



OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On December 5, 2006 appellant, then a 59-year-old tax examining technician, filed a traumatic injury claim (Form CA-1) alleging that on December 5, 2006 she fell from her desk chair, causing injury to her right shoulder, right knee, and the right side of her back. OWCP accepted the claim for right shoulder sprain and right rotator cuff sprain, and authorized two right shoulder arthroscopic procedures.<sup>2</sup> Effective January 20, 2017, it paid appellant wage-loss compensation for temporary total disability on the supplemental rolls. OWCP placed her on the periodic compensation rolls effective October 28, 2017.

In a letter dated November 7, 2007, OWCP advised appellant that she would continue to receive payment every 28 days until she recovered or returned to some type of work. The attached Form EN1049 advised appellant of her rights and responsibilities as a FECA benefits recipient. It noted, among other things, that she must report any retirement income, disability income, or compensation benefits from any federal agency. The notice explained that a recipient of compensation benefits under FECA was not permitted to receive benefits under certain other federal programs, including the Civil Service Retirement System.

In May 2013, appellant was eligible to receive age-related SSA retirement benefits.

In an EN1032 form signed by appellant on May 23, 2013, she checked a box marked "yes" indicating that she had received SSA benefits as part of an annuity for federal service.<sup>3</sup> She noted: "As of 5/13 SSA from work. Reached age 65." On the same form, appellant also reported that since May 2012, she had been receiving monthly SSA disability benefits in the amount of \$835.00.

Appellant continued to receive wage-loss compensation for temporary total disability on the periodic compensation rolls.

On EN1032 forms signed by appellant on May 30, 2014, June 2, 2015, May 25, 2016, and May 23, 2017, she indicated that she was not receiving SSA retirement benefits, but continued to report having received monthly SSA disability benefits.

On June 22, 2017 an SSA representative provided OWCP a FERS/SSA dual benefit calculation worksheet. The SSA representative noted that appellant was entitled to disability benefits for the period May 2009 through April 2013, for which a FERS/SSA offset did not apply. Beginning May 2013, appellant was entitled to full retirement benefits, which benefits were subject to FERS/SSA offset. The SSA representative provided corresponding monthly SSA benefits rates beginning May 2013 that both included and excluded appellant's FERS contributions. Including FERS, appellant was entitled to monthly SSA rate of \$939.90 effective

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<sup>2</sup> OWCP also initially accepted left knee sprain, but subsequently rescinded acceptance of that particular condition.

<sup>3</sup> With respect to SSA retirement benefits, the EN1032 form instructed appellant to report any benefits from SSA which she received as part of an annuity under the Federal Employees' Retirement System (FERS). The form further indicated "DO NOT" report any benefits received from the SSA on account of employment in the private sector.

May 2013, \$953.90 effective December 2013, \$955.30 effective January 2014, \$971.50 effective December 2014, \$971.50 effective December 2015, and \$974.40 effective December 2016. Without FERS, she would have been entitled to a monthly SSA rate of \$721.20 effective May 2013, \$732.00 effective December 2013, \$732.00 effective January 2014, \$744.40 effective December 2014, \$744.40 effective December 2015, and \$746.60 effective December 2016.

OWCP completed a FERS offset calculation worksheet on July 10, 2017. It determined the 28-day FERS offset amount for the days in each period, which it added to a find a total overpayment of \$11,248.35.

In a letter dated July 11, 2017, OWCP advised appellant that it was adjusting her compensation, effective July 11, 2017, to offset the portion of her SSA age-related retirement benefits attributable to her federal service. It informed her that she would receive net compensation of \$2,565.23 every 28 days.

In a preliminary overpayment determination dated October 26, 2017, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$11,248.35 because it had failed to reduce her wage-loss compensation benefits for the period May 1, 2013 to June 24, 2017 by the portion of her SSA benefits that were attributable to federal service. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. OWCP provided appellant an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that within 30 days of the date of the letter she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On November 30, 2017 appellant requested a telephone conference with OWCP and requested waiver of recovery of the overpayment. In an accompanying Form OWCP-20, she advised that she had monthly income of \$3,401.00 and monthly expenses of \$5,170.29. Appellant related that she had assets of \$43,150.00. She also submitted a portion of an EN1032 form dated May 31, 2017 where she checked a box marked "yes" indicating that she received SSA benefits.

In an EN1032 form signed by appellant on May 21, 2018, she checked a box marked "yes" that she received SSA benefits as part of an annuity for federal service. She reported receiving \$866.00 monthly.

A telephone conference was held on June 4, 2018. Appellant verified the amounts on the Form OWCP-20 and explained that she was supporting her husband who was in a nursing home.

By decision dated June 29, 2018, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$11,248.35 for the period May 1, 2013 through June 24, 2017. It also found appellant at fault, noting that she either was or should have reasonably been aware that she was not entitled to these dual benefits without an offset. OWCP noted that she submitted several EN1032 forms dating back at least to 2014 wherein she certified her understanding that she must report monies or income from federally-assisted disability or benefits programs. It further noted that on appellant's most recent EN1032, dated May 23, 2017, she indicated that she was not receiving benefits from SSA as part of an annuity for

federal service. Because appellant was at fault in creating the overpayment, it was determined that she was not eligible for waiver of recovery of the overpayment. OWCP further advised her that it would recover the overpayment by deducting \$100.00 every 28 days from her continuing wage-loss compensation payments.

### **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 his or her duty.<sup>4</sup> 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.<sup>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.<sup>6</sup> FECA Bulletin No. 97-09 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.<sup>7</sup>

Section 404.310 of SSA's regulations provides that entitlement to SSA compensation begins at 62 years.<sup>8</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,248.35 for the period May 1, 2013 through June 24, 2017.

The record supports that appellant received FECA wage-loss compensation for total disability beginning in January 2007, and that she received SSA age-related retirement benefits beginning in May 2013. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.<sup>10</sup> The information provided by SSA indicated that appellant received age-related SSA benefits that were attributable to her federal service beginning May 1, 2013. As OWCP neglected to offset her

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> 20 C.F.R. § 404.310.

<sup>9</sup> *Id.* at § 404.409.

<sup>10</sup> *Supra* note 7; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

FECA benefits for the period May 1, 2013 through June 24, 2017, she received an overpayment of wage-loss compensation.<sup>11</sup>

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rate with FERS and without FERS for specific periods from May 1, 2013 through June 24, 2017.<sup>12</sup> OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$11,248.35, creating an overpayment of compensation in that amount, for the period from May 1, 2013 through June 24, 2017.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that an overpayment of 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 be against equity and good conscience."<sup>13</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>14</sup>

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

"[M]ay consider waiving an overpayment of compensation 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 benefit. 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; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

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<sup>11</sup> *Id.*

<sup>12</sup> The SSA worksheet provided applicable rates effective the following dates: May 1 and December 1, 2013, January 1 and December 1, 2014, December 1, 2015, and December 1, 2016.

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

<sup>14</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”<sup>15</sup>

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.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP has not established that appellant was at fault in the creation of the overpayment for the period May 1, 2013 through June 24, 2017. OWCP found her at fault because she accepted a payment which she knew or should have known was incorrect.

SSA advised OWCP that appellant had been eligible for SSA disability benefits through April 2013, and in May 2013 she became eligible for full retirement benefits. In her May 23, 2013 EN1032, appellant advised OWCP that she was receiving age-related SSA benefits and that she had also been receiving monthly SSA disability benefits in the amount of \$835.00. In subsequent years appellant noted on her EN1032 that she was not receiving SSA retirement benefits, but continued to report receiving monthly SSA disability benefits. It is not entirely clear from the record whether she fully appreciated that the monthly SSA benefits she continued to receive were no longer based on her disability, but were instead age-related retirement benefits. Appellant consistently reported her SSA income, but under the wrong section of the EN1032.

Based on the June 22, 2017 FERS/SSA dual benefit calculation information provided by SSA, more than 75 percent of appellant’s monthly SSA age-related retirement benefit was attributable to earnings apart from her federal service. Over the six-year period of the overpayment, OWCP calculated a 28-day FERS offset between \$201.88 and \$210.28. While this amount is not miniscule, it begs the question of whether appellant would have reasonably known that she was being overpaid approximately \$200.00 every 28 days, which represented about 7.5 percent of her net FECA wage-loss compensation.

The FECA Procedure Manual identifies a dual benefits scenario where the claimant receives SSA benefits as part of an annuity under FERS as the type of circumstance where the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.<sup>17</sup> Under the circumstances, the Board finds that OWCP has not sufficiently explained how appellant’s various EN1032 forms dating back to May 2013 established that she knew or should have known that she was receiving wage-loss compensation benefits without an appropriate

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<sup>15</sup> 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.

<sup>16</sup> *Id.* at § 10.433(b).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

offset due to her SSA retirement benefits.<sup>18</sup> As noted, to determine if an individual was at fault in 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.<sup>19</sup> Therefore, based on the circumstances described above, OWCP has not established that appellant was at fault in the creation of the overpayment for the period May 1, 2013 through June 24, 2017.<sup>20</sup>

As appellant was not at fault in the creation of the overpayment for the period May 1, 2013 through June 24, 2017, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment. Because the issue of waiver of recovery is not in posture for decision, it is premature to address whether OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$11,248.35 for the period May 1, 2013 through June 24, 2017. The Board further finds that she was not at fault in the creation of the overpayment during the above-noted period of compensation and that the case will be remanded to OWCP to consider waiver of recovery of the overpayment.

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

<sup>19</sup> *Supra* note 16.

<sup>20</sup> See *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 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: July 11, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board