

On appeal, appellant contends that she was falsely accused of being under the Federal Employees Retirement System (FERS) and at fault in creation of the overpayment. She further contends that her due process rights were violated by OWCP as it did not allow her to defend the overpayment because it failed to return her telephone calls to schedule a telephone conference. Appellant asserts that she acted on the advice given to her by an employing establishment personnel specialist. She also asserts that the Social Security Administration (SSA) verified that she was never under FERS and that the SSA stated that she was entitled to SSA benefits.

FACTUAL HISTORY

On May 4, 1998 appellant, then a 51-year-old personnel assistant, filed an occupational disease claim (Form CA-2) alleging that she developed anxiety, depression, and stress as a result of being harassed by coworkers and supervisors. She first became aware of the claimed condition and its relationship to her federal employment in October 1992. Appellant claimed that she involuntarily retired due to the alleged harassment.

A notification of personnel action (Form SF-50B) dated September 13, 1995 indicated that appellant retired from the employing establishment effective September 3, 1995 and she received a separation incentive payment in the amount of \$25,000.00. The form also indicated that she was covered under the Federal Insurance Contributions Act (FICA) retirement plan and partial Civil Service Retirement System (CSRS) retirement plan, with a January 27, 1970 service computation.² It listed appellant's retirement plan as Code C, applicable to those under the CSRS offset retirement plan.

On May 18, 2001 OWCP accepted appellant's claim for anxiety state, not otherwise specified, and aggravation of irritable bowel syndrome. It placed her on the daily compensation rolls and paid wage-loss compensation benefits beginning December 22, 2001. OWCP later placed her on the periodic rolls.

On an election form dated June 17, 2002, appellant elected to continue to receive FECA benefits effective July 16, 1996. The election form noted that she understood that she was not entitled to receive FECA benefits and CSRS/FERS benefits concurrently.

On August 8, 2010 OWCP accepted appellant's claim for ulcerative enterocolitis, tension headache, adjustment disorder with mixed anxiety and depressed mood, and chronic abdominal pain syndrome. It continued to pay appropriate compensation benefits.

Between June 2001 and August 2011, appellant regularly submitted Form EN1032 annual statements regarding her employment status, volunteer work, dependents, and other federal benefits received. She responded "NO" to the question of whether she received benefits from the SSA as part of an annuity for federal service in the previous 15 months. 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 letters that accompanied the EN1032 forms between June and August 2011, she was advised that she "must report to OWCP ... any income or change in income from Federally assisted disability or benefit

² FICA is a payroll tax withheld from an employee's pay to fund social security and Medicare.

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.

By letter dated September 28, 2012, the employing establishment informed OWCP that appellant was currently receiving SSA benefits and that she was under FERS. It noted that perhaps OWCP was already deducting a FERS offset. If not, the employing establishment suggested that OWCP contact the SSA to verify whether appellant was receiving benefits and if appropriate, reduce her compensation by that amount.

In a facsimile (fax) transmittal dated November 20, 2012, OWCP requested SSA to provide information regarding any dual benefits appellant may have received. On January 11, 2013 SSA submitted a form which showed SSA rates with a FERS offset and without a FERS offset from September 2008 through December 2012.

In EN1032 forms signed by appellant on August 30, 2013 and September 11, 2014, she again responded “NO” to the question of whether she received benefits from SSA as part of an annuity for federal service in the previous 15 months. In August 1, 2013 and August 1, 2014 letters accompanying the EN1032 forms, appellant was again informed that she must report to OWCP any income or change in income from federally assisted disability or benefit programs.

By letter dated August 21, 2014, the employing establishment advised appellant that she may not receive SSA and federal compensation at the same time. It noted that her employing establishment personnel file indicated that she was in FERS’s retirement pension system. The employing establishment indicated that appellant was “presently past the full SSA retirement age of 66 (age 67).” It informed her that FECA required a reduction in benefits if she received retirement benefits from the SSA attributable to federal service. OWCP requested that appellant place a checkmark by the appropriate statement to indicate whether she received SSA benefits.

On September 11, 2014 appellant responded by referencing the Form EN1032 she signed on September 11, 2014, which indicated that she had not received benefits from SSA as part of an annuity for federal service in the previous 15 months. She submitted a February 23, 1991 Form SF-50B which identified her retirement plan as FICA and CSRS.

In a September 16, 2014 memorandum, the employing establishment informed OWCP that appellant had turned 66 years old on August 18, 2012. It noted that she was currently 69 years old. The employing establishment asserted that on August 18, 2012, appellant’s SSA benefit changed from disability to old-age retirement and any SSA benefits that she was currently receiving were considered SSA retirement benefits. It requested that OWCP send a FERS questionnaire to the SSA regarding an offset of appellant’s FECA benefits.

In a fax transmittal dated October 8, 2014, OWCP again requested that SSA provide information regarding any dual benefits appellant may have received. On May 2, 2015 SSA submitted a form which indicated SSA rates with a FERS offset and without a FERS offset from September 2008 through December 2014.

By letter dated August 3, 2015, OWCP requested that appellant complete an accompanying Form EN1032.

In a September 22, 2015 memorandum, the employing establishment again informed OWCP that appellant was receiving SSA retirements benefits.

On November 16, 2015 OWCP received an EN1032 form signed by appellant on September 5, 2015, indicating that she did not work for any employing establishment for the past 15 months. She also included her CSA number. Appellant did not indicate whether she received SSA benefits as part of annuity for her federal service in the previous 15 months.

In a November 20, 2015 memorandum, the employing establishment again requested an offset of appellant's FECA benefits by her SSA retirement benefits. It noted that she had been receiving SSA retirement benefits since September 2008. The employing establishment further noted that appellant was partially covered under CSRS, but she had elected social security deductions from her federal employment salary. As such, it contended that any SSA retirement benefits she received must be offset. The employing establishment asserted that appellant's September 3, 1995 Form SF-50 confirmed her retirement plan.

In a December 4, 2015 fax transmittal and by letter dated December 17, 2015, OWCP requested that SSA provided updated information concerning dual benefits appellant may have received. On March 7, 2016 SSA submitted a form which provided SSA rates with a FERS offset and without a FERS offset from September 2008 through December 2015.

By notice dated March 23, 2016, OWCP advised appellant of its preliminary determination that she received a \$47,469.74 overpayment of compensation for the period September 1, 2008 through March 5, 2016 because she was in receipt of FECA and SSA benefits without a FERS offset amount applied to her FECA benefits for that period. It noted that the portion of SSA benefits earned as a federal employee, which is part of the FERS retirement package, and the receipt of FECA benefits concurrently was a prohibited dual benefit. Therefore, the SSA benefits which were attributable to the federal service of an employee covered under FECA must be deducted from FECA. OWCP made a preliminary determination that appellant was at fault in creating the overpayment because she did not report her receipt of SSA benefits as instructed by the Form EN1032 she signed and, thus, she accepted payments which she knew or reasonably should have known she was not entitled to receive. It advised her that she could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. OWCP also informed appellant of review options she could pursue within 30 days, including a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

On April 18, 2016 appellant requested a telephone conference. She submitted a completed Form OWCP-20 and various financial documents. On the Form OWCP-20 appellant asserted that she was not at fault in creation of the overpayment because she contacted the SSA several times and was told that her benefits would not affect her OWCP benefits. She claimed that the Form EN1032 indicated that she did not have to report SSA benefits. Appellant asserted that she was never under FERS, that she was under CSRS disability, and that it was not her intent to take something to which she was not entitled and that it was an honest misunderstanding. She maintained that she would lose everything if compelled to repay the overpayment. Appellant reported her monthly income and expenses and funds.

OWCP made several unsuccessful attempts to schedule a telephone conference with appellant. On September 6, 2016 appellant withdrew her request for a telephone conference and instead requested that OWCP issue a decision based on the record.

In a September 12, 2016 letter, appellant asserted that she did not answer a question on the Form EN1032 because it was misleading and she did not know how to answer the question. She claimed that she had been falsely accused of lying and requested waiver of recovery of the overpayment.

By decision dated October 4, 2016, OWCP finalized the preliminary determination that appellant received a \$47,469.74 overpayment of compensation for the period September 1, 2008 through March 5, 2016. It found that she was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that appellant had submitted a completed Form OWCP-20 and, after reviewing her financial situation, determined that the overpayment would be collected by withholding \$300.00 from continuing compensation payments every four weeks, beginning October 16, 2016. It indicated that she did not provide a total for her monthly expenses, that the information she provided was difficult to comprehend as it was scattered all over the page, and there was no documentation submitted to support all of her expenses.

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.³ 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.⁴

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.⁵ 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.⁶ Section 8116(d)(2) provides that the receipt of SSA benefits

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *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).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e)(2) (January 1997); Chapter 2.1000.11(a)-(b) (February 1995).

“does not affect the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained anxiety state, not otherwise specified, aggravation of irritable bowel syndrome, ulcerative enterocolitis, tension headache, adjustment disorder with mixed anxiety and depressed mood, and chronic abdominal pain syndrome while in the performance of duty. Appellant’s February 23, 1991 and September 13, 1995 SF-50B forms documented her enrollment in the CSRS-offset retirement plan.

The Board finds that appellant received an overpayment of compensation from September 1, 2008 to March 5, 2016 because she 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 FICA taxes as a federal civilian employee under the CSRS Interim/Offset system, a precursor to FERS that required contributions to both CSRS and for social security. FICA 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, 1983.⁸ Appellant received age-based SSA benefits after retirement as a result of her contributions to SSA under the CSRS interim 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 from September 1, 2008 through March 5, 2016.

Although the Board finds that the fact of overpayment has been established, the case is not in posture for decision with respect to the amount of the overpayment or the period of the overpayment. SSA provided OWCP with information regarding appellant’s rate of SSA benefits beginning September 2008 both with and without FERS. As discussed, however, the record supports that appellant was covered under the CSRS-offset retirement plan instead of FERS. It is unclear from the record whether the rates under the CSRS-offset plan are the same as the rates in the FERS plan. Therefore, the case will be remanded to OWCP to obtain additional information from SSA and the Office of Personnel Management regarding appellant’s retirement system and her SSA rate with and without any offset required based on her federal civilian service.⁹ It will then recalculate the period and amount of the overpayment. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

On appeal, appellant contends that she was not a FERS employee, but covered under CSRS. As set forth above, the case will be remanded for additional development regarding her retirement program and any benefits received.

⁷ 5 U.S.C. § 8116(d)(2).

⁸ See *A.P.*, Docket No. 12-0122 (issued May 7, 2012).

⁹ *D.B.*, Docket No. 16-1224 (issued June 23, 2017); *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

CONCLUSION

The Board finds that appellant received an overpayment of compensation, but that the case is not in posture for decision regarding the period or amount of the overpayment.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the October 4, 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.

Issued: November 3, 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

¹⁰ In view of the Board's determination regarding the amount of the overpayment, it is premature to address the issues of fault and recovery of the overpayment.