



Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly found that appellant was 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 \$475.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On March 7, 2003 appellant, then a 52-year-old electronics technician, filed a traumatic injury claim (Form CA-1) alleging that on February 28, 2003 she experienced low back, left shoulder, and left arm pain extending into her left fingers while in the performance of duty. OWCP accepted the claim for cervical radiculopathy. Appellant stopped work on February 28, 2003 and did not return. OWCP paid her wage-loss compensation on the supplemental rolls effective April 15, 2003 and on the periodic rolls effective June 15, 2003.

On January 2, 2013 OWCP informed appellant that section 8116(d)(2) of FECA<sup>3</sup> requires that a claimant's continuing compensation benefits be reduced if she begins receiving SSA retirement benefits based on her age and federal service. It further advised that failure to report receipt of retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery.

On February 25, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.

On March 12, 2021 SSA completed the FERS/SSA dual benefits form and provided appellant's SSA age-related retirement benefit rates with FERS and without FERS from January 2017 through December 2020. SSA indicated that, beginning January 1, 2017, her SSA rate with FERS was \$1,631.10 and without FERS was \$750.20, beginning December 2017, her SSA rate with FERS was \$1,663.70 and without FERS was \$765.20, beginning December 2018, her SSA rate with FERS was \$1,710.20 and without FERS was \$786.60, beginning December 2019, her SSA rate with FERS was \$1,737.50 and without FERS was \$799.10, and beginning December 2020, her SSA rate with FERS was \$1,760.00 and without FERS was \$809.40.

In an April 5, 2021 letter, OWCP informed appellant that effective March 28, 2021 it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her compensation benefits. It found that with the SSA offset she was entitled to net compensation every 28 days of \$2,428.36.

OWCP completed a FERS offset overpayment calculation form on April 5, 2021. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period January 1, 2017 through March 27, 2021. OWCP found that, from January 1 through November 30, 2017, she received an overpayment of \$9,699.58, from December 1, 2017 through November 30, 2018, she received an overpayment of \$10,811.62, from December 1, 2018 through November 30, 2019, she received an overpayment of \$11,113.65, from December 1, 2019 through November 30, 2020, she received an overpayment of \$11,322.67, and from December 1, 2020

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<sup>3</sup> 5 U.S.C. § 8116(d)(2).

through March 27, 2021, she received an overpayment of \$3,666.60. In calculating the overpayment, OWCP added the overpayment created from December 1, 2017 through November 30, 2020 to find a total overpayment of \$42,947.52.

In a preliminary overpayment determination dated July 15, 2021, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$42,947.52 because her wage-loss compensation benefits had not been reduced for the period January 1, 2017 through March 27, 2021 by the portion of her SSA age-related retirement benefits attributable to her federal service. It further advised her of its preliminary determination that she was with fault in the creation of the overpayment as she failed to provide information which she knew or should have known was material. OWCP requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20). It further requested that she submit supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records supporting income and expenses. Additionally, OWCP provided an overpayment action request form and 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.

Appellant requested a decision by OWCP based on the written evidence. In a completed OWCP-20 form, she provided her monthly income as \$4,039.36 and monthly expenses as \$4,625.73. Appellant advised that she had assets in cash and a checking account of \$21,211.18. She noted that she required these funds for home repairs. In an accompanying letter of even date, appellant asserted that she was without fault in the creation of the overpayment, noting that she had advised OWCP about her confusion regarding whether she was receiving SSA as an annuity for federal service. She submitted supporting financial documentation.

By decision dated October 6, 2021, OWCP finalized its preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$42,947.52 for the period January 1, 2017 through March 27, 2021 because she had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits attributable to her federal service without appropriate offset. It further finalized its preliminary finding that she was at fault in the creation of the overpayment and therefore precluded from waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$475.00 from appellant's continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>4</sup> 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>5</sup> Section 8116 limits the right of an employee to receive

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> 5 U.S.C. § 8102.

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>6</sup>

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 retirement benefits that are attributable to the employee's federal service.<sup>7</sup> 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.<sup>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability beginning April 13, 2003. Appellant received SSA age-related retirement benefits beginning January 1, 2017. As noted, a claimant cannot receive concurrent FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service, without an appropriate offset.<sup>9</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. Accordingly, the Board finds that fact of overpayment has been established.<sup>10</sup>

The Board further finds, however, that the case is not in posture for decision regarding the period and the amount of the overpayment.

In determining the amount of the overpayment, OWCP found that appellant had received an overpayment of \$9,699.58 for the period January 1 through November 30, 2017; \$10,811.62 for the period December 1, 2017 through November 30, 2018; \$11,113.65 for the period December 1, 2018 through November 30, 2019; \$11,322.67 for the period December 1, 2019 through November 30, 2020; and \$3,666.60 for the period December 1, 2020 through March 27, 2021. It calculated the final amount of the overpayment, however, by adding the amount of the overpayment created from January 1, 2017 through November 30, 2020. OWCP has not explained the discrepancy between the period and amount set forth in its overpayment

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<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see L.S.*, Docket No. 21-0562 (issued November 30, 2021); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>9</sup> *Supra* note 7; *see also F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>10</sup> *See L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

calculation and its final overpayment determination. Consequently, the case must be remanded to OWCP for recalculation of the period and amount of the overpayment.<sup>11</sup>

On remand, OWCP shall clarify the period and the amount of overpayment.<sup>12</sup> It shall 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.<sup>13</sup> After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that an overpayment of 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 be against equity and good conscience.”<sup>14</sup> No waiver of payment is possible if appellant is at fault in helping to create the overpayment.<sup>15</sup>

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; (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.<sup>16</sup> Section 10.433(b) further provides that whether 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.<sup>17</sup>

OWCP’s procedures provide that, if a claimant receives benefits from 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.<sup>18</sup>

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<sup>11</sup> See *J.L.*, Docket No. 20-0444 (issued October 16, 2020).

<sup>12</sup> See *F.L.*, Docket No. 21-0619 (issued December 16, 2021); *J.H.*, Docket No. 19-1887 (issued June 16, 2020).

<sup>13</sup> *F.L., id.; R.K.*, Docket No. 19-0713 (issued October 20, 2020).

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

<sup>15</sup> *J.B.*, Docket No. 19-1244 (issued December 20, 2019); *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

<sup>16</sup> 20 C.F.R. § 10.433(a); see *K.F.*, Docket No. 19-1016 (issued February 14, 2020); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

<sup>17</sup> *Id.* at § 10.433(b); *L.L.*, Docket No. 19-1690 (issued February 25, 2020); *C.L., id.*

<sup>18</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(4) (September 2020).

## ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment of compensation.

As noted above, OWCP's procedures provide that, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, 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>19</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 offset. Therefore, she could not reasonably have been aware during the relevant period that her concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.<sup>20</sup>

As previously noted, 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>21</sup> Therefore, based on the circumstances described, the Board finds that OWCP did not meet its burden of proof to establish that appellant was at fault in the creation of the overpayment.<sup>22</sup>

## CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that OWCP improperly determined that she was at fault in the creation of the overpayment of compensation. The case is not in posture for decision regarding the period and amount of the overpayment.

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<sup>19</sup> *Id.*

<sup>20</sup> *H.H.*, Docket No. 18-0674 (issued September 3, 2020); *G.G.*, Docket No. 19-0684 (issued December 23, 2019).

<sup>21</sup> *Supra* note 18.

<sup>22</sup> In light of the Board's disposition of Issues 1 and 2, Issue 3 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 6, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part, reversed in part, and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 19, 2023  
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