



## **FACTUAL HISTORY**

On May 17, 1999 appellant, then a 54-year-old deck engineer/machinist, filed an occupational disease claim (Form CA-2) alleging that he sustained a bone spur on his right heel causally related to factors of his federal employment. He stopped work on April 25, 1999. OWCP accepted the claim for plantar fibromatosis of the right foot and an aggravation of left knee derangement. It paid appellant compensation for total disability beginning in 1999.<sup>2</sup>

A notification of personnel action (SF-50) effective September 1, 1999 indicated that appellant's retirement plan was Federal Insurance Contributions Act (FICA) and partial Civil Service Retirement System (CSRS). It listed his retirement place as Code C, applicable to those under the CSRS offset retirement plan. A notification of personnel action dated May 15, 2000 also provided that appellant's retirement plan was FICA and CSRS (partial).

Appellant completed EN1032 forms regarding his employment activities and earnings on October 4, 2010, October 10, 2011, October 11, 2012, October 6, 2013, and October 4, 2014. On the forms, he indicated that he did not receive benefits from the Social Security Administration (SSA) as part of an annuity for federal service.

The employing establishment, on July 11, 2014, advised OWCP that appellant was 69 years old and a FERS employee. It requested that OWCP obtain information from SSA regarding any required offset from his compensation due to his receipt of SSA retirement benefits.

SSA, in a July 31, 2014 FERS/SSA dual benefits calculations form, provided the amount that appellant received monthly in retirement benefits with FERS and also the hypothetical amount that he would have received without FERS. Including federal employment, it provided that he was entitled to a monthly payment rate of \$1,491.20 effective October 2010, \$1,492.20 effective December 2010, \$1,544.80 effective December 2011, \$1,571.00 effective December 2012, and \$1,594.50 effective December 2013. Without counting federal earnings, appellant was entitled to a monthly SSA rate of \$832.60 effective October 2010, \$832.60 effective December 2010, \$862.50 effective December 2011, \$877.10 effective December 2012, and \$890.20 effective December 2013.

On August 14, 2014 OWCP advised appellant that it was adjusting his compensation to offset the portion of his SSA retirement benefits attributable to his federal service. It informed him that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

By letter dated March 27, 2015, OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$31,357.66 because it paid him compensation benefits from October 1, 2010 through July 26, 2014 without the appropriate FERS offset. It calculated the overpayment by determining the difference

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<sup>2</sup> OWCP also accepted that appellant sustained asbestosis under File No. xxxxxx938. That claim is not before the Board on the present appeal.

between his SSA amount with and without FERS for each period and then multiplying the daily offset amount by the number of days in each period to find a total overpayment of compensation in the amount of \$31,357.66. OWCP further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. It requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, that he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 23, 2015 appellant, through his then-counsel, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on January 9, 2017, he maintained that he did not receive FERS compensation.<sup>3</sup> Appellant related that he took his money out of FERS and put it in a separate bank account, and only received one check from FERS for around \$700.00. He received disability benefits from SSA. Appellant indicated that the employing establishment hired him as a CSRS employee. He stopped work in 1985 to go to college. Appellant returned to work with the employing establishment in 1988 and paid into the FERS system as a crossover employee. He related that he did not receive any money from FERS until he was over 70 years old. The hearing representative informed appellant that at the age of 65 disability benefits under SSA converted to retirement benefits that had to be offset by the amount attributable to federal service under FERS.

On January 20, 2017 appellant submitted a Notice of Personnel Action (Form SF-50) effective July 7, 1994 showing that his retirement plan was FICA and partial CSRS. It listed his retirement place as Code C, applicable to those under the CSRS offset retirement plan. An October 16, 1988 SF-50 indicated that it had hired appellant on a one-year trial and that he was automatically covered under FERS. It provided his retirement plan as Code K applicable to those under FERS and FICA.

Appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) dated January 16, 2017. He provided his total monthly income as \$6,522.00 and his monthly expenses as \$3,169.00. Appellant listed assets of \$31,376.00 and submitted supporting financial documentation.

By decision dated February 28, 2017, OWCP's hearing representative found that appellant received an overpayment of compensation in the amount of \$31,357.66 for the period October 1, 2010 through July 26, 2014 because OWCP failed to offset the amount he received from SSA attributable to federal service under FERS from his compensation benefits. She further found that he was at fault in the creation of the overpayment and thus not entitled to waiver of recovery. The hearing representative determined that the overpayment should be recovered by withholding \$1,300.00 installments from his continuing compensation payments.

On appeal appellant contends that he disclosed that he was receiving SSA disability benefits. He asserts that he removed his money from FERS in 2007 and put it in a retirement

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<sup>3</sup> The hearing representative indicated that the notice of hearing sent to appellant's counsel was returned as undeliverable.

account. Appellant related that he had money in CSRS and SSA. He notes that he was not informed that anything changed when he reached the age of 65.

### **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.<sup>4</sup> 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.<sup>5</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 compensation benefits shall be reduced by the amount of SSA benefits attributable to his federal service.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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

OWCP accepted that appellant sustained plantar fibromatosis of the right foot and an aggravation of left knee derangement causally related to factors of his federal employment. Appellant stopped work on April 24, 1999 and received compensation for total disability.

Appellant related that the employing establishment hired him as a CSRS employee until he stopped work in 1985 to attend college. He resumed work in 1998. Appellant submitted

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<sup>4</sup> 5 U.S.C. § 8102.

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

<sup>8</sup> *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

some SF-50 forms indicating that his retirement plan was a combination of FICA and partial CSRS and designating his retirement as Code C, applicable to those under the CSRS offset retirement plan.

OWCP determined that appellant received an overpayment of compensation from October 1, 2010 through July 26, 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 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.<sup>9</sup> 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 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 June 2004 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 unclear from the record whether the rates under the CSRS offset plan are the same as the rates in FERS plan. OWCP should have further inquired regarding the accuracy of this information.<sup>10</sup> Consequently, the case will be remanded for further development.<sup>11</sup>

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

On appeal appellant contends that he did not receive money from FERS. As set forth above, the case will be remanded for additional development regarding his retirement program and any benefits received.<sup>12</sup>

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<sup>9</sup> See *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

<sup>10</sup> *D.B.*, Docket No. 16-1224 (issued June 23, 2017).

<sup>11</sup> See *F.F.*, Docket No. 16-0063 (issued June 24, 2016).

<sup>12</sup> *Id.*

**CONCLUSION**

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.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 16, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>13</sup> In view of the Board's findings regarding the amount of the overpayment, it is premature to address fault and recovery.