

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.V., Appellant** )  
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 )  
**and** )  
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**DEPARTMENT OF TRANSPORTATION,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, Newark, NJ, Employer** )

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**Docket No. 13-1612  
Issued: September 18, 2013**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 27, 2013 appellant, through his attorney, filed a timely appeal from an April 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,030.19 from September 29, 2002 through January 12, 2013 because his benefits were not properly reduced by the Federal Employees' Retirement System (FERS) offset amount; (2) whether he was at fault in the creation of the overpayment; and (3) whether OWCP properly set the rate of recovery of the overpayment at \$1,260.00 from continuing compensation benefits.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 30, 2002 appellant, then a 63-year-old supervisory transportation security screener, filed a traumatic injury claim alleging that on August 14, 2002 he sustained a stress-related heart attack causally related to factors of his federal employment. OWCP accepted the claim for a myocardial infarction and an acute stress reaction. It paid appellant compensation for total disability beginning September 29, 2002.

On October 16, 2002 appellant filed a claim for compensation (Form CA-7) beginning September 29, 2002. The form asked whether he had applied for or received payment under any federal retirement or disability law. If he had, the form requested that appellant supply the claim number, the date his annuity began, the amount of the monthly payment and the identity of the federal system providing benefits, including the Social Security Administration (SSA). He responded "no." Appellant signed his name to certify that the information provided was true and accurate to the best of his knowledge and belief.

Appellant completed and signed Forms EN1032 on November 11, 2004, October 13, 2006, October 5, 2007, October 2, 2008, October 30, 2009, November 12, 2010, November 14, 2011 and November 26, 2012. On the forms he responded "no" to the question of whether he received SSA benefits as part of an annuity under FERS for federal service. The form advised that appellant should not report SSA benefits received based on private sector employment.

On January 15, 2013 SSA provided the amount that appellant received in retirement benefits with FERS and also the hypothetical amount that he would have received without FERS. Including federal employment, appellant was entitled to rate of \$986.30 effective September 2002, \$1,000.00 effective December 2002, \$1,021.00 effective December 2003, \$1,070.00 effective December 2004, \$1,114.20 effective December 2005, \$1,151.00 effective December 2006, \$1,177.40 effective December 2007, \$1,245.70 effective December 2008 to December 2010, \$1,290.50 effective December 2011 and \$1,312.40 effective December 2012. Without counting his earnings in federal employment, appellant was entitled to a rate of \$967.70 effective September 2002, \$981.20 effective December 2002, \$1,001.80 effective December 2003, \$1,028.80 effective December 2004, \$1,071.00 effective December 2005, \$1,106.30 effective December 2006, \$1,131.70 effective December 2007, \$1,197.30 effective December 2008 to December 2010, \$1,240.40 effective December 2011 and \$1,261.40 effective December 2012.

By letter dated January 16, 2013, appellant asserted that he did not participate in any retirement system.

On January 28, 2013 OWCP informed appellant it was offsetting his compensation by the amount of his SSA benefits due to his federal service as a FERS employee. It advised him that the portion of the SSA benefits earned as a federal employee was part of FERS retirement package and that the receipt of FECA benefits and federal retirement benefits concurrently constituted a prohibited dual benefit.

On February 6, 2013 OWCP notified appellant of its preliminary determination that he received an overpayment of \$5,030.19 as he received compensation payments for the period

September 29, 2002 through January 12, 2013 that were not reduced by the portion of the SSA benefits he earned as a federal employee. It determined that he began receiving regular retirement benefits under SSA and workers' compensation benefits on September 29, 2002. OWCP found that the portion of the SSA benefit earned as a federal employee was part of the FERS retirement package. It calculated the overpayment by determining the difference between his SSA amount with and without FERS for each period. OWCP multiplied the daily offset amount by the number of days in each period from September 29, 2002 to December 1, 2012, to find a total overpayment of \$5,030.19. It also made a preliminary determination that appellant was at fault in the creation of the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precouplement hearing.

In a February 6, 2013 telephone call, appellant informed OWCP that he only worked for the employing establishment around six months and questioned the offset of his compensation benefits.

On February 14, 2013 appellant requested a telephone conference. He advised that he received only workers' compensation benefits and SSA benefits and asserted that he was not at fault in creating the overpayment.

By letter dated March 26, 2013, OWCP notified appellant that it could not schedule a telephone conference as he had not submitted a completed overpayment questionnaire, Form OWCP-20, with supporting financial information. It allotted him 15 days to submit the requested information. OWCP informed appellant that a failure to provide the overpayment recovery questionnaire with supporting documentation would be considered to be a withdrawal of a request for a conference.

In a decision dated April 23, 2013, OWCP determined that appellant received a \$5,030.19 overpayment of compensation from September 29, 2002 through January 12, 2013. It further found that he was at fault in the creation of the overpayment. OWCP noted that appellant had not provided a completed overpayment recovery questionnaire or supporting documentation and thus determined that there was no evidence that he could not repay the debt fully. It found that it would recover the overpayment by deducting \$1,260.00 from his continuing compensation payments.

On appeal, appellant argues that he was not receiving benefits under FERS and could not pay back \$1,250.00 a month without losing his home. He also noted that OWCP did not advise him that he owed the money and was currently withdrawing \$47.88 from his monthly compensation.

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

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age of death that are attributable to federal service. If an employee

receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.<sup>2</sup>

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.<sup>3</sup> The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefits computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefits to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.<sup>4</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$5,030.19 overpayment of compensation because his compensation payments for the period September 29, 2002 through January 12, 2013 were not offset by the amount of his SSA benefits attributable to his federal employment. Appellant received both SSA benefits based in part on his federal employment under FERS and workers' compensation benefits without any offset. As he was not entitled to receive both FECA disability benefits and that portion of his SSA benefits attributable to his federal employment, the Board finds that OWCP properly determined that appellant received an overpayment of compensation.<sup>5</sup> The Board has reviewed OWCP's calculations of the dual benefits received and finds that it properly determined that he received an overpayment of \$5,030.19 for the period September 29, 2002 through January 12, 2013. The record contains documents from the SSA delineating the offset figures that OWCP used to calculate the overpayment. It determined the overpayment by adding \$38.62 for the period September 29 to November 30, 2002 (28-day offset amount of \$17.17); \$226.22 for the period December 1, 2002 to November 30, 2003; (28-day offset amount of \$17.35); \$231.67 for the period December 1, 2003 to November 30, 2004 (28-day offset amount of \$17.72); \$500.57 for the period December 1, 2004 to November 30, 2005 (28-day offset amount of \$38.40); \$519.82 for the period December 1, 2005 to November 30, 2006 (28-day offset amount of \$39.88); \$537.87 for the period December 1, 2006 to November 30, 2007 (28-day offset amount of \$41.26); \$551.41 for the period December 1, 2007 through November 30, 2008 (28-day offset amount of \$42.18); \$582.40 for the periods December 1, 2008 to November 30, 2010, December 1, 2010 to November 30, 2011 and

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<sup>2</sup> 5 U.S.C. § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a); Chapter 2.1000.4(e)(2) and Chapter 2.1000.11 (February 1995). OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

<sup>4</sup> *See N.R.*, Docket No. 12-1853 (issued June 10, 2013).

<sup>5</sup> *See L.L.*, Docket No. 12-1724 (issued March 26, 2013).

December 1, 2011 to November 30, 2012 (28-day offset amount \$44.68); \$604.50 for the period December 1, 2011 to November 30, 2012 (28-day offset amount \$46.25); and \$72.30 for the period December 1, 2012 to January 12, 2013 (28-day offset amount \$47.08). OWCP added the offset amount for these periods to find an overpayment of \$5,030.19.

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

Section 8129(b) of FECA<sup>6</sup> states that “[a]djustment 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 this subchapter or would be against equity and good conscience.” Section 10.433 of OWCP’s implementing regulations<sup>7</sup> provide that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

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.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

OWCP determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material and made an incorrect statement about a material fact which he knew or should have known was incorrect. It found that he denied receiving SSA retirement benefits on a Form CA-7 dated October 16, 2002 and on EN1032 forms dated November 2004 through November 2012. The forms advised that appellant must report any income received from SSA as part of an annuity for federal service but he responded “no” to the questions on the forms.

Appellant argued that he did not receive retirement benefits under FERS. He maintained that he did not know that a portion of his SSA benefits constituted an annuity for federal service. Appellant, however, should have known that the information that he was receiving benefits under SSA was material as OWCP inquired repeatedly on its forms whether he was in receipt of

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<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.433.

<sup>8</sup> *Id.* at § 10.433(b).

benefits from other federal programs. The language of the forms clearly advised him of his responsibility to report his SSA benefits and informed him that the providing of this information was material.<sup>9</sup> Although appellant was in receipt of SSA benefits since September 29, 2002, he consistently failed to report these benefits to OWCP. As he failed to provide information which he knew or should have known was material, the Board will affirm OWCP's determination that he was at fault in the creation of the overpayment.<sup>10</sup> Consequently, appellant is not entitled to waiver of recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.411 of OWCP's regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.<sup>11</sup>

### **ANALYSIS -- ISSUE 3**

Although OWCP provided appellant with an overpayment recovery questionnaire, he did not submit a completed questionnaire or other financial information that OWCP requested prior to its final overpayment determination. The overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.<sup>12</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>13</sup> The Board thus finds that it did not abuse its discretion in finding that it would recover the overpayment by deducting \$1,260.00 from continuing compensation payments.

On appeal, appellant argues that he cannot afford to have \$1,260.00 deducted from his compensation and asserts that OWCP is already deducting \$47.88 from his payments. As discussed, he did not submit any financial information and thus OWCP properly determined the repayment schedule. The \$47.88 deducted is for the offset of SSA benefits from appellant's

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<sup>9</sup> See *R.D.*, Docket No. 11-412 (issued September 22, 2011).

<sup>10</sup> See *T.C.*, Docket No. 12-1311 (issued March 20, 2013).

<sup>11</sup> See 20 C.F.R. § 10.411(a). The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. See *Desiderio Martinez*, 55 ECAB 245 (2004).

<sup>12</sup> *Id.* at § 10.438.

<sup>13</sup> *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004). In all cases where an overpayment is due for recovery, OWCP should follow minimum collection guidelines, which state in general that Government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. See *id.* at Chapter 6.200.4d(1)(b); *Gail M. Roe*, 47 ECAB 268 (1995).

continuing compensation payments attributable to his federal service and is not for repayment of the overpayment of compensation.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$5,030.19 from September 29, 2002 through January 12, 2013 because his benefits were not properly reduced by FERS offset amount. The Board further finds that he was at fault in the creation of the overpayment and that OWCP properly set the rate of recovery of the overpayment at \$1,260.00 from continuing compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board