

File Number:
HR20-D-H

U.S. DEPARTMENT OF LABOR

RECEIVED JUN 01 2019

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a Review of the Written Record, the case file was transferred to the Branch of Hearings and Review.

The review was completed on 05/22/2019. As a result of such review, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Hearing Representative
Division of Federal Employees' Compensation

PAUL H FELSER
ESQ
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, May 28, 2019

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 *et seq.* of
Claimant; Employed by the Case No.

Examination of the Written Record was completed in Washington, D.C. Based on this review, the September 10, 2018 decision of the District Office is set aside for the reasons below.

The issues for determination are whether the claimant received an overpayment of compensation in the amount of \$3,415.08 for the period of December 1, 2017 to August 18, 2018, because she received compensation from the Office of Workers' Compensation Programs (OWCP) and benefits from the Social Security Administration (SSA) without an appropriate offset and whether she was with fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment.

The claimant, born on was employed as a for the in The claimant timely filed a Federal Employees' Compensation Act (FECA) claim for traumatic injury when she was rear ended in her in the performance of her federal duties. The District Office accepted the claim for sprain of right ankle; contusion of right shoulder region; sprain of neck; adhesive capsulitis of right shoulder; disorder of bursae and tendons in right shoulder region, unspecified; and dysthymic disorder. The claimant has been on the periodic roll for her partial temporary disability since December 15, 2008.

On November 30, 2017, the District Office received the claimant's form EN-1032, signed by the claimant on November 4, 2017. The claimant indicated that effective January 1, 2018, she would be receiving SSA retirement benefits.

On August 9, 2018, the District Office received the August 4, 2018 "FERS/SSA Dual Benefits Calculations Fax Transmittal" form, signed by a representative from the SSA, which indicated that effective December 2017, the claimant received a monthly payment of \$1,109.80 for her SSA with FERS (Federal Employees' Retirement System) contribution, and \$712.90 for her SSA rate without contribution of her FERS. The District Office calculated the offset amount. Noting that the SSA rate with FERS was \$1,109.80 and the SSA rate without FERS was \$712.90, the District Office calculated the difference between these two rates finding a monthly FERS offset of \$396.90 (\$1,109.80-\$712.90= \$396.90). This rate was then converted to 28-day FERS offset amount of \$366.37 (\$396.90 x 12/13).

Effective August 19, 2018, the District Office began to deduct the 28-day FERS offset amount of \$366.37 from the claimant's periodic roll payments.

By letter dated September 6, 2018, the District Office advised the claimant that her new net compensation payment from FECA, after the offset deduction, would be \$2,674.13, and that as her SSA benefits increased, the offset would also increase.

On September 10, 2018, the District Office issued a preliminary finding that an overpayment of \$3,415.08 occurred for the period December 1, 2017 to August 18, 2018, because the claimant

received FECA benefits that were not reduced by the FERS portion of her SSA retirement benefits. The Office found that the claimant was with fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. The District Office calculated the overpayment by counting the number of days from December 1, 2017 to August 18, 2018, which is 261 days. The \$366.37 offset rate was divided by 28 to obtain the daily rate of \$13.0846 ($\$366.37/28 = \13.0846). Multiplying 261 days by the daily rate of \$13.0846 showed an overpayment of \$3,415.08 ($261 \times \$13.0846 = \$3,415.08$). The District Office noted that OWCP had assigned a debt number for the overpayment: 906325772.

On October 3, 2018, the claimant, through her attorney, Paul Felser, requested a pre-recoupment hearing. She did not submit a completed copy of her overpayment recovery questionnaire with her request.

On November 9, 2018, the District Office received the claimant's updated EN-1032 form, signed by the claimant, but not dated. The claimant noted that on September 20, 2018, she had received a lump sum of \$3,141 from SSA and that her monthly amount was \$1,027.00 as of October 24, 2018. With this form, the claimant submitted a November 14, 2018 online summary of benefits, which she noted as hers, which showed a payment history for retirement from January 24, 2018 to October 24, 2018.¹ According to the document, the recipient was paid \$678.00 or \$707.00 from December 27, 2017 to September 26, 2018; on September 20, 2018, a one-time payment of \$3,414.00 was made; and that on October 24, 2018, a payment of \$1,027.00 was made. On November 19, 2018, the claimant submitted a new copy of her EN-1032 form, which was dated November 19, 2018, and initialed by the claimant.

On November 19, 2018, the claimant submitted a letter in which she disagreed with the findings of the preliminary decision noting that she had not received her full SSA and therefore, an overpayment had not occurred. She noted that her lump sum of \$3,141.00 should be used to calculate her overpayment, not the \$3,415.08 determined by the District Office. She submitted a Notice of Award from the SSA, dated September 26, 2018, which showed that the claimant's retirement award began December 2017; that she was to have received a monthly benefit of \$1,027.30; and that she was entitled to a lump sum benefit of \$3,141.00 for money past due.

By letter received December 31, 2018, the claimant indicated that there was a proposed increase to \$1,056.00, beginning on January 2019.

A hearing was scheduled for March 21, 2019. By letter dated March 18, 2019, the claimant, through her attorney, requested that the pre-recoupment hearing be converted to a review of the written record. The attorney noted that at the time of the issuance of the decision, the claimant had not received of a FERS annuity for the period of dual benefits noted in the District Office decision. By letter dated March 18, 2019, the undersigned acknowledged the request.

Based on the evidence of record, the September 10, 2018 preliminary determination decision of the District Office is remanded.

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with 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; or (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

¹ SSA benefits for a given month are paid the next month.

payment which the individual knew or should have been expected to know was incorrect.² Whether or not the Office 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.³

A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (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 (this provision applies only to the overpaid individual).⁴ Whether or not the Office 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.⁵

In this instance, the District Office determined that the claimant was with fault in the creation of the overpayment because she knowingly accepted a payment that she knew or should have known to be incorrect. The undersigned disagrees. Since the claimant noted the receipt of the SSA payments on her EN 1032 forms, I find that the claimant was without fault in the creation of the overpayment.

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.⁷

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.⁸ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.⁹ The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁰

² 20 C.F.R. § 10.433(a). See

51 ECAB 116 (1999).

³ *Id* at § 10.433(b).

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id* at § 10.433(b).

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b).

⁸ 20 C.F.R. § 10.437(b).

⁹ See *supra* note 7 at Chapter 6.200.6.b(3).

Docket No. 14-975 (issued September 11, 2014).

¹⁰ 20 C.F.R. § 10.438(a);

55 ECAB 442 (2004).

When an overpayment has been made to an individual who is entitled to further payments, 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 any hardship.¹¹

As it relates to dual benefits, FECA benefits will be reduced by SSA benefits paid on the basis of age and which are attributable to the employee's federal service.¹² The amount to be deducted from FECA benefits is the difference between the actual SSA benefit and a hypothetical SSA benefit computed without the federal earnings. SSA will provide the actual amount of SSA benefits received by the claimant, as well as the hypothetical SSA benefit computed without FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefit to obtain the amount of compensation payable.¹³

The August 4, 2018 "FERS/SSA Dual Benefits Calculations Fax Transmittal" form indicated that effective December 2017, the claimant received a monthly payment of \$1,109.80. The claimant's September 26, 2018 SSA Notice of Award letter indicated that her benefit amount beginning on December 2017, was \$1,027.30, which is different than the August 4, 2018 SSA documentation.

On remand, the District Office should forward a copy of the claimant's September 26, 2018 SSA Notice of Award letter and the August 4, 2018 "FERS/SSA Dual Benefits Calculations Fax Transmittal" to SSA and request clarification of the claimant's SSA benefits.

Following completion of any further development the District Office deems necessary, the District Office should issue a *de novo* preliminary overpayment determination noting that the claimant should be found without fault.

Consistent with the above findings, the decisions of the District Office dated September 10, 2018 is set aside, and the case file is REMANDED for further action as described above.

Issued:
Washington, D.C.

Susan P.
Hearing Representative
for
Director, Office of Workers'
Compensation Programs

¹¹ *Id.* at § 10.441(a).

¹² Federal (FECA) Procedure Manual, Part 2 --Claims, *Dual Benefits*, Chapter 2.1000.4(e); *see also* Docket No. 09-2131 (issued April 2, 2010).

¹³ FECA Bulletin 97-09 (issued February 3, 1997); *see id.*