

(3) whether it properly reduced appellant's continuing compensation payments by \$500.00 every 28 days to recover the overpayment.

FACTUAL HISTORY

On February 1, 2002 appellant, then a 58-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she twisted her left knee when entering her postal vehicle. OWCP accepted the claim for left knee lateral meniscus tear and left pelvic dysfunction. Appellant received medical and wage-loss compensation intermittently until she stopped work completely on June 5, 2010 and was placed on the periodic rolls.

Appellant submitted her annual EN1032 form, dated September 20, 2014, on which she advised OWCP that she was receiving a regular retirement check ("not disability") from the Social Security Administration (SSA).

On September 26, 2014 OWCP requested clarification from appellant as to whether and when she began receiving retirement benefits. It also requested that the SSA verify the benefits she had received. In a November 7, 2014 Federal Employees Retirement System (FERS)/SSA Dual Benefits Calculations worksheet, SSA provided appellant's SSA rate with FERS and SSA rate without FERS from September 2009 through December 2013.

In a November 17, 2014 memorandum, OWCP advised appellant of a potential overpayment because she was receiving a prohibited dual benefit. It noted that she was receiving wage-loss compensation for her federal position, and that a portion of her SSA retirement benefits were attributable to her federal employment. OWCP noted that a FERS offset should have been deducted from her FECA compensation beginning September 1, 2009 and continuing through November 15, 2014.

In a second letter dated November 19, 2014, OWCP informed appellant that her current monthly benefit amount was \$3,475.00, but that SSA had determined that she was only entitled to \$2,532.45 as \$942.55 of her monthly social security payment was attributable to her federal employment. It noted the difference of \$942.55 must be offset against her compensation benefits. Accordingly, the offset of appellant's compensation payments would begin with her benefit payment dated November 16, 2014 and her new net compensation amount would be \$1,982.65, every 28 days.

OWCP provided a worksheet wherein it calculated the FERS offset by subtracting her SSA rate without FERS from the SSA rate with FERS. The monthly FERS offset amount was multiplied by 12 and divided by 13 to calculate FERS offset for the 28-day compensation cycle. OWCP calculated the overpayment by adding the FERS offset by the number of days actually overpaid to arrive at \$61,659.25.

By notice dated December 19, 2014, OWCP made a preliminary determination of an overpayment of compensation in the amount of \$61,659.25 for the period September 1, 2009 through November 15, 2014 as appellant was paid dual benefits under FECA and SSA without an appropriate offset. It found that she was without fault in the creation of the overpayment. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment,

appellant was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On December 31, 2014 appellant, through counsel, requested a prerecoupment hearing before an OWCP hearing representative.

At the September 9, 2015 hearing, counsel argued that OWCP had not met its burden of proof to establish fact of overpayment because there was no evidence that appellant was under FERS. He explained that appellant was employed as a career employee by the employing establishment in 1980, prior to the establishment of FERS.³ As such, this would put appellant under Civil Service Retirement System (CSRS) which would not require an offset for FECA benefits. Counsel explained that OWCP had failed to develop the evidence and was under an obligation to request this information from the Office of Personnel Management (OPM). As such, OWCP could not make a proper overpayment determination. Moreover, counsel argued that as appellant was without fault in the creation of the overpayment of compensation, repayment should be waived as it would create a substantial hardship and that she had detrimentally relied on the benefits received. The record was held open for 30 days.

Following the hearing, appellant submitted a 2007 and 2011 United States Postal Service (USPS) Personal Statement of Benefits. The benefits statement offered a personalized summary of appellant's total compensation for both direct pay and benefits. On both the 2007 and 2011 statements, appellant's retirement plan was classified as 5 CSRS/Offset. Both of the statements noted the annual amounts that had been paid to social security Old-age, Survivors and Disability Insurance (OASDI) by appellant and matched by the employing establishment. In an accompanying statement, appellant argued that she was not under FERS and therefore was not required to have her benefits offset. She explained that the USPS Personal Statement of Benefits established that her retirement plan was 5 CSRS/Offset. Appellant explained that she was under CSRS but had also been paying into social security OASDI for all of these years.

Appellant submitted an OWCP-20 form and numerous other financial documents, arguing that the overpayment of compensation should be waived as repayment would cause her financial hardship.

By decision dated November 23, 2015, an OWCP hearing representative finalized the overpayment of compensation in the amount of \$61,659.25 for the period September 1, 2009 through November 15, 2014 as appellant was paid dual benefits under FECA and SSA without an appropriate offset. It noted that SSA was the agency which determined whether benefits are attributable to federal service, that OWCP did not have access to appellant's payroll records, and that there was no reason for the district office to question the offset information provided by SSA. The hearing representative also found that the 2007 and 2011 benefits statements provided by appellant, classifying her retirement plan as CSRS, failed to establish that she was not covered under FERS, and appellant had failed to submit any other information from SSA to establish the offset information they provided was incorrect.

³ The record reflects that a USPS health benefits form notes appellant's conversion to a rural carrier (career appointment) on May 12, 1984.

The hearing representative found that appellant was not at fault in the creation of the overpayment because there was no evidence that she knew or should have known that she was not entitled to the payment received. She determined, however, that the overpayment was not subject to waiver based on the financial information and documentation provided. The hearing representative noted that appellant had a monthly household income of \$6,714.63, monthly household expenses of \$4,205.31, and household assets of \$270,000.00. She further determined that appellant's household income exceeded her current monthly household expenses by \$2,675.00, which exceeded the resource base for an individual with a spouse and exceeded her documented ordinary and necessary monthly expenses by more than \$50.00. OWCP's hearing representative determined that she could repay the overpayment by deducting \$500.00 from continuing compensation every 28 days.

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 or her duty.⁴ Section 8129(a) of FECA provides, 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."⁵

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.⁶ 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 SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received a \$61,659.25 overpayment of compensation.⁸ With respect to the fact and amount of the claimed overpayment, OWCP based its overpayment determination on appellant having reportedly received SSA age-related benefits for her federal service, under the FERS retirement plan. Relying on information provided by the SSA, OWCP found that she had been receiving a dual benefit dating back to September 2009. The Board

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁷ 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. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁸ *J.J.*, Docket No. 14-785 (issued September 3, 2014).

finds that appellant has established that she was under the CSRS/Offset benefit plan, not the FERS retirement plan.⁹

The record establishes that appellant's federal civilian service began in 1980 and at that time would have been covered under the CSRS plan.¹⁰ The employing establishment's Personal Benefits statement of record, however, noted appellant's retirement plan as "5 CSRS/OFF." Appellant has also testified that she was never under the FERS retirement plan. The evidence of record does not substantiate that appellant was under the FERS retirement plan.

OWCP determined that appellant received an overpayment of compensation from September 1, 2009 through November 15, 2014 because she received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to age-related SSA benefits that are attributable to federal service.

The Board also finds that the record does substantiate, based upon appellant's own statement as well as the employing establishment Personal Benefits statements, that she paid into social security OASDI.

Appellant received age-based SSA benefits after retirement as a result of her contributions to SSA under the CSRS-Offset system. As she received SSA benefits based in part of her federal service concurrently with disability compensation from OWCP without an appropriate offset, she received an overpayment of compensation.¹¹

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 September 2009 both with and without FERS. As discussed, however, she was not covered by FERS, but was instead under the CSRS-Offset retirement plan. It is not clear from the record whether the offset rates under the CSRS-Offset retirement plan are the same as the rates in FERS plan. On remand, OWCP should obtain additional information from SSA and OPM regarding appellant's retirement system and her SSA rate with and without any offset required based on her federal civilian service.¹²

The Board finds that the case is not in posture for decision.¹³ Accordingly, the Board will remand the case for OWCP to recalculate the amount of the overpayment.¹⁴

⁹ *A.P.*, Docket No. 12-122 (issued May 7, 2012).

¹⁰ Under CSRS, federal employees were generally exempt from paying social security taxes; social security OASDI. 5 U.S.C. §§ 8331-8351.

¹¹ *Supra* note 6.

¹² *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

¹³ *F.F.*, Docket No. 16-0063 (issued June 24, 2016).

¹⁴ *Supra* note 12.

CONCLUSION

The Board finds that OWCP has established fact of overpayment of compensation for which appellant was without fault, but that the case is not in posture for decision regarding the amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: June 23, 2017
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