for the period July 10, 2007 to October 31, 2011. The Board additionally finds that appellant was not at fault in the creation of the overpayment from July 1, 2006 to June 9, 2007.

¹⁶ See *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁷ See *R.C.*, *supra* note 10.

¹⁸ *Id.*

¹⁹ In view of the Board's decision on the amount and period of the overpayment and on fault, the issue of recovering the overpayment from continuing compensation payments is premature.

ORDER

IT IS HEREBY ORDERED THAT September 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 14, 2016
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