

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Akron, OH, Employer)

**Docket No. 16-1190
Issued: May 12, 2017**

Appearances:

*Alan J. Shapiro, 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 May 13, 2016 appellant, through counsel, filed a timely appeal from a January 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$21,256.31 because appellant concurrently received Social Security

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 5 U.S.C. § 8101 *et seq.*

Administration (SSA) retirement benefits for the period August 1, 2013 to May 30, 2015 while receiving FECA benefits; (2) whether OWCP properly found appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery; and (3) whether OWCP properly required repayment of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

On appeal counsel asserts that, since appellant reported her SSA benefits on OWCP EN1032 forms, she was not at fault in the creation of the overpayment and therefore was entitled to waiver of recovery.

FACTUAL HISTORY

This case has previously been before the Board.³ On April 23, 1997 appellant, a rural carrier, had employment-related thoracic and lumbar strains and bilateral shoulder strains with left shoulder adhesive capsulitis when she tried to stop a falling filing cabinet. She stopped work on May 1, 1997 and returned to limited duty for four hours per day on July 2, 1997. Appellant began working eight hours per day on July 28, 1997. On December 17, 1997 she filed claim for a recurrence of disability for which she stopped work on December 4, 1997 due to flare-ups and pain. In a July 21, 1998 decision, OWCP denied the recurrence claim because the medical evidence was insufficient. On July 28, 1998 appellant, through counsel, requested a hearing that was held on January 26, 1999. In a decision finalized April 20, 1999, an OWCP hearing representative affirmed the prior decision. Appellant filed an appeal with the Board. In an October 3, 2000 decision, the Board found the case not in posture for decision regarding whether appellant established that she sustained a recurrence of disability. In its October 3, 2000 decision, the Board found that the medical evidence was sufficient to require further medical development. The Board remanded the case for referral to an appropriate Board-certified specialist for a rationalized opinion regarding whether appellant had any disability due to the accepted condition. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference.

On December 14, 2000 subsequent to the Board's October 3, 2000 decision and based on the opinion of Dr. George A. Hunter, a Board-certified orthopedic surgeon and OWCP referral physician, OWCP accepted a December 4, 1997 recurrence of disability. Appellant received retroactive wage-loss compensation to December 4, 1997 and was placed on the periodic compensation rolls. She has not returned to work.⁴

On OWCP EN1032 forms completed by appellant beginning on December 18, 2000 she reported that she was receiving SSA benefits.

³ Docket No. 99-2043 (issued October 3, 2000).

⁴ In a July 18, 2002 decision, OWCP denied appellant's claim to adjust the pay rate for compensation purposes. On July 15, 2003 an OWCP hearing representative affirmed the July 18, 2002 decision. Appellant has a separate claim, adjudicated under File No. xxxxxx609, accepted for right hip strain, aggravation of right hip arthritis, and aggravation of fibromyalgia. On January 18, 2008 OWCP granted a schedule award for 50 percent permanent impairment of the right leg under File No. xxxxxx609, which is not before the Board in the present appeal.

By letter dated February 19, 2010, OWCP advised appellant that, as she was reaching retirement age, she should notify SSA she was receiving FECA compensation benefits as her SSA retirement benefits could be subject to an offset and potentially create an overpayment. It instructed that she explain the nature and circumstances surrounding her entitlement to SSA benefits and forward a copy of the award letter. Appellant forwarded an October 7, 1999 award letter from the SSA. It indicated that her SSA claim was fully favorable, but did not include details of the basis for the decision or describe the content of the award. On November 5, 2010 OWCP again wrote appellant. It specifically advised that under section 8116(d)(2) of FECA compensation benefits would be reduced if a compensationner began receiving SSA retirement benefits based upon his or her age and federal service. OWCP noted that failure to report receipt of such retirement benefits could result in an overpayment of compensation which could be subject to recovery. Appellant was advised her to immediately contact her local district office so that the process of making any necessary adjustments to her compensation benefits could begin.

Appellant submitted a Form EN1032 on December 10, 2011 in which she indicated that she was receiving SSA benefits as part of an annuity for federal service. A handwritten note on the EN1032 form advised "PP disability." In correspondence dated January 20, 2012, OWCP asked appellant to explain the notation "PP." It advised her that she could not receive FECA compensation and SSA retirement benefits based in part on her federal service.

On EN1032 forms signed by appellant on December 2, 2013 and December 10, 2014, she noted that she was not receiving SSA as part of an annuity for federal service.

On January 30, 2015 OWCP learned that appellant had not accurately reported her SSA retirement benefits and asked SSA to forward information regarding SSA benefits with and without Federal Employees' Retirement System (FERS). On May 5, 2015 SSA advised that appellant began receiving SSA retirement benefits on August 1, 2013 indicated that beginning in August 2013 her SSA rate with FERS was \$1,173.40 and without FERS \$224.30. Beginning December 1, 2013 the SSA rate with FERS was \$1,191.00 and without FERS \$227.60, and beginning December 1, 2014 the SSA rate with FERS was \$1,211.20 and without FERS \$231.40.

Using this SSA information, OWCP found an overpayment in FECA benefits beginning August 2013 in the amount of \$876.09 every 28 days for 122 days \$3,817.26, effective December 1, 2013 in the amount of \$889.29 every 28 days for 365 days totaling approximately \$11,592.56, and effective December 1, 2014, in the amount of \$904.43 every 28 days, for a period of 515 days totaling approximately \$16,635.07. This yielded an overpayment of \$32,044.89.

On May 20, 2015 OWCP notified appellant that, based on information provided by SSA regarding the amount of her SSA benefits attributable to federal service, her FECA benefits would be adjusted effective May 31, 2015.

On June 29, 2015 OWCP issued a preliminary determination of overpayment of compensation in the amount of \$32,044.89. It explained that the overpayment had occurred because a portion of appellant's SSA benefits from August 1, 2013 to May 30, 2015, was based on her employment in the Federal Government and that this portion of her SSA benefit was a

prohibited dual benefit. OWCP found appellant at fault because she should have reasonably been aware that her SSA benefits required offset based on the language of EN1032 forms and OWCP letters dated February 19 and November 5, 2010. Appellant was provided an overpayment action request and an overpayment recovery questionnaire and (Form OWCP-20) afforded 30 days to respond.

Appellant timely requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review. She disagreed that the overpayment had occurred and with the fault determination. Appellant noted that she had another active FECA claim for which she had received a schedule award which had also created an overpayment with SSA that required repayment of \$42,000.00. She contended that her full retirement age of 66 years occurred on December 31, 2014 and she had never requested SSA retirement benefits. Appellant maintained that she had always informed OWCP correctly.⁵

At the hearing, held on November 5, 2015, counsel argued that, as appellant had not turned 65 until December 31, 2013, it was error for an offset to begin in August 2013. He further maintained that appellant was not at fault in creating the overpayment because she had always noted on EN1032 forms that she was receiving SSA benefits. Following the hearing appellant submitted an itemized listing of monthly expenses totaling \$3,093.00.

By decision dated January 21, 2016, an OWCP hearing representative finalized the preliminary overpayment determination, but modified the amount. She found that OWCP had miscalculated that portion of the overpayment for the period December 1, 2014 through May 30, 2015, indicating that it encompassed 181 days, not 515 as OWCP had previously listed on the overpayment worksheet. The hearing representative found that the overpayment for this period was \$5,846.49 rather than \$16,635.07. The new overpayment amount was \$21,256.31. She found appellant at fault because she had been put on notice by OWCP in its February 19, 2010 correspondence to report receipt of SSA retirement benefits received due to her federal service as they were subject to offset and potentially an overpayment. The hearing representative noted that appellant's monthly income was \$3,341.50, based on \$998.00 in SSA compensation and \$2,343.50 in FECA compensation with monthly expenses of \$3,093.00, and that she had assets of approximately \$137,000.00. Repayment in the amount of \$200.00 was to be deducted every 28 days from appellant's continuing compensation.

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

⁵ Appellant attached an SSA notice stating that her 2015 benefit payment would be \$1,102.90 before deductions. On an overpayment recovery questionnaire, appellant reported that her monthly income was \$4,650.90, with monthly expenses of \$3,093.00. She further noted that she had a savings account balance of \$119,059.42 and an Individual Retirement Account (IRA) of \$18,000.00. Appellant also forwarded three pages of what appeared to be an SSA decision dated January 30, 2015, in which an administrative law judge found that she was overpaid in the amount of \$42,484.00 during the period March 1, 2007 to December 31, 2013, that she was not at fault, but that, as recovery would not defeat the purpose of 20 C.F.R. § 404.508(a) and would not be against equity and good conscience pursuant to 20 C.F.R. § 404.509, she was not entitled to waiver of recovery of the overpayment. Deductions of \$75.00 were to be made from her continuing SSA compensation.

performance of duty.⁶ Section 8116 limits the right of an employee to receive compensation and provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

Section 404.409 of SSA regulations provides that for individuals born from January 2, 1943 to January 1, 1955, the full retirement age is 66 years.¹⁰

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision. The record supports that appellant received FECA wage-loss compensation beginning in 1997, and that she also received SSA disability benefits. As noted, the portion of the SSA retirement benefits attributable to her federal employment was a prohibited dual benefit.¹¹ The dual benefit was not offset until May 31, 2015.

SSA notified OWCP of the applicable SSA compensation rates for appellant and effective dates of monthly compensation for periods from August 2013 to December 2014. These included rates with and without FERS offset. Based on the rates provided by SSA, by decision dated January 21, 2016, an OWCP hearing representative calculated the dual benefit appellant received from August 1, 2013 to May 31, 2015, which yielded an overpayment of compensation in the amount of \$21,256.21. However, because neither OWCP nor SSA explained why August 1, 2013 was selected as the date FERS offset began, the case must be remanded to OWCP.

Appellant's date of birth is December 31, 1948. She reached age 62 on December 31, 2010. As noted, for an individual such as appellant, who was born from 1943 to 1954, full retirement age is reached at 66 years.¹² Appellant, thus, reached full retirement age on December 31, 2014. August 1, 2013, the date selected for the FERS offset and, therefore, when

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-9 (issued February 3, 1997).

¹⁰ 20 C.F.R. § 404.409.

¹¹ *Supra* notes 7 and 8.

¹² *Supra* note 10.

the overpayment of compensation began, does not comport with either turning 62 on December 31, 2010 or turning 66 on December 31, 2014.

Given the lack of explanation as to why this date was used to determine the period of prohibited dual payment, the Board lacks sufficient information to render an informed decision. On remand OWCP should obtain official clarification from SSA as to the FERS offset should begin, including references to appropriate SSA policies. SSA should then provide appellant's SSA rate with and without any offset from FERS.¹³ Following this and such further development deemed necessary, OWCP should issue a *de novo* decision.

Based on the Board's disposition of whether an overpayment of compensation was created, the issues of fault and recovery are moot.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant received an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: May 12, 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

¹³ See generally *E.H.*, Docket No. 16-1465 (issued December 19, 2016).