

U.S. Department of Labor Employees' Compensation Appeals Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



May 7, 2012

Mr. Paul H. Felser  
P.O. Box 10267  
Savannah, GA 31401

Docket Number:

OWCP File No.:

Dear Mr. Paul H. Felser:

**Please note that the caption of any decision and/or order issued on or after August 1, 2006, will display only your initials, docket number and issue date for the decision. (This change in policy is prospective only and is not based upon any legal requirement.)**

Enclosed is a copy of the Board's DECISION AND ORDER, which is self explanatory.

By direction of the Board,

Thomas O. Shepherd, Jr., Esq  
Clerk of the Appellate Boards

Enclosure(s)

cc:

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

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A.P., Appellant

and

DEPARTMENT OF THE NAVY, NEW YORK  
NAVAL SHIPYARD, Brooklyn, NY, Employer

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**Docket No.**  
**Issued: May 7, 2012**

*Appearances:*  
*Paul H. Felser, Esq., for the appellant*  
*No appearance, for the Director*

Oral Argument March 29, 2012

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 17, 2011 appellant, through his counsel, timely appealed the June 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which found an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 (2011), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant received an overpayment of \$136,280.31 for the period July 1, 1990 to September 25, 2010.

**FACTUAL HISTORY**

Appellant, an \_\_\_\_\_-year-old former \_\_\_\_\_, has an accepted claim for back strain and lumbosacral derangement, which arose on \_\_\_\_\_. He was \_\_\_\_\_ years old at the time of \_\_\_\_\_.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

injury. Appellant's back condition precluded him from resuming his regular pipefitter duties; however, he was not disabled from all work. Because the employing establishment was unable to accommodate his physical restrictions, OWCP paid him wage-loss compensation for temporary total disability.<sup>2</sup> By decision dated August 24, 1965, it adjusted appellant's wage-loss compensation based on his ability to earn wages in the constructed position of watchman.<sup>3</sup> Thereafter, it paid wage-loss benefits based on the August 24, 1965 LWEC determination.

Since leaving federal service in the mid-1960s, appellant worked in various capacities in the private sector.<sup>4</sup> From October 1966 through June 1968, he was \_\_\_\_\_ as a \_\_\_\_\_. Appellant reported similar \_\_\_\_\_ from April through December 1971. For a few months in 1972, he worked as a \_\_\_\_\_ with \_\_\_\_\_, \_\_\_\_\_. From 1974 until 1978, appellant reported \_\_\_\_\_ as a \_\_\_\_\_. He subsequently worked for \_\_\_\_\_, \_\_\_\_\_ from July 1980 until March 1982. From May 1982 until his retirement in \_\_\_\_\_, \_\_\_\_\_, <sup>5</sup> \_\_\_\_\_, appellant worked in various capacities for \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

Appellant turned \_\_\_\_\_ in \_\_\_\_\_, at which point he was eligible to receive the maximum amount (100 percent) of Social Security Act (SSA) age-related benefits. He continued to work in the private sector for another six years. Also, OWCP continued to pay appellant wage-loss compensation based on the 1965 LWEC determination.

On August 13, 2010 OWCP requested information from the Social Security Administration regarding appellant's SSA age-related benefits. It forwarded a form entitled "[Federal Employees Retirement System (FERS)] SSA Dual Benefit Calculation \_\_\_\_\_," which requested information regarding the effective date of his social security benefits, as well as separate calculations of the SSA rate with FERS and without FERS. OWCP asked SSA to calculate appellant's age-related benefits based on his private-sector employment contributions only and then provide a separate calculation that included both private-sector and federal (FERS-based) employment contributions. SSA provided the requested information on \_\_\_\_\_.

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<sup>2</sup> OWCP placed appellant on the periodic compensation rolls effective April 1, 1965.

<sup>3</sup> At the time, the weekly wage of a \_\_\_\_\_ was \$ \_\_\_\_\_. Comparing this figure with appellant's date-of-injury wages as a \_\_\_\_\_, OWCP found that he had a 50 percent loss in wage-earning capacity (LWEC). Accordingly, it adjusted appellant's wage-loss compensation effective September 30, 1965.

<sup>4</sup> Appellant regularly reported his employment activity to OWCP on EN/CA-1032 forms. OWCP also periodically received information from the Social Security Administration regarding his employment activities and earnings (SSA-1826, Itemized Statement of Earnings).

<sup>5</sup> Appellant was \_\_\_\_\_ years old when he last worked.

August 25, 2010. It noted various pay rates from July 1990 through December 2009. SSA provided 28 different pay rates with FERS, but only 22 corresponding pay rates without FERS.<sup>6</sup>

On September 22, 2010 OWCP advised appellant that, effective September 25, 2010, it would reduce his 28-day compensation payment by \$670.98 based on information SSA had recently provided.<sup>7</sup> It explained that, because he had been a “[f]ederal employee under the [FERS],” he had paid into the social security system as a federal civil servant and such income was considered to be part of his federal retirement package. OWCP further explained that FECA prohibited an injured worker from receiving both wage-loss compensation and retirement annuity payments, such as Office of Personnel Management (OPM) annuity payments and social security payments based upon federal employment. It noted that, beginning in July 1990, appellant received SSA retirement benefits along with FECA wage-loss compensation and thus, OWCP was required to offset his FECA benefits to avoid a dual benefit.

On December 8, 2010 OWCP issued a preliminary determination that appellant received an overpayment of \$136,280.31 for the period July 1, 1990 to September 25, 2010. It referenced its September 22, 2010 letter regarding the required offset for FERS-based SSA benefits. Because no such offset was made for the above-noted period, appellant was found to have received a dual benefit. OWCP also found that he was not at fault in creating the overpayment.

Appellant requested a preresoupment hearing before the Branch of Hearings & Review, which was held on April 27, 2001. He did not submit an overpayment recovery questionnaire (Form OWCP-20) or any other financial information.

By decision dated June 13, 2011, an OWCP hearing representative found that appellant had received an overpayment of \$136,280.31 and that he was without fault in creating the overpayment. Citing 20 C.F.R. § 10 438, the hearing representative denied waiver of recovery of the overpayment because he had not provided the requisite financial information (OWCP-20). Additionally, she instructed OWCP to recover the debt at the rate of \$1,000.00 per month.<sup>8</sup>

### **LEGAL PRECEDENT**

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>9</sup> To avoid payment of a dual benefit, FECA wage-loss

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<sup>6</sup> While SSA provided FERS inclusive rates for January 1991, January 1992, January 1993, January 1994, January 1995 and January 1996, there was no corresponding “without FERS” data for those particular dates. The “FERS SSA Dual Benefit Calculation” form did not specify a daily, weekly or monthly rate. However, it is presumed that the rate information SSA provided represented appellant’s monthly benefit. OWCP did not request, nor has SSA provided, a complete payment history of the SSA age-related benefits he reportedly received beginning July 1990.

<sup>7</sup> As of December 2009, the reported SSA FERS inclusive monthly rate was \$1,655.80 and excluding FERS that rate was \$928.90. The monthly difference was \$726.90, which OWCP converted to a 28-day offset of \$670.98.

<sup>8</sup> The hearing representative did not specifically address whether the overpayment should have been recovered by reducing appellant’s continuing compensation as provided under 20 C.F.R. § 10.441(a) (2011). At the time, appellant’s net 28-day compensation payment was \$96.98.

<sup>9</sup> See 5 U.S.C. § 8116(a), (d); *id.* at § 10.421(a)

compensation benefits shall be reduced by the amount of SSA benefits attributable to the employee's federal (FERS-based) service.<sup>10</sup> However, an offset is not required where the employee-beneficiary is covered under the Civil Service Retirement System (CSRS) and his SSA age-related benefits are attributable to private-sector employment.<sup>11</sup>

### ANALYSIS

As to fact of overpayment, the Board finds that the case is not in posture for decision. OWCP based its overpayment determination on appellant having reportedly received SSA age-related benefits for his federal service. Relying on information provided by the Social Security Administration, OWCP found that he had been receiving a dual benefit dating back to July 1, 1990. Notwithstanding the information SSA provided on August 25, 2010, the record calls into question OWCP's determination that appellant was covered under FERS or received a dual benefit.

The offset provision of 5 U.S.C. § 8116(d)(2) applies to social security old-age benefits that are attributable to federal service covered by FERS. However, the record suggests that appellant's federal civilian service would have been covered under FERS' predecessor, the CSRS.<sup>12</sup> Based on the evidence of record, appellant last worked for the Federal Government in the mid-1960s, which was well in advance of the January 1, 1987 effective date of FERS.<sup>13</sup> There is no evidence of record that he paid social security taxes (OASDI) as a federal civilian employee under either FERS or CSRS Interim/Offset.<sup>14</sup> Furthermore, there is no evidence that appellant either elected or was eligible to convert from CSRS to FERS.<sup>15</sup> Based on the SSA earnings statements and information he provided OWCP, it appears he had not worked for the Federal Government since 1965. Prior to his February 1997 retirement, appellant worked almost 15 years for Fidelity Chemical/Auric Corporation.

While SSA provided OWCP information concerning the amount of appellant's age-related benefits purportedly attributable to his FERS-based civilian service; given his pre-1987 employment history OWCP should have further inquired regarding the accuracy of this information. The procedure manual provides that, where a possible dual benefit exists, OWCP should review the file carefully if the claimant is     years or older and is under FERS, because a

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<sup>10</sup> *Id.* at § 8116(d)(2); *id.* at § 10.421(d).

<sup>11</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2 812.8c (March 2010); Federal (FECA) Procedure Manual, *id.* at *Dual Benefits*, Chapter 2 1000.4e (January 1997).

<sup>12</sup> Under CSRS, federal employees were generally exempt from paying social security taxes; Old-age, Survivors and Disability Insurance (OASDI) 5 U.S.C. §§ 8331- 8351.

<sup>13</sup> 5 U.S.C. § 8402(b)(2)(B).

<sup>14</sup> CSRS Interim/Offset was a precursor to FERS that required contributions to both CSRS and OASDI. It generally applied to certain new hires or former CSRS-covered employees who had been separated from service for at least one year and rehired after December 31, 1983.

<sup>15</sup> See 5 U.S.C. § 8402.

FERS offset may be required.<sup>16</sup> The procedure manual further notes that an offset is not required for CSRS benefits and if OWCP “cannot determine what retirement system the claimant is under, the [claims examiner] should send a letter to ... OPM to request information.”<sup>17</sup> OWCP did not seek clarification from OPM, but instead placed the onus on appellant to disprove that a FERS offset was required.

In its December 8, 2010 preliminary determination, OWCP informed appellant that it was required to accept SSA’s finding that he retired under FERS. It advised him that if he believed he retired under CSRS or otherwise disagreed with SSA’s finding, he should contact either SSA or OPM in order to submit findings why a FERS offset should not apply.<sup>18</sup> OWCP cited no statutory/regulatory authority or Board precedent requiring it to accept SSA’s finding without question, thereby abrogating its inherent responsibility as fact-finder.<sup>19</sup> As noted, the Procedure Manual places the responsibility on the claims examiner to carefully review the file in situations where a dual benefit might possibly occur, including the responsibility of contacting OPM to determine the applicable civil service retirement system.<sup>20</sup>

The Board finds that, in light of appellant’s pre-1984 federal employment history, the evidence does, not establish that he was covered under FERS or received a dual benefit.<sup>21</sup> OWCP did not thoroughly investigate whether appellant was covered under either CSRS, CSRS Interim/Offset or FERS. The Board further notes that while SSA provided data regarding various effective rates over a 20-year period beginning July 1990; it did not provide a complete payment history substantiating his receipt of SSA age-related benefits during the purported overpayment period of July 1, 1990 to September 25, 2010. Due to these deficiencies, the Board finds that the case is not in posture for decision. OWCP’s determination that appellant received a dual benefit and overpayment of compensation will be set aside. The case is remanded for further development. On remand, OWCP should consult with OPM regarding his retirement coverage. It should also obtain a complete earnings history from SSA, including the period of appellant’s federal civilian service. Lastly, OWCP should obtain a complete payment history from SSA regarding the age-related benefits he reportedly received beginning in July 1990. After it has supplemented the case record, a *de novo* decision shall be issued.

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<sup>16</sup> Federal (FECA) Procedure Manual, *supra* note 11.

<sup>17</sup> *Id.*

<sup>18</sup> OWCP noted that it lacked “jurisdiction” regarding the applicability of CSRS versus FERS. Despite OWCP’s jurisdictional claim, even a rudimentary understanding of the federal CSRS would give one pause to question how an employee who last worked for the Federal Government in the mid-1960s was covered under a retirement program (FERS) that was designed and implemented some two decades later.

<sup>19</sup> Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits *Curtis Hall*, 45 ECAB 316 (1994).

<sup>20</sup> Federal (FECA) Procedure Manual, *supra* note 11

<sup>21</sup> *See G.W.*, Docket No. 09-1211 (issued January 6, 2010) (the Board reversed OWCP’s finding of overpayment where the employment history indicated that the former employee was not likely covered under FERS and SSA had provided conflicting information regarding whether a FERS/SSA offset was required).

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant received an overpayment of compensation

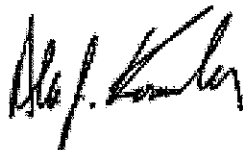
ORDER

**IT IS HEREBY ORDERED THAT** the June 13, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision

Issued: May 7, 2012  
Washington, DC



Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board



Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board



Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board