



## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$73,266.30 for the period November 1, 2011 through April 28, 2018 because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (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 \$774.58 from appellant's continuing compensation payments every month.

## **FACTUAL HISTORY**

On February 14, 2005 appellant, then a 59-year-old secretary, filed an occupational disease claim (Form CA-2) alleging that on March 15, 2004 she first realized that her upper respiratory condition was caused or aggravated by exposure to irritants in her workplace.<sup>4</sup> She stopped work on February 14, 2005 and has not returned. OWCP accepted an episode of chronic bronchitis. Appellant was placed on the supplemental rolls effective March 14, 2005 and on the periodic rolls effective May 14, 2006.

In a March 17, 2006 letter, OWCP noted the amount of appellant's monthly FECA wage-loss compensation. It advised her that, if she elected FECA benefits, she may concurrently receive benefits from the Thrift Savings Fund and SSA benefits. OWCP noted, however, that FECA benefits would be reduced by the SSA benefits paid on the basis of age and attributable to federal service.

In a March 24, 2009 letter, the employing establishment advised that appellant was presently at SSA retirement age of 63. It explained that if she chose to receive SSA retirement benefits, part of her award may be used to reduce her federal compensation benefits. This would occur no matter when appellant began receiving SSA retirement benefits. The employing establishment advised that, under 5 U.S.C. § 8116(d)(2), FECA compensation benefits must be offset if FERS employees received SSA retirement benefits. On March 26, 2009 appellant signed the letter and acknowledged that she was in receipt of SSA benefits and that she knew that her SSA benefit had been calculated using her federal service earnings.

In EN1032 forms dated November 12, 2009, November 10, 2010, November 4, 2011, November 6, 2012, November 2, 2013, November 4, 2014, November 20, 2015, December 3, 2016, November 21, 2017, November 9, 2018 and December 3, 2019, appellant reported that she was not receiving SSA benefits as part of an annuity for federal service. As of 2014, the EN1032 forms noted that "If you receive Social Security disability benefits, those SSA benefits may be reduced due to your receipt of FECA benefits."

On January 12, 2018 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form. On March 26, 2018 SSA submitted the completed

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<sup>4</sup> Appellant's workstation was under the main heating vent and air conditioning (HVAC) system. She originally stopped work on March 12, 2004 and OWCP accepted an episode of chronic bronchitis as related to the exposure to hazardous irritants. Appellant returned to full duty on March 22, 2004. She had intermittent work stoppages due to upper respiratory infections.

form which showed SSA benefit rates with a FERS offset and without a FERS offset from November 2011 through December 2016. From November 1, 2011 appellant's SSA rate with FERS was \$1,015.40 and SSA rate without FERS was \$141.70; from December 1, 2011, her SSA rate with FERS was \$1,051.90 and SSA rate without FERS was \$146.80; from December 1, 2012, her SSA rate with FERS was \$1,069.70 and SSA rate without FERS was \$149.20; from December 1, 2013, her SSA rate with FERS was \$1,085.70 and SSA rate without FERS was \$151.40; from December 1, 2014 through December 1, 2015, her SSA rate with FERS was \$1,104.10 and SSA rate without FERS was \$153.90; from December 1, 2016 her SSA rate with FERS was \$1,107.40 and SSA rate without FERS was \$154.30; and from December 1, 2017, her SSA rate with FERS was \$1,129.50 and SSA rate without FERS was \$153.30.<sup>5</sup>

In a letter dated May 4, 2018, OWCP advised appellant that she had been receiving prohibited dual benefits as she had received FECA wage-loss compensation and SSA age-related benefits since November 1, 2011. It noted that the portion of SSA benefits earned as a federal employee under the FERS retirement program should have been offset from her FECA wage-loss compensation. OWCP adjusted appellant's FECA benefits to account for her SSA offset as of April 29, 2018.

On September 28, 2018 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$73,266.30 because she received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits from November 1, 2011 through April 28, 2018. It provided a calculation of the overpayment. OWCP recommended that appellant be found not at fault in the creation of the overpayment because she was not aware, nor could she reasonably have been expected to know, that it had paid compensation incorrectly. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. OWCP also noted that appellant could request waiver of recovery of the overpayment. It provided her with appeal rights and afforded 30 days for a response.

On October 4, 2018 appellant, through counsel, requested a telephonic prerecoupment hearing. Appellant indicated that the overpayment occurred through no fault of her own and requested waiver of recovery of the overpayment. She did not provide a completed Form OWCP-20.

On January 4, 2019 OWCP's Branch of Hearings and Review completed a preliminary review and determined that the case was not in posture for a hearing. The hearing representative set aside the September 28, 2018 preliminary overpayment decision finding that the case record contained evidence that appellant had previously been put on notice of the prohibited dual benefit, with language that was not ambiguous, namely her acknowledgement on March 26, 2009 regarding the status of her benefits. The hearing representative concluded that OWCP had not sufficiently supported its finding of without fault. The case was remanded for the issuance of a new preliminary overpayment determination with an appropriate discussion of whether appellant was at or without fault in the creation of the overpayment.

On January 14, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$73,266.30 because she received FECA wage-loss

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<sup>5</sup> OWCP paid appellant wage-loss compensation for disability from August 2006 through October 2011. Appellant's SSA disability benefits automatically converted to retirement benefits on November 1, 2011.

compensation benefits concurrently with SSA age-related retirement benefits from November 1, 2011 through April 28, 2018. It recommended that she be found with fault as she failed to provide information which she knew or should have known to be material. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. It also noted that she could request waiver of recovery of the overpayment. OWCP provided appellant with appeal rights and afforded 30 days for a response.

On January 19, 2019 appellant, through counsel, requested a prerecoupment hearing. She contested the preliminary determination as to the fact and amount of the overpayment, and the finding of fault.

In a May 9, 2019 letter, counsel provided a recoupment proposal asserting that appellant should be treated as though she had not responded to the overpayment decision. He argued that 25 percent of appellant's four-week pay after deductions, or \$327.12 monthly over a period of 14 years, was reasonable based on her life expectancy of 14 years. Counsel also requested that the one percent per annum interest be waived. Alternatively, he proposed recovery of \$391.38 per month. Evidence pertaining to appellant's health, 2018 life expectancy tables, and financial information was received.

In a May 17, 2019 telephonic hearing, appellant testified that there was some confusion over the term annuity when she filled out the EN1032 forms. She also testified that she and her husband had health issues which created a hardship for them. Appellant testified as to her monthly income and expenses, noting that she had savings in excess of \$80,000.00.

After the hearing, OWCP received additional financial information. Appellant totaled her monthly expenses at \$10,667.05 and indicated a monthly income of \$9,466.96. Documentation of a mutual fund in the amount \$74,866.42 was submitted. A completed OWCP-20 form was not submitted.

By decision dated August 6, 2019, an OWCP hearing representative finalized the preliminary determination that appellant received an overpayment of compensation of \$73,166.30<sup>6</sup> for the period November 1, 2011 through April 28, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The hearing representative found that appellant was at fault in the creation of the overpayment, precluding waiver of recovery of the overpayment. The hearing representative further determined that the overpayment could be recovered by deducting \$774.58<sup>7</sup> monthly from appellant's continuing compensation payments and that no compromise of principle was necessary.

### **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>8</sup> Section 8116 limits the right of an employee to receive

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<sup>6</sup> This figure appears to be a typographical error and should be \$73,266.30 as supported by the evidence of record.

<sup>7</sup> The hearing representative found that a \$715.00 deduction from appellant's 28-day payments amounted to \$774.58 monthly.

<sup>8</sup> 5 U.S.C. § 8102(a).

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>9</sup>

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.<sup>10</sup> FECA Bulletin No. 97-09 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.<sup>11</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$73,266.30 for the period November 1, 2011 through April 28, 2018.

The record supports that appellant received SSA age-related retirement benefits beginning in November 2011. As noted, a claimant cannot receive FECA compensation for wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>12</sup> The information provided by SSA indicated that appellant received age-related SSA benefits that were attributable to her federal service beginning November 1, 2011. OWCP, however, neglected to offset her FECA benefits until April 29, 2018. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period November 1, 2011 through April 28, 2018.

Based on the information provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. The SSA provided appellant's SSA rate with FERS and without FERS for the period November 1, 2011 through April 28, 2018. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet. No contrary evidence was provided. While appellant initially contested the fact and amount, her counsel subsequently indicated that her case should be treated as though she did not respond to the overpayment notice. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$73,266.30, which created an overpayment of compensation in that amount for the period November 1, 2011 through April 28, 2018.<sup>13</sup>

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<sup>9</sup> *Id.* at § 8116.

<sup>10</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>11</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also J.B.*, Docket No. 19-1244 (issued December 20, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>12</sup> *Id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

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

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides that 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.<sup>14</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>15</sup> 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.

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>

When a claimant receives benefits from the SSA as part of an annuity under the Federal Employees Retirement System concurrently with disability/wage loss compensation, 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>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period November 1, 2011 through April 28, 2018.

The Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at 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>18</sup> Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an

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<sup>14</sup> 5 U.S.C. § 8129(b).

<sup>15</sup> See *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>16</sup> *Id.* at § 10.433(b); see also Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

<sup>17</sup> *Id.* at Chapter 6.300.4g(4) (September 2018).

<sup>18</sup> *Id.*

offset. Therefore, he could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.<sup>19</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>20</sup> The Board finds that appellant was without other options to avoid a potential FECA overpayment. Therefore, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period November 1, 2011 through April 28, 2018.

As appellant was not at fault in the creation of the overpayment for the period November 1, 2011 through April 28, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.<sup>21</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$73,266.30 for the period November 1, 2011 through April 28, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board finds that she was without fault in the creation of the overpayment.

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<sup>19</sup> See *J.B.*, Docket No. 19-1244; *G.G.*, Docket No. 19-0684 (issued December 24, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related retirement benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset prior to receipt of information for the SSA).

<sup>20</sup> *Supra* note 19.

<sup>21</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision of the Board.

Issued: March 23, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board