

age-based benefits while also receiving FECA benefits for the period March 1, 2012 through March 31, 2018; (2) whether OWCP properly found appellant at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On October 18, 2004 appellant, then a 54-year old respiratory therapy supervisor, filed a traumatic injury claim (Form CA-1) , alleging that on that day she experienced right shoulder and left neck pain while reaching to adjust oxygen equipment while in the performance of duty. OWCP adjudicated the claim under File No. xxxxxx700 and accepted right shoulder strain, cervical strain, left rotator cuff tear, left shoulder bursitis, and post-traumatic stress disorder (PTSD). Appellant stopped work on the date of injury and returned to limited-duty work on November 13, 2004.³

On March 22, 2005 appellant filed an occupational disease claim (Form CA-2), alleging that her work duties caused neck pain. OWCP adjudicated the claim under File No. xxxxxx585 and accepted sprain/strain of right shoulder, sprain/strain of neck, and tendinitis of right shoulder. Appellant was off work intermittently until July 26, 2006 when she underwent an authorized right shoulder acromioplasty with rotator cuff repair and was off work continuously thereafter. She returned to limited-duty work on September 11, 2006.⁴

Appellant stopped work again completely on December 12, 2008. OWCP paid her wage-loss compensation on the supplemental rolls until August 29, 2010 when she began receiving compensation on the periodic compensation rolls.

In letters dated January 27 and February 2, 2012, OWCP informed appellant that her FECA benefits would be reduced by the amount of SSA retirement benefits received based on age and federal service.

On EN1032 forms signed by appellant on February 10, 2014, February 14, 2015, February 23, 2016, February 27, 2017, February 23, 2018, and February 20, 2019, she indicated that she was not receiving SSA benefits as part of an annuity for federal service. The EN1032 forms signed by appellant provided: "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 SSA on account of employment in the private sector." On the form signed on February 23, 2018 she indicated that she was not receiving SSA benefits as part of an annuity for federal service, but was instead receiving SSA retirement benefits.

³ On August 9, 2004 appellant filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2004 she injured her right shoulder while attempting to keep equipment from falling. OWCP administratively approved the claim for limited medical expenses. That claim, assigned File No. xxxxxx984, was never formally adjudicated by OWCP. Appellant stopped work on the date-of-injury and returned to limited-duty work on October 16, 2004.

⁴ OWCP administratively combined OWCP File Nos. xxxxxx700, xxxxxx984, and xxxxxx585 on November 7, 2007, with OWCP File No. xxxxxx700 serving as the master file.

On April 6, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated: beginning in March 2012, appellant's SSA rate with FERS was \$1,385.20 and without FERS \$1,155.50; beginning in December 2012, her SSA rate with FERS was \$1,408.70 and without FERS was \$1,175.10; beginning in December 2013, her SSA rate with FERS was \$1,429.90 and without FERS was \$1,192.70; beginning in December 2014, her SSA rate with FERS was \$1,454.10 and without FERS was \$1,212.90; beginning in February 2016, her SSA rate with FERS was \$2,060.60 and without FERS was \$1,608.30; beginning in December 2016, her SSA rate with FERS was \$2,066.70 and without FERS was \$1,613.10; and beginning in December 2017, her SSA rate with FERS was \$2,108.00 and without FERS was \$1,645.30.

By letter dated April 13, 2018, OWCP notified appellant that based on information provided by SSA regarding the amount her SSA age-based benefits were attributable to federal service, her FECA wage-loss compensation had been adjusted, and that an overpayment of compensation could exist.

On May 23, 2018 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$22,979.73 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-based benefits that she received from March 1, 2012 through March 31, 2018 were based on credits earned while working in the federal government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found appellant at fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for her completion.⁵ It explained its calculation of the overpayment, informed appellant of the actions she could take, and allotted 30 days for her to respond.

On an unsigned overpayment action request forwarded to OWCP on June 19, 2018, along with an overpayment questionnaire, appellant requested that OWCP make a decision based on the written evidence. In an attached statement, she noted disagreement with the fault finding, indicating that at a meeting with SSA, she was not informed that she had to report her SSA retirement benefit to OWCP. On the overpayment questionnaire, signed by appellant on May 14, 2018, she reported SSA income of \$1,974.00. Reported expenses totaled \$1,658.76. Appellant attached financial information including bank statements, utility bills, credit card bills, and medical bills. She maintained that OWCP did not pay for treatment for her accepted PTSD.

By decision dated August 30, 2018, OWCP finalized the preliminary determination of a \$22,979.73 overpayment of compensation. It determined that appellant was at fault in the creation of the overpayment and, therefore, she was not entitled to waiver of recovery of the overpayment. OWCP required recovery by deducting \$300.00 every 28 days from her continuing FECA compensation.

⁵ OWCP explained that she was to attach documents to the overpayment recovery questionnaire including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

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 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.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁸ 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.⁹

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.¹⁰ Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$22,979.73.

In its August 30, 2018 decision, OWCP found that an overpayment of compensation was created for the period March 1, 2012 through March 31, 2018. The overpayment was based on the evidence received from SSA with respect to age-based benefits paid to appellant. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹² The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period March 1, 2012 through March 31, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

⁹ FECA Bulletin No. 97-09 (February 3, 1997).

¹⁰ 20 C.F.R. § 404.310.

¹¹ *Id.* at § 404.409.

¹² *See E.K.*, *supra* note 8.

federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing March 1, 2012 through March 31, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2012 through March 31, 2018 and finds that an overpayment of compensation in the amount of \$22,979.73 was created.¹³

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."¹⁴

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; or (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)."¹⁵

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.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment thereby precluding waiver of the recovery of the overpayment.

¹³ See *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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

¹⁵ 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.

¹⁶ 20 C.F.R. § 10.433(b); *C.Y.*, *id.*

OWCP found appellant at fault based on the fact that she accepted a payment which she knew or should have known to be incorrect.

In letters dated January 27 and February 2, 2012, OWCP informed appellant that her FECA benefits would be reduced by receipt of SSA retirement benefits based on age and federal service. Appellant signed EN1032 forms on February 10, 2014, February 14, 2015, February 23, 2016, February 27, 2017, and February 23, 2018, wherein she indicated that she was not receiving SSA benefits as part of an annuity for federal service. The EN1032 forms signed by appellant provided: “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 SSA on account of employment in the private sector.” Despite being given notice on January 27 and February 2, 2012 that receipt of SSA benefits would reduce her entitlement to FECA compensation, appellant continued to accept full wage-loss compensation without an appropriate offset from March 1, 2012 through March 31, 2018 which she knew or should have known was incorrect.¹⁷ Moreover, based on the clear language of the EN1032 forms which she knowingly signed, she failed to provide information she knew or should have known to be material and accepted payment she knew was incorrect.¹⁸ As such, she is not entitled to waiver of recovery of the overpayment.¹⁹

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP’s regulations provides that 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 hardship.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$300.00 every 28 days from appellant’s continuing compensation payments.

The record indicates that appellant’s monthly income from SSA and FECA exceeds her reported monthly expenses by approximately \$3,400.00. OWCP therefore did not abuse its discretion in requiring recovery of the overpayment at the rate of \$300.00 every 28 days from her continuing compensation payments.²¹

¹⁷ See *G.C.*, Docket No. 18-1062 (issued December 4, 2018).

¹⁸ See *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁹ *L.L.*, *supra* note 13.

²⁰ 20 C.F.R. § 10.441; see *E.K.*, *supra* note 8.

²¹ *G.K.*, Docket No. 18-0243 (issued August 17, 2018).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$22,979.73 because she concurrently received SSA benefits while also receiving FECA benefits for the period March 1, 2012 through March 31, 2018. The Board further finds that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment, and that OWCP properly required recovery by deducting \$300.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2019
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