

FACTUAL HISTORY

On June 3, 2004 appellant, then a 55-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he injured his lower back while in the performance of duty. OWCP accepted the claim for aggravation of lumbar degenerative disc disease.

Appellant stopped work on June 13, 2012 when he underwent lumbar spine surgery. By letter dated July 11, 2012, OWCP informed him that he was being placed on the periodic compensation rolls. It informed appellant of his obligations regarding completing an EN1032 form. OWCP also indicated that he must also report any retirement income, disability income, or compensation benefits from any federal agency, noting that a recipient of compensation benefits under FECA was not permitted to receive benefits under certain other federal programs, including the Civil Service retirement program. It continued that, if appellant was receiving or had filed for SSA disability benefits, he should contact his local SSA office about the award.

On an EN1032 form signed by appellant on September 29, 2015, appellant indicated that he began receiving SSA disability benefits in June 2014. He also indicated that he had not received SSA benefits as a part of a retirement annuity for federal service. On EN1032 forms signed by appellant on November 1, 2016 and September 25, 2017, appellant reported that he was receiving monthly SSA benefits of \$2,054.00 as part of an annuity for federal service.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA on October 17, 2017. SSA completed the form on October 24, 2017. It notified OWCP that appellant had received SSA age-based benefits from September 2014 through December 2017. SSA indicated that, beginning in September 2014, appellant's SSA rate with FERS was \$2,123.30 and without FERS was \$571.60. Beginning in December 2014, the SSA rate with FERS was \$2,159.30 and without FERS was \$581.30. Beginning in December 2015, the SSA rate with FERS was \$2,159.30 and without FERS was \$581.30. Beginning in December 2016, the SSA rate with FERS was \$2,165.70 and without FERS was \$583.00, and beginning in December 2017, the SSA rate with FERS was \$2,209.00 and without FERS was \$594.60.

OWCP calculated appellant's FERS offset, indicating that, for the period September 1 to November 30, 2014, appellant's monthly offset was \$1,551.70 (\$2,123.30 - \$571.60) or \$1,432.34 every 28 days, yielding a 91-day overpayment of \$4,655.10. For the period December 1, 2014 to November 30, 2016, the monthly offset was \$1,578.00 (\$2,159.30 - \$581.30) or \$1,456.62 every 28 days, yielding a 731-day overpayment of \$38,028.06. For the period December 1, 2016 to November 30, 2017, the monthly offset was \$1,582.70 (\$2,165.70 - \$583.00) or \$1,460.95 every 28 days, yielding a 365-day overpayment of \$19,044.58, and for the period December 1, 2017 to January 6, 2018, the monthly offset was \$1,614.40 (\$2,209.00 - \$594.60) or \$1,490.22 every 28 days, yielding a 37-day overpayment of \$1,969.21. The overpayment amount for the period September 1, 2014 to January 6, 2018 totaled \$63,696.95.

In correspondence dated January 23, 2018, OWCP notified appellant that, based on information provided by SSA regarding the amount of his age-based SSA benefit attributable to federal service, his FECA benefits had been adjusted effective January 7, 2018.

On January 23, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$63,696.96 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, for the period September 1, 2014 to January 6, 2018, was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. It provided appellant with an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) and afforded him 30 days to respond.

On an overpayment action request signed on February 10, 2018, appellant disagreed with the fault finding and requested that OWCP make a decision based on the written evidence. In an attached statement, he indicated that he had never received correspondence from OWCP regarding a potential overpayment issue. Appellant maintained that he was unaware of an overpayment and was not at fault. He submitted an overpayment recovery questionnaire which listed income of \$1,687.58 including monthly SSA income of \$843.33, other monthly income of \$842.93, and \$1.32 monthly from a money market account, and expenses totaling \$3,090.01. Expenses included gifts to grandchildren and appellant's church. Appellant attached a breakdown of his monthly expenses for January and February 2018 and noted an additional asset of a 401(k) retirement plan totaling \$19,819.96. He also listed additional assets including a savings account balance of \$26,084.10. Appellant included an August 2, 2013 letter from SSA which related that, beginning September 2013, it would not reduce his benefit because of workers' compensation and public disability payments, and that it did not reduce benefits for months when the disabled worker is age 65 or over.²

By decision dated March 6, 2018, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$63,696.96. It explained that the overpayment occurred because a portion of appellant's SSA benefits from September 1, 2014 through January 6, 2018 was based on credits earned while working in the Federal Government and that this portion of his SSA benefit was a prohibited dual benefit. OWCP noted that, based on the July 11, 2012 letter and EN1032 forms, he had been reasonably notified of the prohibited dual entitlement yet continued to accept SSA benefits as well as FECA benefits without FERS offset deduction. It found appellant with fault in the creation of the overpayment. OWCP noted that his monthly SSA benefit was \$2,209.00 plus \$921.05 in FECA compensation, for total monthly compensation of \$3,130.05, and that only necessary living expenses were to be considered and not such expenses as for grandchildren, church donations, cellular telephone, internet, and cable television. It indicated that appellant submitted no financial information to support his reported debts and also noted his assets. OWCP found that his monthly necessary living expenses totaled \$2,010.12, which was \$1,119.93 less than his monthly income, and set recovery at \$425.00 each 28 days from his 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

² Appellant was born in September 1948.

performance of duty.³ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁴

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any age-based SSA benefits that are attributable to federal service of the employee.⁵ FECA Bulletin No. 97-09 provides 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.⁶

Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$63,696.96.

The record supports that appellant received FECA wage-loss compensation beginning in 2012 and that he received SSA retirement benefits beginning in September 2014.⁸ The portion of the SSA benefits appellant earned as a federal employee was part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.⁹

SSA notified OWCP of the applicable SSA compensation rates for appellant and dates of monthly SSA compensation beginning in September 2014. This included rates with and without FERS offset.

Appellant's FECA compensation was not offset by his SSA retirement benefits until January 7, 2018. Based on the rates provided by SSA, by decision dated March 6, 2018, OWCP calculated a prohibited dual benefit that he received from September 1, 2014 through

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

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

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁷ 20 C.F.R. § 404.409.

⁸ The record indicates that appellant turned 66 in September 2014.

⁹ *Supra* note 6.

January 6, 2018.¹⁰ The record includes an overpayment worksheet explaining the overpayment calculation which has a minor addition error of one cent.¹¹

The Board has reviewed OWCP's calculations of the dual benefit appellant received for the period September 1, 2014 through January 6, 2018 and notes that OWCP's calculation contains a minor addition error. The Board concludes that he received a prohibited dual benefit totaling \$63,696.95 for this period, thus creating an overpayment of compensation in that amount.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."¹³

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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 in 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 or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."¹⁴

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹⁵

¹⁰ *Supra* note 7.

¹¹ OWCP found an overpayment of compensation in the amount of \$63,696.96. Adding the individual overpayment amounts for each year of compensation yields an overpayment totaling \$63,696.95.

¹² *See I.H.*, Docket No. 15-1578 (issued November 19, 2015).

¹³ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹⁴ 20 C.F.R. § 10.433(a); *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *see also* 20 C.F.R. § 10.430.

¹⁵ *Id.* at § 10.433(b); *C.Y.*, *id.*

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment for the period September 1, 2014 through July 31, 2015.

OWCP based the fault finding, under the third standard described, that appellant accepted a payment which he knew or should have known to be incorrect. In EN1032 forms signed by appellant on November 12, 2014 and November 17, 2015, he indicated that he was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as, by SSA records, he was in receipt of SSA retirement benefits effective November 1, 2014. EN1032 forms provide:

“PART D -- OTHER FEDERAL BENEFITS OR PAYMENTS

* * *

2. SSA Retirement Benefits. Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector.

a. Do you receive benefits from the SSA as part of an annuity for federal service?
Yes or No: _____”

The Board finds that appellant was aware that he received SSA and FECA benefits simultaneously. Appellant inaccurately reported that he was not receiving SSA benefits as part of a retirement annuity for federal service on EN1032 forms he signed on November 11, 2014 and November 17, 2015. Based on the clear language of the forms which he knowingly signed, he failed to provide information he knew or should have known to be material and accepted payment he knew was incorrect. The Board thus finds that appellant was at fault in the creation of an overpayment of compensation for the period September 1, 2014 through July 31, 2015.¹⁶

The Board, however, finds appellant without fault for the period beginning August 1, 2015. On EN1032 forms he signed on November 1, 2016 and September 25, 2017, appellant reported that he was receiving SSA benefits as part of an annuity for federal service. Instructions for completing an EN1032 form indicate that each statement covers the 15 months prior to the date the form is completed and signed. Thus, appellant’s signature on November 1, 2016 covered the prior 15 months, back to August 1, 2015. The record does not contain an EN1032 form signed after September 25, 2017.

As noted, to determine if 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.¹⁷

¹⁶ V.E., Docket No. 15-0340 (issued April 1, 2015).

¹⁷ 20 C.F.R. § 10.433(b); C.Y., *supra* note 14.

In this case, the language of OWCP's July 11, 2012 letter did not clearly instruct that OWCP had to deduct from appellant's FECA compensation at least part of any SSA benefits to which he would be entitled based on age. Moreover, beginning with the EN1032 form appellant signed on November 1, 2016, he reported that he was receiving SSA retirement benefits as part of an annuity for federal service. Therefore, based on the circumstances described above, he was not at fault for the period beginning August 1, 2015.

As appellant was not at fault for the period August 1, 2015 through January 6, 2018, the case will be remanded to OWCP to consider waiver of recovery of the overpayment for this period.¹⁸

Because the issue of waiver of recovery for the period August 1, 2015 to January 6, 2018 is not in posture for decision at the time, it is premature to address recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$63,696.95 for the period September 1, 2014 through January 6, 2018. The Board further finds that he was at fault for the period September 1, 2014 through July 31, 2015 and, thus, would not be entitled to waiver of recovery for this period. For the period August 1, 2015 through January 6, 2018, the Board finds that appellant was not at fault, and the case will be remanded to OWCP to consider waiver of recovery of the overpayment covering this period and to then address recovery of the overpayment.

¹⁸ See *E.M.*, Docket No. 17-1987 (issued July 25, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part as modified and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 29, 2019
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