

properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly deducted \$125.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On April 28, 1992 appellant, then a 44-year-old diagnostic radiologic technician, filed a traumatic injury claim (Form CA-1) alleging a left shoulder and humerus injury when she was struck by items falling from the top of a metal cabinet that date.⁴ OWCP accepted the claim for C5-6 herniated disc, C6 radiculopathy, left shoulder soft tissue trauma, and authorized anterior cervical microdiscectomy interbody fusion surgery, which was performed on November 25, 1992 and C5-6 nerve root decompression surgery, which was performed on July 20, 1993. It subsequently expanded acceptance appellant's claim to include major depressive disorder and pain disorder. In a letter dated May 13, 2009, OWCP informed appellant that she was being placed on the periodic rolls for temporary total disability effective April 25, 2005.

Appellant was born in March 1948. When she turned 62 years of age in 2010, she was eligible to receive age-related social security retirement benefits. The record indicates that she was covered under the Federal Employees Retirement System (FERS) and was subject to Federal Insurance Contributions Act (FICA) withholding.

In a letter dated February 18, 2010, OWCP noted that appellant was approaching 62 years of age and advised her that FECA required a reduction in benefits if she received retirement benefits from the Social Security Administration (SSA) attributable to federal service. It advised her to contact OWCP promptly if she received SSA retirement benefits to avoid an overpayment of compensation.

In an EN1032 form dated April 19, 2010, appellant indicated that she had been assigned a Civil Service Annuity (CSA) number by SSA, but had not received SSA retirement benefits during the past 15 months. She submitted an amended EN1032 form dated April 26, 2010 noting she was in receipt of SSA disability benefits.

³ Docket No. 06-0750 (issued June 5, 2007). In a June 5, 2007 decision, the Board found that OWCP properly denied modification of a December 23, 1997 loss of wage-earning capacity determination. The Board also affirmed a June 7, 2005 decision which granted appellant a schedule award for three percent right upper extremity permanent impairment. The Board, however, set aside an OWCP decision dated November 21, 2005 granting 10 percent permanent impairment to her larynx. In Docket No. 08-0689 (issued November 17, 2008), the Board, by order dated November 17, 2008, dismissed the appeal as it was found to be a duplicative claim. In Docket No. 08-0688 (issued April 6, 2009), the Board found that modification of the December 23, 1997 loss of wage-earning capacity was warranted and set aside a December 20, 2007 OWCP decision denying modification. The Board also set aside decisions dated October 23 and 31, 2007 denying appellant's claim for an increased schedule award for permanent impairment to her larynx as there remained an unresolved conflict in the medical opinion evidence.

⁴ Appellant resigned from her position effective July 15, 1994, but returned to work as an office automation clerk on September 15, 1997.

On July 26, 2010 SSA informed OWCP that the offset was not applicable to SSA disability benefits.

OWCP subsequently received completed EN1032 forms dated April 10, 2011, May 9 and 10, 2012, May 4, 2013, March 18, 2014, and March 10, 2016 from appellant noting that she had been assigned a CSA number, but was currently not receiving retirement benefits.

SSA, in forms dated May 2 and 4, 2015, provided the amount that appellant had actually received in retirement benefits with FERS and also the hypothetical amount that she would have received without FERS.

By letter dated May 13, 2015, OWCP advised appellant that it was adjusting her compensation to offset that portion of her SSA retirement benefits attributable to her federal service. It informed her that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package and that FECA prohibited the simultaneous receipt of workers' compensation and federal retirement benefits.

In CA-110 notes dated May 19, 2015, appellant called OWCP contending that she was not in receipt of SSA retirement benefits, but rather received SSA disability benefits. OWCP informed appellant that SSA provided information that she was receiving SSA retirement benefits based on her federal service. If appellant had contrary information from SSA in writing, OWCP advised her to submit it.

On August 10, 2015 OWCP calculated the overpayment by determining the difference between appellant's SSA amount with and without FERS for each period. It then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$5,643.15.

For the period April 1, 2010 to November 30, 2011, appellant received a monthly social security payment (with FERS) of \$1,455.50, but should have received a monthly payment (without FERS) of \$1,343.10. This was an overpayment of \$112.40 per month or \$103.75 per 28 days. For 609 days in that period, the overpayment amount was \$2,256.65. For the period December 1, 2011 to November 30, 2012, appellant received a monthly social security payment (with FERS) of \$1,501.80, but should have received a monthly payment (without FERS) of \$1,391.40. This was an overpayment of \$110.40 per month or \$101.91 per 28 days. For 366 days in that period, the overpayment amount was \$1,332.08. For the period December 1, 2012 to February 28, 2013, appellant received a monthly social security payment (with FERS) of \$1,532.40, but should have received a monthly payment (without FERS) of \$1,415.00. This was an overpayment of \$117.40 per month or \$108.37 per 28 days. For 90 days in that period, the overpayment amount was \$348.33. For the period March 1⁵ to November 30, 2014, appellant received a monthly social security payment (with FERS) of \$1,556.40, but should have received a monthly payment (without FERS) of \$1,436.20. This was an overpayment of \$120.20 per month or \$110.95 per 28 days. For 275 days in that period, the overpayment amount was \$1,089.73. For the period December 1, 2014 to May 2, 2015, appellant received a monthly social security payment (with FERS) of \$1,582.80, but should have received a monthly payment

⁵ This report appears to overlook the period from March 1, 2013 to March 1, 2014.

(without FERS) of \$1,460.60. This was an overpayment of \$112.20 per month or \$112.80 per 28 days. For 153 days in that period, the overpayment amount was \$616.37. This overpayment (\$2,256.65 + \$1332.08 + \$348.33 + \$1,089.73 + \$616.37) was a total of \$5,643.15.⁶

On August 10, 2015 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$5,643.15 as she had received compensation benefits for the period April 1, 2010 through May 2, 2015 that had not been reduced by the portion of her SSA benefits attributable to her federal service. It determined that she had begun receiving regular retirement benefits under SSA effective April 1, 2010. OWCP found that a portion of the SSA benefits she received due to her federal service, which was part of FERS retirement package, was a prohibited dual payment. It further made a preliminary determination that appellant was without fault in creating the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire 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 prerecoupment hearing.

On September 18, 2015 appellant requested a telephone conference with OWCP. She stated that she disagreed with the amount of the overpayment and requested waiver of recovery as she was not at fault in the creation of the overpayment. Appellant noted that March 2014 was the correct date as that was when she reached the retirement age of 66. She also submitted a letter dated March 24, 2014 from SSA informing her that she was entitled to monthly retirement benefits beginning April 2014. SSA informed appellant that her first payment would be \$1,451.00, which was the money SSA owed her for March 2014, and that in the future she would receive monthly payments of \$1,451.00 around the third of each month.

In a January 20, 2016 memorandum of conference, OWCP noted the overpayment occurred because appellant had been receiving SSA retirement benefits from April 1, 2010, but that OWCP had received no SSA/FERS documents until May 8, 2015. In response to the preliminary overpayment determination, appellant again requested a telephone conference, but failed to submit any financial documentation. The telephone conference took place on January 20, 2016. According to OWCP, appellant acknowledged that she had been overpaid and agreed to a repayment amount of \$125.00 from continuing compensation benefits.

By decision dated January 20, 2016, OWCP finalized its preliminary determination regarding the fact and amount of the overpayment, as well as its finding that appellant was not at fault. It found that the financial information received, however, was insufficient to warrant wavier of recovery of the overpayment. OWCP also imposed a 28-day repayment of \$125.00 to be deducted for appellant's continuing compensation payments.

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

⁶ The actual total is \$5,643.16 but OWCP reduced that amount by one cent.

employee receives 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's 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 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 in 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. 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

The possibility of dual benefits occurs when the claimant is at least 62 years old, had FERS retirement, and is paid benefits based on age by SSA. The offset is that portion of SSA benefits attributable to federal service.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted C5-6 herniated disc, C6 radiculopathy, left shoulder soft tissue trauma, major depressive disorder, and pain disorder, and authorized C5-6 nerve root decompression and anterior cervical microdiscectomy interbody fusion surgeries. It found that appellant had been on the periodic rolls effective April 25, 2005. Retroactive compensation payments began May 10, 2009.

Relying on information provided by SSA on May 2 and 4, 2015, OWCP determined that appellant had been receiving a dual benefit beginning April 1, 2010, the date appellant began receiving retirement benefits. SSA provided the total amount appellant received in retirement benefits which included FERS and also the hypothetical amount that she would have received without the benefits of FERS beginning that date.

The record supports that appellant received FECA wage-loss compensation continually since May 10, 2009 and that she received SSA retirement benefits beginning April 1, 2010. The portion of the SSA retirement benefits that was attributable to her federal service through her

⁷ 5 U.S.C. § 8116(d). *See D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁸ *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (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.

⁹ *A.S.*, Docket No. 16-538 (issued September 14, 2016).

¹⁰ *See M.H.*, Docket No. 13-825 (issued August 1, 2013).

FERS retirement package is prohibited dual benefit while also receiving compensation under FECA.¹¹

This dual benefit was not corrected or offset until May 3, 2015. SSA notified OWCP of the amount of benefits she received and the amount she should have received for the period April 1, 2010 to May 2, 2015. Based on these rates, OWCP was able to calculate the improper dual benefit appellant had received for that period which yielded an overpayment of compensation in the amount of \$5,643.15. The record included an overpayment worksheet explaining the overpayment calculation.

The Board finds that OWCP properly calculated the dual benefits for the period April 1, 2010 through May 2, 2015 in the amount of \$5,643.15 for this period, thus creating an overpayment of compensation in that amount.

Appellant contends on appeal that she did not receive retirement benefits from SSA for the period April 1, 2010 through May 2, 2015. The record reflects that SSA verified the payment of SSA retirement benefits effective April 1, 2010 and appellant has submitted insufficient evidence to dispute the receipt of these benefits.

LEGAL PRECEDENT -- ISSUE 2

According to section 10.436,¹² recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ For waiver under this standard, a claimant must meet the two-pronged test and show that he or she both needs substantially all of his or her current income to meet current ordinary and necessary living expenses,¹⁴ and that his or her assets do not exceed the resource base.¹⁵

¹¹ *Supra* note 8 at Chapter 2.1000.4(e) (February 1995).

¹² 20 C.F.R. § 10.436.

¹³ OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent, plus \$960.00 for each additional dependent. *Supra* note 8 at Chapter 6.200.6(a) (October 2004).

¹⁴ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

¹⁵ *See supra* note 13. *W.F.*, 57 ECAB 705, 708 (2006).

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.¹⁶ OWCP's regulations provide:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [OWCP]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of [FECA] or be against equity and good conscience....

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹⁷

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ In an August 10, 2015 preliminary notice of overpayment, it advised appellant of its preliminary determination and instructed her to 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 precoupment hearing.

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

Appellant requested a telephone conference without submitting the overpayment recovery questionnaire or supporting financial documents. Thus, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience such that it would cause a financial burden.¹⁹

Consequently, as appellant did not submit the financial information it had properly requested from her as required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in the amount of \$5,643.15.²⁰

¹⁶ *Id.*

¹⁷ *See* 20 C.F.R. § 10.438.

¹⁸ *See id.* at §§ 10.436, 10.437.

¹⁹ *See R.L.*, Docket No. 16-1564 (January 4, 2017).

²⁰ 20 C.F.R. § 10.438(b) provides that: “Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²¹ Section 10.441(a) of the regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [OWCP] the amount of the overpayment as soon as the error is discovered or her attention is called to same. If no refund is made, [OWCP] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship”²²

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. When, as in this case, an individual fails to provide requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which provide in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²³ In the memorandum of conference, appellant agreed to a deduction of \$125.00 from continuing benefits. The Board finds that OWCP did not abuse its discretion in following those guidelines in this case, where appellant has not submitted complete financial information and agreed to the deduction of \$125.00 every four weeks.

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$5,643.15 for the period April 1, 2010 through May 2, 2015. The Board also finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment. The Board further finds that OWCP properly determined that it would recover the overpayment by deducting \$125.00 every 28 days from continuing compensation payments.

²¹ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²² 20 C.F.R. § 10.441(a).

²³ *Robin D. Calhoun*, Docket No. 00-1756 (issued May 21, 2001); *Gail M. Roe*, 47 ECAB 268 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2016 is affirmed.

Issued: August 1, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board