

June 28, 2014; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$2,500.00 every 28 days from appellant's continuing compensation payments.

On appeal, counsel disagrees with OWCP's calculation of the overpayment amount and finding of fault. He contends that waiver of recovery of the overpayment should be considered.

FACTUAL HISTORY

On April 23, 2002 appellant, then a 60-year-old supervisory attorney advisor, filed an occupational disease claim (Form CA-2) alleging that she had acute stress disorder and acute reactive stress disorder that were caused or aggravated by her federal employment.³ In an accompanying statement, she attributed her conditions to intense verbal abuse, hostility, fits of rage, threats, and unprofessional conduct by her subordinates. OWCP accepted appellant's claim for acute reaction to stress, irritable bowel syndrome, post-traumatic stress disorder (PTSD), and migraines. Appellant last stopped work on December 11, 2006 and has not returned.

In a Form CA-1049 letter dated December 20, 2006 OWCP informed appellant of her placement on the periodic rolls, effective December 24, 2006. It also advised her: "[y]ou must report to the OWCP any retirement income you receive from any Federal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS)." OWCP explained that if appellant was covered under FERS, "OWCP must deduct from your compensation entitlement at least part of any [s]ocial [s]ecurity [r]etirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in [s]ocial [s]ecurity retirement benefits. Therefore, advise OWCP immediately upon filing for or receiving [s]ocial [s]ecurity [r]etirement benefits." Appellant did not sign and return the Form CA-1049, but acknowledged receipt of the form in an undated letter received by OWCP on December 29, 2006 and by a telephone call on January 4, 2007.

In a July 17, 2007 letter, appellant's first counsel, Martin Kaplan, Esquire, advised the Social Security Administration (SSA) that appellant was receiving FECA compensation benefits. He noted that FECA benefits may be reduced by SSA benefits attributable to appellant's federal service. Counsel requested calculation of appellant's SSA benefits excluding her federal employment to determine if there was a potential offset.

In an OWCP Form EN1032 signed by appellant on October 25, 2007, she responded that she did not know if she had received SSA benefits as part of an annuity for federal service as SSA had refused to answer this question.

By letter dated February 12, 2008, Mr. Kaplan informed OWCP that appellant had been approved for disability retirement by the Office of Personnel Management (OPM). On February 27, 2008 appellant elected to continue to receive FECA benefits effective

³ Appellant's date of birth is May 24, 1941.

February 1, 2002. The election form noted that she understood she was not entitled to receive FECA benefits and CSRS/FERS benefits concurrently except for a schedule award.

A notification of personnel action (Form SF-50) dated January 16, 2008 indicated that appellant had voluntarily retired from the employing establishment effective January 25, 2008 and that she was covered under the FERS retirement plan.

On March 18, 2008 OPM advised OWCP that appellant had not been paid an annuity.

In a Form EN1032 signed by appellant on August 7, 2008, she indicated that she had not received SSA benefits as part of an annuity for federal service. In an August 19, 2009 Form EN1032, she indicated that she had received SSA benefits as part of an annuity for federal service since her retirement at age 65.⁴ In EN1032 forms signed by appellant on May 29, 2010, May 29, 2011, June 18, 2012, June 10, 2013, and June 3, 2014, she responded “NO” to the question whether she received benefits from SSA as part of an annuity for federal service. By signing the forms, appellant certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief. In May 5, 2010, May 18, 2011, May 30, 2012, May 1, 2013, and May 1, 2014 letters accompanying the EN1032 forms, appellant was advised that she “must report to OWCP ... any income or change in income from Federally assisted disability or benefit programs” as this information would be used to decide whether she was entitled to continue receiving these benefits or whether her benefits should be adjusted.

In facsimile (fax) transmittals dated March 6 and April 24, 2014, OWCP requested SSA to provide information regarding any dual benefits appellant may have received.

On July 8, 2014 SSA submitted a form which showed SSA rates with a FERS offset and without a FERS offset from January 2007 through December 2013.

In a letter dated June July 17, 2014, OWCP informed appellant that she had been receiving FERS/SSA dual benefits. It advised that the portion of SSA benefits earned as a federal employee was part of the FERS retirement package and the receipt of FECA benefits and federal retirement benefits concurrently was a prohibited dual benefit. Therefore, SSA benefits which were attributable to the federal service of an employee covered under FECA must be adjusted for the FERS portion of the SSA benefits and in compliance her compensation would be offset. OWCP noted that \$598.15 would be offset from her compensation every month. The record contains an OWCP worksheet showing that appellant received a \$54,341.91 overpayment of compensation for the period January 1, 2007 through June 28, 2014 due to the failure to offset SSA benefits.

By letter dated July 28, 2014, OWCP advised appellant that she should have received an enclosed letter when she approached 62 years old. It enclosed July 28, 2014 letter which noted that appellant was approaching 62 years old and informed her that FECA required a reduction in benefits if she received retirement benefits from the SSA attributable to federal service. The

⁴ The Board notes that appellant was 66 years old on January 25, 2008, the effective date of her retirement.

letter advised her to contact OWCP promptly if she had been approved or received SSA retirement benefits to avoid an overpayment of compensation.

On August 8, 2014 appellant submitted a signed appointment of representative appointing her current counsel as her representative before OWCP.

In a June 9, 2015 notice, OWCP advised appellant of its preliminary determination that she received a \$54,341.91 overpayment of compensation for the period January 1, 2007 through June 28, 2014 due to the failure to offset her FECA benefits for the SSA benefits she received. Appellant was found at fault in creating the overpayment because she had not accurately reported her receipt of SSA benefits as instructed by the December 20, 2006 CA-1049 letter and, thus, she accepted payments that she knew or reasonably should have known were incorrect. OWCP advised her that she could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, it informed her that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

By letter dated June 16, 2015, appellant, through counsel, requested a prerecoupment hearing. At the February 10, 2016 prerecoupment hearing, counsel challenged the calculation of the overpayment amount and finding of fault. He asserted that appellant was not “the same reasonable person that [he and the hearing representative should be compared to] under the circumstances” based on her accepted conditions and she was unable to understand the process due to great weights placed on her from a mental and emotional standpoint. Counsel noted appellant’s repeated assertions that she had not retired and did not accept FERS retirement benefits as she had elected to receive OWCP benefits. He related that appellant did not have an understanding of the issues in her case. Counsel contended that OWCP did not follow its procedures as it failed to send the July 28, 2014 letter to appellant when she was at or approaching age 62. He also contended that she did not understand the questions on the Form EN1032, although she accurately responded in 2009 and 2011. Thus, counsel maintained that the overpayment period should not have gone beyond 2009. He maintained that, while equally valid arguments could be made for a finding with fault and without fault, appellant should be given the benefit of the doubt.

Following the prerecoupment hearing, appellant submitted a completed Form OWCP-20 and various financial documents. On the Form OWCP-20 she reported total monthly income of \$6,471.74, which included \$1,770.00 in SSA benefits and \$4,701.74 in FECA benefits. Appellant also reported monthly expenses of \$6,406.83, which included \$1,689.06 for rent or mortgage including property tax, \$931.30 for food, \$275.00 for clothing, \$400.00 for utilities, \$166.68 for long-term care insurance, \$200.42 for auto insurance, \$200.00 for veterinarian services, \$320.00 for housecleaning services, \$150.00 for charities and gifts, \$200.00 for medicine and drugs, \$100.00 for auto repairs and fuel, \$100.00 for pet food, \$30.64 for pet health insurance, \$344.77 for a car loan, \$1,000.00 for credit cards, \$594.00 for Terminix services, \$100.00 for medical concierge fees, and \$75.00 homeowners’ insurance. She indicated the following assets: \$20.00 cash on hand, \$3,478.65 in a checking account, \$15,000.00 in a savings account, \$102,000.00 in investments, and \$5,000.00 for other personal property and other funds for a total of \$125,498.65 in assets.

By letter dated March 25, 2016, counsel contended that the overpayment amount was based on an incorrect pay rate. He noted that the overpayment amount should have been based on appellant's pay rate for a GS-14 step 3 and not a GS-13.

In a March 31, 2016 decision, an OWCP hearing representative finalized the preliminary determination that appellant received a \$54,341.91 overpayment of compensation for the period January 1, 2007 through June 28, 2014. She found that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. With respect to monthly expenses, the hearing representative found that some expenses were unreasonable or not adequately documented. She found the reasonable and documented monthly expenses were: \$1,689.06 mortgage, \$500.00 food, \$100.00 clothing, and \$300.00 utilities, \$31.00 pet food, \$100.00 pet insurance, \$225.00 household operations, supplies, furnishings, and equipment, \$100.00 gifts and charitable contributions, \$150.00 medicine, \$100.00 insurance premiums, \$100.00 automobile repairs and fuel, \$166.88 long-term health insurance premiums, \$50.00 Terminix, and \$344.77 installment debt, or \$3,957.00 per month. Appellant's monthly income was found to be \$6,475.67 based on compensation and SSA benefits. The hearing representative found that her monthly income exceeded her monthly expenses by \$2,519.00. She also noted appellant's reported assets in the amount of \$125,498.65. Consequently, the hearing representative directed repayment of the overpayment by deducting \$2,500.00 per 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 performance of duty.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 and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits.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 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 on 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. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(d); see *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); see *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

OWCP will then deduct the hypothetical benefit from the actual benefits 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.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained acute reaction to stress, irritable bowel syndrome, PTSD, and migraines while in the performance of duty. The record supports that appellant received FECA wage-loss compensation on the periodic rolls beginning December 24, 2006 and that she received SSA benefits beginning January 1, 2007. The portion of the SSA benefits she earned as a federal employee was part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.⁹ Appellant's FECA compensation was not offset until June 28, 2014. SSA notified OWCP of the applicable SSA rates for that period and their effective dates. Based on these rates, OWCP calculated the dual benefit appellant had received from January 1, 2007 to June 28, 2014, which yielded an overpayment of compensation in the amount of \$54,341.91. The record includes a detailed overpayment worksheet explaining the overpayment calculation.

Thus, the Board finds that the evidence of record supports that appellant received a \$54,341.91 overpayment of compensation for the period January 1, 2007 to June 28, 2014.

On appeal, counsel disagrees with OWCP's calculation of the overpayment amount. However, he has failed to explain how the evidence of record establishes this assertion.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹¹ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he

⁸ See *P.G.*, Docket No. 13-0589 (issued July 9, 2013).

⁹ 5 U.S.C. § 8116(d)(2); see also *R.C.*, Docket No. 14-1383 (issued December 5, 2014); see also FECA Bulletin No. 97-9 (issued February 3, 1997).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.435(a).

or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹²

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the \$54,341.91 overpayment of compensation.

The record reflects that she accepted payments covering the period January 1, 2007 to June 28, 2014 which she knew or should have known to be incorrect.¹⁴ Appellant was advised on several occasions that receipt of SSA benefits would affect her entitlement to FECA compensation, but she continued to accept full FECA benefits during the period January 1, 2007 to June 28, 2014 in addition to her SSA benefits. On December 20, 2006 a Form CA-1049 was issued notifying appellant of her placement on the periodic rolls effective December 24, 2006 and advising her of her entitlement to ongoing disability payments. The Form CA-1049 further clearly advised, “[y]ou must report to the OWCP any retirement income you receive from any [f]ederal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the CSRS or FERS.” On December 29, 2006 and January 4, 2007 appellant acknowledged receipt of the Form CA-1049. Moreover, in May 5, 2010, May 18, 2011, May 30, 2012, May 1, 2013, and May 1, 2014 letters accompanying EN1032 forms, appellant was repeatedly advised that she must inform OWCP immediately if she received benefits from federally-assisted disability or benefit programs as this would affect her benefits from OWCP.

Despite being given notice that receipt of SSA benefits would reduce her entitlement to FECA compensation, appellant continued to accept full FECA benefits during the period January 1, 2007 to June 28, 2014. In addition, she also failed to provide information which she knew or should have known to be material for a portion of the period January 1, 2007 to June 28, 2014. In EN1032 forms signed on May 29, 2010, May 29, 2011, June 18, 2012, June 10, 2013, and June 3, 2014, appellant responded “NO” to the question of whether she received benefits from the SSA as part of an annuity for federal service, despite the fact that she had received such benefits in the 15-month period preceding her signing of the form. By signing the form, appellant certified that all of the statements made in response to the questions on the form were true, complete, and correct to the best of her knowledge and belief.

¹² *Id.* at § 10.433(a); see *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹³ *Id.* at § 10.433(b).

¹⁴ *Supra* note 12.

While appellant had proffered the argument that she was of diminished mental capacity, there is no reasoned medical report of record which either diagnosed a cognitive deficit or supports this argument.

The Board thus finds appellant at fault under the third standard, as she accepted compensation which she knew she was not entitled to receive¹⁵ and, as such, recovery of the overpayment of compensation in the amount of \$54,341.91 may not be waived.

Counsel argued that OWCP procedures provide that, where equally valid arguments can be made both for without fault and with fault, the benefit of the doubt should go to the claimant.¹⁶ He contended that OWCP did not follow its procedures as it failed to send the July 28, 2014 letter regarding the offset of appellant's FECA benefits for receipt of SSA benefits she received once she reached a certain retirement age. However, even though OWCP may have been negligent in failing to send the July 28, 2014 letter to appellant, this does not excuse appellant's acceptance of compensation checks which she knew or should have been expected to know were incorrect.¹⁷

On appeal, counsel generally challenges OWCP's finding of fault and contends that waiver of recovery of the overpayment should be considered, but offered no specific argument relative to his contention.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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 his or her attention is called to the 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.”¹⁸

The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.¹⁹

¹⁵ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5 (June 2009).

¹⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁸ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁹ See *Howard R. Nahikian*, 53 ECAB 406 (2002).

ANALYSIS -- ISSUE 3

In the present case, appellant submitted a Form OWCP-20 and financial documents. The hearing representative reviewed the evidence of record. With respect to expenses, she explained that the reasonable and documented expenses were: \$1,689.06 mortgage, \$500.00 food, \$100.00 clothing, and \$300.00 utilities, \$31.00 pet food, \$100.00 pet insurance, \$225.00 household operations, supplies, furnishings, and equipment, \$100.00 gifts and charitable contributions, \$150.00 medicine, \$100.00 insurance premiums, \$100.00 automobile repairs and fuel, \$166.88 long-term health insurance premiums, \$50.00 Terminix, and \$344.77 installment debt per month, or \$3,957.00 per month. Appellant's monthly income was reported at \$6,475.67, based on compensation and SSA benefits. The hearing representative concluded that appellant could repay the overpayment by deducting \$2,500.00 per month from her continuing compensation.

The Board finds that OWCP properly considered the relevant factors under 20 C.F.R. § 10.441. OWCP procedures indicate that the hearing representative should evaluate the claimant's financial information and establish the highest reasonable rate of repayment which will collect the debt promptly and at the same time minimize any hardship to the claimant.²⁰ The hearing representative considered the financial information submitted and reasonably found the overpayment of compensation could reasonably be recovered by deducting \$2,500.00 from continuing compensation every 28 days. The Board finds that OWCP properly determined the recovery of the overpayment in this case.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,341.91 for the period January 1, 2007 to June 28, 2014. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Board also finds that OWCP properly required repayment of the overpayment by deducting \$2,500.00 every 28 days from appellant's continuing compensation payments.

²⁰ *Supra* note 16 at Chapter 6.200.4(d) (June 2009).

ORDER

IT IS HEREBY ORDERED THAT March 31, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2017
Washington, DC

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

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

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