

ISSUES

The issues are: (1) whether appellant received a \$48,649.60 overpayment of compensation for the period January 1, 2012 through February 3, 2018 because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits; (2) whether OWCP properly found appellant at fault in the creation of the overpayment and thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$450.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On July 23, 1994 appellant, then a 48-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained stress, anxiety, and depression causally related to factors of her federal employment. She stopped work on June 24, 1994. OWCP accepted appellant's claim for post-traumatic stress disorder (PTSD) and a single episode of moderate-to-severe major depression. OWCP paid her wage-loss compensation for total disability.

By decision dated September 30, 1999, OWCP reduced appellant's wage-loss compensation as her actual earnings as a modified mail handler, effective March 1, 1999, fairly and reasonably represented her wage-earning capacity.⁴

The employing establishment subsequently withdrew appellant's modified position under the National Reassessment Program (NRP). On April 18, 2011 OWCP modified the September 30, 1999 decision and paid her wage-loss compensation for total disability on the periodic rolls beginning April 10, 2011.

In EN1032 forms signed February 4, 2012, February 7, and March 25, 2013, and February 6, 2014, appellant indicated that she was not receiving SSA retirement benefits as part of an annuity for federal service.

In EN1032 forms dated February 12, 2015, February 3, 2016, February 22, 2017, and February 6, 2018, appellant advised that she received SSA benefits as part of an annuity for federal service and indicated the monthly amount of her benefits.

On March 28, 2017 SSA provided OWCP with a FERS/SSA dual benefit calculation worksheet setting forth her SSA rate with FERS and her hypothetical rate without FERS from January 2012 through the present. With FERS, her SSA rate was \$1,399.90 effective January 2012, \$1,423.60 effective December 2012, \$1,444.90 effective December 2013, \$1,469.40 effective December 2014 and December 2015, and \$1,473.80 effective December 2016. Without FERS, appellant's SSA rate was \$759.10 effective January 2012, \$772.00 effective December 2012, \$783.50 effective December 2013, \$796.80 effective December 2014 and December 2015, and \$799.10 effective December 2016.

OWCP completed a FERS offset calculation form on February 7, 2018. It calculated the amount that it should have offset from appellant's wage-loss compensation from January 10, 2012

⁴ In decisions dated 1999 and 2000, OWCP denied appellant's claim for intermittent wage-loss for various periods of disability.

through February 3, 2018. OWCP found that effective January 1, 2012, the monthly offset was \$640.80 (\$1,399.90-\$759.10), or \$591.51 every 28 days, effective December 1, 2013, the monthly offset was \$651.60 (\$1,423.60 - \$772.00), or \$601.48 every 28 days, effective December 1, 2014 and 2015, the monthly offset was \$672.60 (\$1,469.40-\$796.80) or \$620.86 every 28 days, and effective December 1, 2016 the monthly offset was \$674.70 (\$1,473.80-\$799.10), or \$622.80 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from January 1, 2012 to December 1, 2016, to find the amount that it overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset \$48,649.60 from her wage-loss compensation.

In a preliminary overpayment determination dated February 22, 2018, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$48,649.60 because it had failed to reduce her wage-loss compensation benefits for the period January 1, 2012 through February 3, 2018 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 had accepted payments that she knew or reasonably should have known to be incorrect. OWCP provided appellant with 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 prerecoumment hearing.

On March 12, 2018 appellant requested a telephonic prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. In an accompanying Form OWCP-20, she advised that she had monthly income of \$4,008.11 and monthly expenses of \$5,030.68. Appellant related that she had assets of \$53.20. She asserted that she had received disability benefits from SSA until February 1, 2011 when she turned 65 years old. Appellant indicated that she had reported her SSA income to OWCP.

A telephonic prerecoumment hearing was held on August 14, 2018. Appellant related that SSA advised her on August 10, 2010 that it was reducing her benefits due to her receipt of workers' compensation. On December 29, 2011 it advised her that her benefits had increased as she had reached the age of full retirement. Appellant applied for disability retirement in 2013, and provided her Civil Service Annuity (CSA) number on subsequent EN1032 forms. Appellant's representative maintained that she had completed the EN1032s, which were updated in 2015 and 2018, to the best of her ability.

By decision dated November 23, 2018, OWCP's hearing representative found that appellant had received a \$48,649.60 overpayment of compensation as she received wage-loss compensation from OWCP from January 1, 2012 through February 3, 2016⁵ without an appropriate offset. She further found that she was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment. The hearing representative determined that the overpayment would be recovered by withholding \$450.00 every 28 days from appellant's continuing compensation payments.

⁵ The Board notes that OWCP's hearing representative likely made a typographical error by using the date February 3, 2018 rather than February 3, 2016.

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.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 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.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's 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 \$48,649.60 for the period January 1, 2012 through February 3, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

OWCP paid appellant wage-loss compensation for total disability following her injury. It subsequently paid her wage-loss compensation for partial disability based on her loss of wage-earning capacity effective March 1, 1999, and again for total disability beginning April 10, 2011. Beginning January 1, 2012, appellant received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹² The information provided by SSA indicated that a portion of appellant's age-related SSA benefits were attributable to her federal service. As OWCP neglected to offset her FECA benefits for the period January 1, 2012 to February 3, 2018, she received an overpayment of wage-loss compensation.¹³

⁶ 5 U.S.C. § 8102.

⁷ *Id.* at § 8116.

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

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹⁰ 20 C.F.R. § 404.310.

¹¹ *Id.* at § 404.409.

¹² *Supra* note 10; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹³ *Id.*

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. SSA provided appellant's SSA rate with FERS and without FERS for specific periods beginning January 1, 2012.¹⁴ 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 \$48,649.60, creating an overpayment of compensation in that amount.¹⁵

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) provides: "Adjustment or recovery by the United States may not be made when 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 A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁷ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.¹⁸

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide 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.¹⁹

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 January 1, 2012 through February 3, 2018.

OWCP determined that appellant was at fault in the creation of the overpayment as she accepted a payment that she knew or should have known was incorrect. It must thus establish that,

¹⁴ SSA's worksheet provided applicable rates effective the following dates: January 2012, December 2012, December 2013, December 2014, December 2015, and December 2016.

¹⁵ A.S., Docket No. 19-0171 (issued June 12, 2019).

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ See C.Y., Docket No. 18-0263 (issued September 14, 2018).

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *Id.* at § 10.433(b); see also D.M., Docket No. 17-0983 (issued August 3, 2018).

at the time she received the compensation in question, she knew or should have known that the payment was inaccurate.²⁰

Appellant advised that she had been eligible for disability benefits from SSA prior to receiving age-related benefits and that she had applied for retirement benefits in 2013. She maintained that after she received a CSA number, she provided it on subsequent EN1032 forms. In EN1032 forms dated February 4, 2012, February and March 2013, and February 6, 2014, appellant indicated that she was not receiving SSA retirement benefits. In EN1032 forms dated February 12, 2015, February 3, 2016, February 22, 2017, and February 6, 2018, she advised that she received SSA benefits as part of an annuity for federal service.

Effective September 2018, OWCP's procedures provide that a claimant should be found without fault in a dual benefits scenario where the claimant receives SSA benefits as part of an annuity under FERS 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.²¹ The Board finds that OWCP has not sufficiently explained how the completed EN1032 forms established that appellant knew or should have known that she was receiving wage-loss compensation benefits without an appropriate offset due to her SSA retirement benefits.²² 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 January 1, 2012 through February 3, 2018.²³

As the Board finds that appellant was without fault in the creation of the overpayment for the period February 1, 2012 through February 3, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$48,649.60 for the period January 1, 2012 to February 3, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits. The Board further finds that she was without fault in the creation of the overpayment during the above-noted period and that the case will be remanded to OWCP to consider waiver of recovery of the overpayment.

²⁰ See *G.D.*, Docket No. 18-0510 (issued August 6, 2018); *E.M.*, Docket No. 17-1987 (issued July 25, 2018).

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g (4) (September 2018).

²² *B.M.*, Docket No. 19-0158 (issued July 11, 2019).

²³ See *B.M.*, *id.*

²⁴ In light of the disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 29, 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