

concurrently received FECA benefits and age-related retirement benefits from the Social Security Administration (SSA) without appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$278.55 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 22, 2010 appellant, then a 78-year-old tax examining technician, filed a traumatic injury claim (Form CA-1) alleging that on November 10, 2010 she tripped and fell over a cord injuring her ankle, foot, and wrist while in the performance of duty. She stopped work on the date of injury. Appellant received continuation of pay from November 11 through December 25, 2010. On January 14, 2011 OWCP accepted her claim for left muscle spasm. On February 15, 2011 it expanded acceptance of appellant's claim to include left ankle sprain and left foot tenosynovitis. On May 3, 2011 appellant returned to work for two hours a day, two days a week. On November 16, 2011 OWCP expanded acceptance of her claim to include edema, effusion of the left lower leg, and left tarsal tunnel syndrome. It paid appellant wage-loss compensation on the supplemental rolls as of December 26, 2010.

In a letter dated January 25, 2012, OWCP informed appellant that she was placed on the periodic compensation rolls effective January 15, 2012 and notified her of her obligations regarding completing an EN1032 form which required the reporting of retirement income, disability income, and/or compensation benefits she received from any federal agency.

In a February 3, 2012 telephone memorandum (Form CA-110), OWCP's claims examiner noted that appellant reported that she had been receiving SSA benefits for years. She informed appellant that she was not entitled to receive SSA age-related benefits and FECA wage-loss compensation for the same period and that an offset of benefits would be required. On January 11, 2013 the employing establishment removed appellant from service. Appellant's personnel records indicate that her date-in-service was June 26, 1986 and that she was covered by the Federal Employees Retirement System (FERS).

On February 20, 2013 appellant completed an EN1032 form which asked that she report any benefits received from the SSA received as part of an annuity under FERS, but indicated that she was not to report any benefits received from the SSA on account of employment in the private sector. She responded "no" to the question of whether she received benefits from SSA as part of an annuity for federal service.

On October 23, 2013 the Office of Personnel Management (OPM) informed OWCP that appellant had elected to receive FECA compensation benefits.

In an EN1032 form dated February 18, 2014, appellant denied receiving benefits from SSA as part of an annuity for federal service. She completed an EN1032 form similarly on February 20, 2015. In an EN1032 form dated March 7, 2016, appellant indicated that she was not receiving benefits from SSA. She completed an EN1032 form similarly on February 28, 2017.

On March 3, 2017 OWCP requested that SSA provide a dual benefits calculation. In a form dated March 7, 2017, SSA responded: effective January 2010 appellant's SSA rate with FERS was \$1,310.40 and without FERS was \$619.50; effective, January 2011 her SSA with FERS was \$1,371.80 and without FERS was \$619.50; effective December 2011 appellant's SSA rate with FERS was \$1,421.20 and without FERS was \$641.80; effective December 2012 her SSA rate with FERS was \$1,445.30 and without FERS was \$652.60; effective December 2013 her SSA rate with FERS was \$1,466.90 and without FERS was \$662.40; effective December 2014 her SSA rate with FERS was \$1,491.80 and without FERS was \$673.60; effective December 2015 appellant's SSA rate with FERS was \$1,491.80 and without FERS was \$673.60; and effective December 2016 her SSA rate with FERS was \$1,496.20 and without FERS was \$675.50.

In a March 31, 2017 letter, OWCP informed appellant that she had been receiving SSA age-related retirement benefits since at least January 1, 2010 and that a portion of her SSA benefits were attributed to her federal service. It found that if her federal service was not included in her SSA computation she would be entitled to \$675.50 rather than \$1,496.20, and that her monthly FERS offset was \$820.70 and the 28-day offset was \$757.57. OWCP reduced appellant's 28-day compensation payments by \$757.57.

In a preliminary determination dated September 14, 2017, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$67,276.38 because her compensation benefits had not been reduced for the period January 10, 2010 through March 4, 2017 by the portion of her SSA benefits that were attributable to her federal service.

OWCP calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for each period. It provided a chart listing the SSA rate paid, the amount due with FERS offset, and the daily rate with FERS offset. OWCP found that for the period January 10 through December 31, 2010 or 356 days, appellant received an overpayment of compensation in the amount of \$8,108.58. It combined this sum with that of \$59,167.80 for the additional periods from January 1, 2011 through March 4, 2017 totally to reach a total overpayment of \$67,276.38. OWCP further made a preliminary determination that appellant was at fault in the creation of the overpayment because she knew or should have known that she had accepted compensation to which she was not entitled. It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant 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 precoupment hearing.

On October 9, 2017 appellant requested a telephone conference with OWCP on the issues of fault and waiver of the overpayment. She provided a completed Form OWCP-20 and supporting financial documents. Appellant listed her total monthly income \$2,566.17 including SSA benefits and OWCP benefits in the amounts of \$1,496.00 and \$1,070.17, respectively. She listed her monthly expenses as \$1,766.61. Appellant noted that her date-of-injury was November 10, 2010, but that OWCP had calculated her overpayment as beginning January 10, 2010 and that this resulted in an overpayment for 2010 of \$8,108.58 when she only received FECA compensation beginning November 10, 2010.

In an EN1032 form dated March 7, 2018, appellant indicated that she was receiving SSA benefits in the amount of \$1,526.00 per month.

On December 13, 2018 OWCP's claims examiner spoke to appellant regarding the overpayment. He explained how it was created and noted that normally OWCP deducted 25 percent of the monthly amount to repay the overpayment.

By decision dated December 13, 2018, OWCP finalized its preliminary overpayment determination and found an overpayment of compensation in the amount of \$67,276.38 for the period January 10, 2010 through March 4, 2017 because it had failed to offset appellant's compensation payments for the portion of her SSA age-related retirement benefits that were attributable to her federal service. It found she was not at fault in the creation of the overpayment. OWCP noted that appellant had an excess of \$799.00 every month and denied waiver of recovery as the evidence did not substantiate that recovery would defeat the purpose of FECA or be against equity and good conscience. It determined that it would require recovery of the overpayment by deducting \$278.55 from appellant's continuing compensation payments every 28 days.

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.³ However, section 8116 also 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 OWCP's regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

Beginning November 10, 2010, appellant received FECA wage-loss compensation while she continued to receive age-related retirement benefits from SSA. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA age-related retirement benefits

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

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

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

attributable to federal service for the same period.⁷ The fact of overpayment is therefore established.

The Board finds, however, that OWCP improperly calculated appellant's overpayment for the period January 10, 2010 through March 4, 2017. Appellant's accepted employment injury occurred on November 10, 2010. She, therefore, did not receive wage-loss compensation under FECA until after her November 10, 2010 employment injury. Consequently, the SSA benefits appellant received prior to November 10, 2010 were not dual benefits and should not have been included in the overpayment calculation. OWCP improperly calculated her overpayment based on her dual SSA and FECA benefits beginning January 10, 2010 rather than the appropriate date of November 10, 2010.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.⁸ The Board finds that the overpayment decision in this case does not provide such an explanation. Therefore, the amount of the overpayment has not been established.

On remand OWCP shall determine the exact amount of the overpayment of compensation, and the correct dates during which the overpayment occurred. It should then issue a new preliminary overpayment determination, with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.⁹

CONCLUSION

The Board finds that this case is not in posture for decision.

⁷ 5 U.S.C. § 8116(d)(2); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

⁸ *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); *see also O.R.*, 59 ECAB 432 (2008) with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); *see Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

⁹ As the case is not in posture for decision regarding the amount of overpayment, the issue of waiver of recovery of the overpayment is moot.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 27, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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