

FACTUAL HISTORY

On November 20, 1993 appellant, then a 58-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome and shoulder impingement as a result of her federal employment duties. She stopped work. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and paid wage-loss compensation and medical benefits. On February 10, 1995 appellant returned to limited duty.²

Appellant worked part-time limited duty from January 22 to October 16, 1997. On October 17, 1997 she underwent right shoulder surgery and stopped work. On May 10, 1998 appellant returned to part-time limited duty. She stopped work again on July 8, 1999. On October 31, 2000 appellant returned to part-time limited duty.

OWCP accepted that on August 7, 2001 appellant sustained a recurrence of her employment injury. Appellant indicated that she worked limited duty and that her medical condition was worsening. She stopped work. OWCP paid wage-loss compensation and placed appellant on the periodic rolls effective December 2, 2001.

OWCP received completed and signed EN1032 forms from appellant dated July 6, 2006, June 20, 2007, June 30, 2008, June 26, 2009, June 21, 2010, June 22, 2011, June 18, 2012, June 16, 2013, June 20, 2014, and June 23, 2015. Each EN1032 form instructed appellant to report to OWCP any benefits received from the SSA which she received as part of an annuity under the Federal Employees Retirement Service (FERS) during the prior 15 months. In the EN1032 forms dated July 6, 2006, June 20, 2007, June 30, 2008, June 26, 2009, June 22, 2011, June 18, 2012, and June 16, 2013 appellant wrote "No" under Part 2, Section 2 indicating that she did not receive benefits from the SSA as part of an annuity for federal service. The certification section of EN1032 forms also noted that by signing these forms appellant understood that she must immediately report to OWCP any improvement in her medical condition, any employment, any change in the status of claimed dependents, any third-party settlement, and any change in income from federally assisted disability or benefit programs.

In the Form EN1032 dated June 20, 2007, while appellant reported in Part D, Section 2 that she had not received SSA benefits as part of an annuity for federal service from the SSA, she also wrote in Part D, Section 4 for Other Benefits: "Social Security \$955.00". Appellant also related that this was not a recurring benefit.

On the Form EN1032 appellant completed on June 21, 2010 she noted "yes" to the question under Part D, Section 2 that she had received SSA benefits as part of an annuity for federal service from the SSA. In the Form EN1032 dated June 20, 2014, she indicated under

² The record reflects that appellant has sustained several other injuries in the performance of her duties, which have been combined with the current claim as the master file. Under OWCP File No. xxxxxx842, OWCP accepted her claim for right shoulder impingement syndrome. It paid compensation for the period January 5 to April 20, 1997 and awarded appellant a schedule award of 16 percent permanent impairment of the right upper extremity. Under OWCP File No. xxxxxx296, appellant's claim was accepted for left shoulder impingement syndrome. She received compensation for the period February 26 to November 15, 1997 and received a schedule award of 12 percent permanent impairment of the left upper extremity. Under OWCP File No. xxxxxx133, OWCP accepted appellant's claim for right shoulder and rib sprain.

Part D, Section 2 that she had received SSA benefits as part of an annuity for federal service in the monthly amount of \$1,153.00. In the Form EN1032 dated June 23, 2015, appellant noted under Part D, Section 2 that she had received SSA benefits as part of an annuity for federal service in the monthly amount of \$1,174.00.

On August 5, 2015 OWCP received information from the SSA regarding appellant's pay rate with and without FERS benefits for the period May 1, 2006 to August 22, 2015.

On August 19, 2015 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$74,956.32 for the period May 1, 2006 through August 22, 2015. It explained that the overpayment occurred because a portion of her SSA benefits that she had received during the above-mentioned time period was based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found that appellant was at fault in the creation of the overpayment because she failed to notify OWCP of her change in SSA benefits effective May 2006 and therefore she was aware or should have been reasonably aware that the payment she received for that period was incorrect. The preliminary determination provided an explanation of the calculation of the overpayment and contained an August 19, 2015 offset calculation worksheet, which indicated that the FERS offset for the period May 1, 2006 to August 22, 2015 totaled \$74,956.32. OWCP requested that appellant respond and complete an attached overpayment action request and an overpayment recovery questionnaire form (OWCP Form 20) within 30 days. Appellant was informed of the required financial documentation and actions she could take.

By letter dated August 20, 2015, OWCP notified appellant that it would reduce her FECA benefits effective August 23, 2015 to reflect the contribution from her SSA benefits attributable to her federal employment. It attached documentation explaining the calculation of the offset.

On October 13, 2015 appellant requested a prerecoupment hearing before an OWCP hearing representative. She indicated that she wished to contest the overpayment on the issues of the amount of overpayment and fault.

In a decision dated April 12, 2016, an OWCP hearing representative denied appellant's request for a prerecoupment hearing because it was not timely filed within 30 days of its August 19, 2015 preliminary determination.

In a May 23, 2016 telephone call memorandum (Form CA-110), appellant informed OWCP that she did not understand how the overpayment was her fault. She explained that in 2005 she went to OWCP to get advice as to how to complete the Form EN1032. Appellant noted that she had been using that advice as a guide ever since. She related that SSA told her that when she turned 65 she would stop getting her husband's SSA and start getting hers. Appellant alleged that she was not aware that she could not receive both benefits at the same time. She also noted that it took OWCP 10 years to inform her of the overpayment and that she had reported on the Forms EN1032 how much money she was getting every year.

By decision dated August 3, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$74,956.32 for the

period May 1, 2006 to August 20, 2015. It also finalized the finding that appellant was at fault in the creation of the overpayment. OWCP determined that it would deduct \$300.00 from her continuing compensation payments beginning August 20, 2016.

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.³ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of SSA benefits attributable to the employee's federal service.⁶ However, an offset is not required where the employee-beneficiary is covered under the Civil Service Retirement System and her SSA age-related benefits are attributable to private sector employment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained various medical conditions as a result of her federal employment. It paid her wage-loss compensation and placed her on the periodic rolls, effective December 2, 2001. On August 5, 2015 the SSA notified OWCP that appellant had been receiving SSA retirement benefits since May 1, 2006. Because a portion of the SSA benefits she earned as a federal employee was part of her FERS retirement package, the receipt of benefits under FECA and federal retirement benefits concurrently constituted a prohibited dual benefit.⁸

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, 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.⁹ It obtains 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

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ *See id.* at § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ *Id.* at § 8116(d)(2); *Id.* at § 10.421(d).

⁷ *K.G.*, Docket No. 16-553 (issued June 21, 2016).

⁸ *Supra* note 5.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997).

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.¹⁰

The SSA provided information regarding appellant's SSA rates, with and without FERS benefits, and their effective dates. Based on these rates, OWCP was able to calculate the amount of the prohibited dual benefit she had received from May 1, 2006 through August 22, 2015. It calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$74,956.32. The Board notes that there is no contrary evidence of record. Accordingly, the Board finds that OWCP properly found that appellant received an overpayment of compensation and properly calculated the dual benefits for the period May 1, 2006 to August 22, 2015 to be \$74,956.32.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.¹¹ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹²

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who--

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

“Accepted a payment which he or she knew or should have known to be incorrect.”¹³

¹⁰ *J.R.*, Docket No. 17-0181 (issued May 22, 2017).

¹¹ 5 U.S.C. § 8129(b).

¹² *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she failed to notify OWCP of her SSA retirement benefits and because she was aware or should have reasonably been aware that the payments she received from May 1, 2006 through August 22, 2015 were not offset for the dual benefit.

The Board finds initially that appellant was at fault in the creation of the overpayment for the period May 1, 2006 to June 26, 2009 because she made an incorrect statement as to a material fact which she knew or should have known to be incorrect.

Appellant received retirement benefits from SSA, which were in part based on her federal employment, simultaneously while receiving compensation from FECA. She had been advised in the letters accompanying the EN1032 forms that the information requested in the forms would be used to determine whether the amount of benefits should be adjusted. Appellant was advised that benefits could be adjusted if she was in receipt of other federal benefits. With respect to whether an individual is with fault in the creation of the overpayment, section 10.433(b) of OWCP's regulations provides that it depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that, in applying the tests to determine fault, OWCP should apply a reasonable person test.¹⁴ The Board finds that appellant was at fault in the creation of the overpayment because she failed to provide information as to a material fact. Appellant had been advised that a person who receives compensation benefits under FECA is not permitted to receive retirement benefits based on her federal service concurrently with FECA benefits.¹⁵

The EN1032 forms cover the period commencing 15 months prior to the signing of the form.¹⁶ In Forms EN1032 dated July 6, 2006, June 20, 2007, June 30, 2008, June 26, 2009, June 22, 2011, June 18, 2012, and June 16, 2013, appellant indicated "No" that she had not received benefits from the SSA as part of an annuity for federal service. Because appellant received SSA retirement benefits commencing May 1, 2006, knowingly signing a statement indicating that she was not receiving SSA benefits as part of an annuity for federal service, constitutes an incorrect statement as to a material fact.¹⁷

The Board notes that on the Form EN1032 dated June 20, 2007 appellant noted in Part D, section 4, that she had received SSA benefits in the amount of \$955.00; however, she also marked "No" that this was not a recurring benefit. Appellant also reported "No" under Part D, section 2 that she did not receive benefits from SSA as part of an annuity for federal service. She signed a certification clause on the EN1032 forms, which advised her in explicit language that she might be subject to civil, administrative or criminal penalties if she knowingly made a false

¹⁴ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

¹⁵ *T.G.*, Docket No. 16-910 (issued November 23, 2016).

¹⁶ *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

¹⁷ *See supra* note 15.

statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, she is deemed to have acknowledged her duty to fill out the form properly. Appellant provided contradictory information and therefore did not complete the form properly. Also by noting that she was not receiving recurring SSA benefits she failed to furnish information which she knew or should have known to be material to OWCP.¹⁸ Therefore appellant was also at fault in creating the overpayment during the 15-month period covered by the June 20, 2007 Form EN1032.¹⁹

Based upon appellant's inaccurate completion of the EN1032 forms dated July 6, 2006, June 20, 2007, June 30, 2008, June 26, 2009, June 22, 2011, June 18, 2012, and June 16, 2013, appellant was at fault in the creation of the overpayment during the periods applicable to these forms.

The Board also finds, however, that appellant did not make an incorrect statement as to a material fact in the Forms EN1032 dated June 21, 2010, June 20, 2014 and June 23, 2015 and accordingly, was not at fault in the creation of the overpayment during the applicable periods. In EN1032 forms dated June 21, 2010, June 20, 2014, and June 23, 2015, appellant fully disclosed her receipt of FERS benefits based in part on federal service.²⁰ As OWCP's finding of fault was premised upon appellant's failure to report SSA benefits in her EN1032 forms, the Board finds that appellant was not at fault in the creation of the overpayment during these periods.

The Board also finds that appellant had not completed a Form EN1032 that pertained to the period June 23 to August 22, 2015 at the time of OWCP's August 3, 2016 decision. Therefore there is no evidence of record that she made an incorrect statement regarding receipt of SSA disability benefits during the period June 23 to August 22, 2015.

Consequently, the case will be remanded to OWCP to consider whether the overpayment created during the periods in which appellant was not at fault should be waived.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$74,956.32 for the period May 1, 2006 through August 22, 2015 because OWCP failed to reduce her FECA benefits by her FERS SSA retirement benefit. The Board further finds that she was at fault in the creation of the overpayment for the period May 1, 2006 to June 26, 2009, and

¹⁸ *Supra* note 15, wherein the Board found that while appellant did indicate in the Form EN1032 signed on November 27, 2012 that he would begin receiving SSA retirement on December 1, 2012, in another question on the same form he indicated that he did not receive benefits from SSA in the prior 15 months as part of an annuity for federal service. He continued to indicate that he did not receive an SSA annuity for federal services in forms signed on November 18, 2013,

¹⁹ *See J.N.*, Docket No. 13-1751 (issued July 1, 2014).

²⁰ *See J.K.*, Docket No. 15-1917 (issued January 29, 2016); *see also B.L.*, Docket No. 13-1422 (issued June 2, 2014).

²¹ In view of the Board's finding that the case must be remanded for OWCP to consider waiver of recovery of the overpayment, it is premature to address recovery of the overpayment from continuing compensation payments.

from June 22, 2010 to June 16, 2013 and was therefore, was not entitled to waiver of recovery of the overpayment for this period. The Board also finds that appellant was not at fault in the creation of the overpayment for the period June 27, 2009 to June 21, 2010 and from June 17, 2013 to August 22, 2015, and that, consequently, the case will be remanded to OWCP to consider waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2016 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 decision of the Board.²²

Issued: December 14, 2017
Washington, DC

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

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

²² Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.