

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$102,330.08 because she concurrently received Social Security Administration (SSA) age-based benefits while also receiving FECA benefits for the period March 1, 2003 through April 28, 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 \$800.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On December 16, 1994 appellant, then a 53-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that she injured the right side of her lower back on December 8, 1994 assisting a patient while in the performance of duty. She stopped work on December 11, 1994 and returned to work on December 13, 1994.

Appellant underwent anterior cervical discectomy at C4-5 on May 8, 1995. On July 17, 1995 OWCP accepted the claim for herniated disc at C4-6 with myelopathy. It paid appellant retroactive wage-loss compensation effective January 23, 1995.

On February 22, 2005 appellant returned to a part-time modified position for four hours daily as a program assistant. By decision dated August 10, 2005, OWCP determined that her modified work fairly and reasonably represented her loss of wage-earning capacity (LWEC) and reduced her compensation accordingly. Appellant continued to work until October 7, 2011, and she continued to receive LWEC wage-loss compensation thereafter.

On EN1032 forms dated March 6, 2003, January 10, 2006, February 6, 2007, and then yearly through February 12, 2018, each of which was signed by appellant, she indicated that she was not receiving SSA benefits as part of an annuity for federal service. On an EN1032 form dated January 30, 2004, she indicated that she was receiving SSA benefits as part of an annuity for federal service.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the January 23, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

On April 25, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form set forth the SSA compensation based upon her rate without FERS and with FERS from March 2003 through December 2017.⁴

In a letter dated May 16, 2018, OWCP notified appellant that, based on information provided by SSA regarding the amount that her SSA age-based benefit was attributable to federal service, her FECA wage-loss compensation had been adjusted.

On June 20, 2018 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$102,330.08 had been created. It explained that the overpayment occurred because portions of appellant's SSA age-based benefits that she received from March 1, 2003 through April 28, 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 (OWCP-20).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 July 18, 2018 appellant requested a prerecoupment hearing with OWCP's Branch of Hearings and Review. She indicated that she disagreed that the overpayment occurred, disagreed that she was at fault in its creation, and requested waiver of recovery of the overpayment.

At the hearing, held telephonically on November 28, 2018, counsel asserted that it was an error to find appellant at fault. Appellant testified that she had not understood the reporting requirements and maintained that, since OWCP had not declared an overpayment for 15 years, she

⁴ The form indicated that beginning in March 2003, appellant's SSA rate with FERS was \$527.40 and without FERS \$348.60; beginning in November 2003, her rate with FERS was \$669.50 and without FERS \$348.60; beginning December 2003, her SSA rate with FERS was \$683.50 and without FERS \$355.80; beginning in December 2004, her SSA rate with FERS was \$702.00 and without FERS \$365.40; beginning in December 2005, her SSA rate with FERS was \$730.60 and without FERS \$380.40; beginning in January 2006, her SSA rate with FERS was \$730.90 and without FERS \$380.40; beginning in October 2006, her SSA rate with FERS was \$906.50 and without FERS \$380.40; beginning in December 2006, her SSA rate with FERS was \$936.40 and without FERS \$392.80; beginning in January 2007, her SSA rate with FERS was \$942.60 and without FERS \$392.80; beginning in December 2007, her SSA rate with FERS was \$964.30 and without FERS \$401.90; beginning in January 2008, her SSA rate with FERS was \$971.10 and without FERS \$401.90; beginning in December 2008, her SSA rate with FERS was \$1,027.30 and without FERS \$425.10; beginning in January 2009, her SSA rate with FERS was \$1,034.60 and without FERS \$425.10; beginning in January 2010, her SSA rate with FERS was \$1,042.40 and without FERS \$425.10; beginning in January 2011, her SSA rate with FERS was \$1,050.20 and without FERS \$425.10; beginning in December 2011, her SSA rate with FERS was \$1,088.00 and without FERS \$440.40; beginning in January 2012, her SSA rate with FERS was \$1,094.10 and without FERS \$440.40; beginning in December 2012, her SSA rate with FERS was \$1,112.60 and without FERS \$447.90; beginning in December 2013, her SSA rate with FERS was \$1,129.30 and without FERS \$454.60; beginning in December 2014, her SSA rate with FERS was \$1,148.40 and without FERS \$462.30; beginning in December 2015, her SSA rate with FERS was \$1,148.40 and without FERS \$462.30; beginning in December 2016, her SSA rate with FERS was \$1,151.90 and without FERS \$463.60; and beginning in December 2017, her SSA rate with FERS was \$1,174.90 and without FERS \$472.90.

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.

should not have to repay it. The record was held open for 30 days for appellant to submit an OWCP-20.

On December 14, 2014 appellant submitted an OWCP-20. She listed monthly income of \$2,830.17 and monthly expenses of \$1,804.83,⁶ and attached financial information including a FECA benefit statement, credit card statements, utility bills, and bank statements.

By decision dated January 23, 2019, an OWCP hearing representative finalized the overpayment determination. The hearing representative referenced section 8116(d)(2) of FECA and found that appellant received an overpayment of compensation in the amount of \$102,330.08 because she received a prohibited benefit from SSA while she concurrently received FECA compensation. He found appellant at fault because she answered “no” on EN1032 forms, which she signed, when asked if she received SSA as part of an annuity for federal service. As such, appellant was not entitled to waiver of recovery of the overpayment. The hearing representative converted appellant’s reported monthly FECA benefit to reflect its 28-day cycle and reviewed her reported expenses and the financial information she submitted in determining her monthly expenses. He found that her reported monthly income of \$3,112.00 exceeded her allowable monthly expenses of \$2,024.00, and set repayment at \$800.00 per compensation period.

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.⁷ Section 8116 limits the right of an employee to receive compensation providing that while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁸ Section 8116(d)(2) specifically provides that disability or death payments paid under FECA are to be reduced by the amount of any SSA age-related benefits paid that are attributable to the employee’s federal service.⁹

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.¹⁰ FECA Bulletin No. 97-9 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.¹¹

⁶ This included \$1,788.17 in FECA benefits and \$1,042.00 in SSA benefits.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 5 U.S.C. § 8116(d)(2).

¹⁰ 20 C.F.R. § 10.421(d); *see J.T.*, Docket No. 18-1791 (issued May 17, 2019).

¹¹ FECA Bulletin No. 97-9 (issued February 3, 1997).

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.¹² Section 404.409 of SSA regulations provides that for individuals born in 1941, full retirement age is 65 years 8 months.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$102,330.08 for the period March 1, 2003 through April 28, 2018.

In its January 23, 2019 decision, OWCP found that an overpayment of compensation was created for the period March 1, 2003 through April 28, 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 FECA compensation for wage loss and SSA age-based benefits attributable to federal service for the same period.¹⁴ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period March 1, 2003 through April 28, 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 federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing March 1, 2003 through April 28, 2018. OWCP provided its calculations for each relevant period based on an SSA worksheet and in its June 20, 2018 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2003 through April 28, 2018 and finds that an overpayment of compensation in the amount of \$102,330.08 was created.¹⁵

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."¹⁶

¹² 20 C.F.R. § 404.310.

¹³ *Id.* at § 404.409.

¹⁴ 5 U.S.C. § 8116(d)(2); *see J.T.*, *supra* note 9.

¹⁵ *See L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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

On the issue of fault, section 10.433(a) of OWCP's regulations provides that an individual is at fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁷ With respect to whether an individual is not at fault, section 10.433(b) provides that whether or not OWCP determines that 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.¹⁸

Section 6.300.4g(4) of OWCP's procedures provides that if a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, in such a case, 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.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not established that appellant was at fault in the creation of the overpayment of compensation.

OWCP found appellant at fault because she accepted a payment which she knew or should have known was incorrect. Based on the April 25, 2018 FERS/SSA dual benefit calculation information provided by SSA, a portion of appellant's monthly SSA age-related retirement benefit was attributable to her federal earnings. Over the approximately 15-year period of the overpayment, OWCP calculated a 28-day FERS offset between \$165.05 and \$648.00 in finding an overpayment of compensation in the amount of \$102,330.08 for the period March 1, 2003 through April 28, 2018.

As noted, OWCP's procedures indicate that where the claimant receives SSA benefits as part of an annuity under FERS, it is the type of circumstance where the claim should be found without fault for the receipt of dual benefits unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits received concurrently with FECA compensation was prohibited.²⁰

Herein, it was not until correspondence dated May 16, 2018 that OWCP provided clear notification to appellant that she had been receiving prohibited dual benefits and her FECA compensation would be adjusted. It provided an explanation that the portion of SSA benefits

¹⁷ 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹⁸ *Id.* at § 10.433(b); *C.L.*, *id.*

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2018).

²⁰ *Id.*

which were attributed to her federal service required an offset of her FECA compensation per section 10.421(d) of its regulations. This was shortly before the June 20, 2018 preliminary overpayment determination which notified appellant that she had received prohibited dual FECA and SSA benefits for the period March 1, 2003 through April 28, 2018. Otherwise, the record only contains a number of EN1032 forms in which appellant indicated that she was not in receipt of SSA benefits as part of an annuity for federal service. Appellant received no clear notification prior to the May 16, 2018 correspondence.

Under the circumstances of this case, the Board finds that OWCP has not sufficiently explained how appellant's various EN1032 forms dating back to 2003 established that she knew or should have known that she was receiving FECA compensation benefits without an appropriate offset due to her SSA retirement benefits.²¹ 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.²² Therefore, based on the circumstances described above, OWCP has not established that appellant was at fault in the creation of the overpayment of compensation for the period March 1, 2003 through April 28, 2018.²³

As appellant has not been found to be at fault in the creation of the overpayment at issue in this case, this 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 making periodic deductions of \$800.00 from appellant's continuing FECA compensation payments.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$102,330.98 for the period March 1, 2003 through April 28, 2018. The Board further finds that she was not at fault in the creation of the overpayment, and the case will be remanded to OWCP for it to consider waiver of recovery of the overpayment.

²¹ *B.M.*, Docket No. 19-0158 (issued July 11, 2019).

²² *Supra* note 17.

²³ *B.M.*, *supra* note 21. The Board also notes that, as written on EN1032 forms, each form covers the preceding 15 months. The last EN1032 dated prior to the final overpayment decision dated January 23, 2019 was dated February 12, 2018. It, therefore, did not cover the period of the overpayment of compensation from February 12 through April 28, 2018.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part, reversed in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board