

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$72,238.79 for the period February 1, 2013 through January 31, 2016; and (2) whether OWCP properly found appellant at fault in creating the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 26, 2005 appellant, then a 59-year-old flat sorter machine operator, filed an occupational disease claim (Form CA-2) alleging that on or before January 26, 2005, repetitive heavy lifting caused a lumbar condition with right-sided radiculopathy. OWCP accepted the claim for a lumbar sprain/strain, acquired spondylolisthesis, and displacement of lumbar intervertebral disc without myelopathy. Commencing in January 2006 appellant performed limited-duty work. She stopped work on January 20, 2010 as the employing establishment could no longer accommodate her medical restrictions. OWCP paid compensation for total disability commencing March 27, 2010.

As appellant's attending physician, Dr. Roy K. Wong, opined in January 2010 that appellant was able to perform full-time sedentary duty, OWCP referred her for vocational rehabilitation services in May 2010. A vocational rehabilitation counselor identified the positions of customer complaint clerk (Department of Labor, *Dictionary of Occupational Titles* # 241.367.014) or receptionist (DOT#: 237.367.022). Both positions were classified at the sedentary physical demand level. From January 2011 to January 2012, appellant completed classes in English as a second language and computer proficiency.

OWCP paid appellant compensation for total disability on the periodic rolls commencing January 13, 2013. Appellant retired from the employing establishment effective February 1, 2013.

The employing establishment paid appellant a \$10,000.00 incentive payment at the time she retired. OWCP suspended her monetary compensation benefits from May 24 to July 30, 2013 to offset the \$10,000.00 payment.

In a Form CA-1049 letter dated April 20, 2010, OWCP notified appellant that she must report any retirement income "from any Federal [employing establishment,]" as a FECA compensation was not permitted to receive benefits under the Civil Service Retirement System (CSRS) or "certain other Federal programs." It also notified appellant that if she received or filed for social security disability benefits, she should contact the appropriate social security office about her FECA compensation. Appellant signed the form on April 23, 2010.

Appellant submitted annual affidavits of earnings and employment (Form EN1032) on January 21, 2012 and February 4, 2013, noting that she had not returned to work and had not received any Social Security Administration (SSA) benefits.

By notice dated May 20, 2013, OWCP notified appellant that it proposed to reduce her wage-loss compensation under sections 5 U.S.C. § 8016 and 5 U.S.C. § 8115, based on her ability to earn wages in the constructed position of receptionist or customer complaint clerk. A labor

market survey confirmed that entry level positions were available in her commuting area with hourly wages of \$10.00 to \$15.00.

Appellant responded by letter dated May 21, 2013, requesting that OWCP terminate her compensation benefits as she had applied to receive SSA benefits commencing February 1, 2013.

By decision dated July 2, 2013, OWCP reduced appellant's wage-loss compensation effective June 20, 2013 under 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104, based on her ability to earn \$401.35 a week in wages in the constructed position of receptionist. It found that the physical and vocational requirements of the position conformed to her medical restrictions and prior work experience. Commencing June 20, 2013, OWCP paid appellant wage-loss compensation benefits at the new rate.⁴

In a letter dated July 16, 2013, OWCP notified appellant that, if she elected to receive FECA benefits, they would be reduced by the amount of the SSA benefits paid on the basis of age and attributable to her federal service. Appellant completed an attached election letter on August 21, 2013, in which she elected to receive FECA compensation benefits in lieu of Office of Personal Management (OPM) retirement benefits effective February 1, 2013.

Appellant submitted a completed Form EN1032 on February 3, 2014. She indicated that she had not received any SSA benefits.

On February 17, 2015 OWCP requested that SSA specify the amount of any monthly benefits paid to appellant commencing February 2013 with and without the Federal Employees Retirement System (FERS) offset attributable to her federal service.

The SSA responded on May 28, 2015 with compensation entitlement amounts for appellant, as follows: commencing February 2013 she had an SSA rate of \$2,197.40 with FERS and \$606.80 without. For the remaining periods, SSA provided only the amount of the SSA rate without FERS: beginning December 2013, the rate was \$615.90; commencing January 2014, the rate was \$666.70; commencing December 2014, the rate was \$678.00; and commencing January 2015, the rate was \$690.50. SSA noted that appellant "withdrew SSA claim and was n[o]t paid after February 2013."

Appellant submitted a completed Form EN1032 on January 28, 2016. She indicated that she had not received any SSA benefits.

The SSA provided a second dual benefits calculation on July 13, 2016 with compensation entitlement amounts for appellant, as follows: commencing February 2013 she had an SSA rate of \$2,035.00 with FERS and \$69.10 without; commencing December 2013, \$2,065.50 with FERS and \$70.10 without; commencing December 2014, \$2,100.60 with FERS and \$71.20 without; and commencing December 2015, \$2,111.90 with FERS and \$71.20 without.

⁴ On July 19, 2013 appellant requested modification of the July 2, 2013 loss of wage-earning capacity determination, contending that she could not work more than 20 hours a week and that her own labor market research showed that she could not earn more than \$200.00 a week as an entry level receptionist. By decision dated October 17, 2013, OWCP denied modification, finding that the evidence of record established that she was medically and vocationally able to earn \$401.35 a week as a receptionist.

In a July 19, 2016 worksheet, OWCP calculated that appellant had been overpaid \$82,061.05 from February 1, 2013 to June 25, 2016, as it failed to offset the SSA/FERS retirement benefits from ongoing FECA benefits. It determined that, from February 1 to November 30, 2013, she received a \$19,637.40 overpayment of compensation as the SSA/FERS offset of \$1,841.91 every 28 days, had not been deducted. OWCP then determined that, from December 1, 2013 to November 30, 2014, appellant received a \$24,010.58 overpayment of compensation as the SSA/FERS offset of \$1,873.29 every 28 days had not been deducted. Finally, it calculated that, from December 1, 2015 to June 25, 2016, appellant received a \$38,413.07 overpayment of compensation, based on an SSA/FERS offset of \$1,883.72 every 28 days. OWCP totaled the three overpayments to equal \$82,061.05.

Commencing June 26, 2016, OWCP adjusted appellant's compensation to reflect a SSA/FERS benefit offset.

By notice dated July 22, 2016, OWCP advised appellant of its preliminary determination that she received an \$82,061.05 overpayment of compensation for the period February 1, 2013 to June 25, 2016 as the SSA/FERS offset was not deducted from her FECA wage-loss compensation benefits. It found that she was with fault in creating the overpayment as she was aware or reasonably should have been aware that her FECA compensation benefits should have been offset by the amount of her SSA benefits for the period at issue. OWCP requested that appellant provide information regarding her income, assets, and expenses on an enclosed overpayment recovery questionnaire (Form OWCP-20).

In response, appellant submitted an August 8, 2016 letter requesting that OWCP stop paying her monetary compensation. She stated that she would return the total amount of FECA monetary compensation benefits paid to her from February 1, 2016 to the present. Appellant submitted social security benefit statements (Form SSA-1099) demonstrating that she was paid SSA benefits as follows: \$11,913.00 in 2012; \$13,211.00 in 2013; \$13,414.80 in 2014; and \$13,642.80 in 2015. A second Form SSA-1099 for 2013 shows that she received and repaid \$10,984.50 in SSA benefits, for a net benefits amount of zero.

In an August 12, 2016 letter, appellant contended that her SSA benefits were not attributable to her federal service prior to January 2016, when she reached 70 years of age and made an election of benefits.

In an overpayment action request (Form CA-2201) signed on August 12, 2016 and received by OWCP on August 23, 2016, appellant requested a telephone conference on the issues of fault and waiver. She disagreed with the fact and amount of overpayment. Appellant submitted a partially completed overpayment recovery questionnaire (Form OWCP-20), indicating that she no longer had the overpaid compensation payments in her possession. She provided no other information regarding her assets, income, or expenses.

In a letter dated October 7, 2016, appellant acknowledged that, as of February 1, 2016, she received SSA payments "attributable to [appellant's] federal service," resulting in an overpayment. She noted that she planned to be out of the country from October 28 to November 15, 2016 and would not have access to e-mail, postal mail, or telephone service during that time. Appellant submitted an election form (Form CA-1105) electing CSRS or FERS benefits in lieu of FECA.

By notice dated March 20, 2017, OWCP advised appellant of its preliminary determination that she received a \$13,537.65 overpayment of compensation for the period February 1 to December 10, 2016 as she elected OPM benefits effective February 1, 2016, but continued to receive FECA compensation payments.

Appellant responded by letter dated April 12, 2017, contending that the alleged \$13,537.65 overpayment of compensation for the period February 1 to December 10, 2016 overlapped the period of the alleged \$82,061.65 overpayment from February 1 to June 25, 2016. She requested an accurate breakdown of the amounts and periods of both overpayments.

By decision dated April 24, 2017, OWCP finalized the March 20, 2017 notice, finding an overpayment of compensation in the amount of \$13,537.65 for the period January 2 to December 10, 2016. Appellant paid the \$13,537.65 debt by lump-sum payment.

By amended notice dated September 26, 2017, OWCP modified its July 22, 2016 preliminary notice of overpayment. It advised appellant of its preliminary determination that she received a \$72,238.79 overpayment of compensation for the period February 1, 2013 to January 31, 2016 as the SSA/FERS offset was not deducted from her FECA wage-loss compensation benefits. Utilizing the July 13, 2016 SSA calculations, OWCP calculated that she was overpaid \$19,637.40 from February 1 to November 30, 2013, \$24,010.58 from December 1, 2013 to November 30, 2014, and \$28,994.46 from December 1, 2014 to November 30, 2015.⁵ It noted that these amounts covered the period February 1, 2013 to February 6, 2016. Appellant had elected OPM benefits effective February 1, 2016 and therefore the final period of payment was manually calculated to account for the 22 days, or a prorated offset of \$403.65. Subtracting the sum of \$403.65 from calculated amount of \$72,642.44 resulted in the final overpayment amount of \$72,238.79. OWCP found that appellant was with fault in creating the overpayment as she was aware or reasonably should have been aware that her FECA compensation benefits should have been offset by the amount of her SSA benefits for the period at issue. It requested that she provide information regarding her income, assets, and expenses on an enclosed overpayment recovery questionnaire (Form OWCP-20).

Appellant responded by October 10, 2017 letters, contesting the fact and amount of the overpayment. She requested a telephone conference with OWCP on the issues of fault and possible waiver of the overpayment. Appellant did not provide financial information as requested.

OWCP attempted to telephone appellant four times on November 13, 2017 and once more on November 14, 2017. A recording allegedly indicated that she was not accepting calls at that number. OWCP noted that it would issue a final decision as it was “unable to contact [appellant] for a conference.”

By decision dated November 14, 2017, OWCP finalized the September 26, 2017 preliminary notice, finding an overpayment of compensation in the amount of \$72,238.79 for the period February 1, 2013 through January 31, 2016. Appellant was found with fault in the creation of the overpayment as she accepted payments which she knew or reasonably should have known were incorrect. OWCP directed recovery of the overpayment by lump-sum payment.

⁵ The Board observes that OWCP calculated the total overpayment of these amounts to be \$72,642.44.

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.⁶ 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.”⁷

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.⁸ If an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service. A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹

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.¹⁰ 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 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 the overpayment.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision as to whether appellant received an overpayment of compensation in the amount of \$72,283.79 for the period February 1, 2013 to January 1, 2016.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(d). *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁹ *See id.* at § 8116(a), (d); 20 C.F.R. § 10.421(a). *See also P.M.*, Docket No. 14-1832 (issued January 20, 2015).

¹⁰ 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).

¹¹ *J.G.*, Docket No. 17-0400 (issued January 12, 2018); *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

The record indicates that, while appellant was receiving compensation for total disability under FECA, she also received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹² Fact of overpayment has therefore been established. However, there is conflicting evidence of record regarding the period and amount of the overpayment.

Initially, by notice dated July 22, 2016, OWCP found that an \$82,061.05 overpayment of compensation was created for the period February 1, 2013 to June 25, 2016. The Board notes however that OWCP informed appellant on May 16, 2013 that her FECA benefits would be suspended from May 24 to July 30, 2013 to offset a \$10,000 retirement incentive payment. OWCP's overpayment calculations do not indicate whether this period of suspension of benefits was taken into account in determining the amount of the overpayment.

OWCP then found a second \$13,537.65 overpayment of compensation for the period February 1 to December 10, 2016, an interval which partially overlapped the prior period of overpayment. Appellant repaid the \$13,537.65 amount in full. OWCP thereafter issued its September 26, 2017 notice, finding a \$72,238.79 overpayment of compensation commencing February 1, 2013, but found that the period of overpayment ended on January 31 or February 6, 2016. It also did not provide a clear calculation as to the effect of appellant's \$13,537.65 repayment on the total amount of the overpayment. The Board therefore finds that the period and amount of the overpayment has thus not been established.

As the period and amount of overpayment have not been properly established, the Board will set aside the overpayment amount of \$72,283.79 and remand the case to OWCP for recalculation of the amount of overpayment.¹³ Following any further development as may be necessary, OWCP shall issue a *de novo* decision regarding the amount of the overpayment.¹⁴

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

¹³ *T.H.*, Docket No. 17-0495 (issued April 19, 2018).

¹⁴ Given the disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2017 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: August 16, 2018
Washington, DC

Christopher J. Godfrey, 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