

ISSUE

The issue is whether OWCP properly reviewed appellant's request for reconsideration of a final overpayment determination on its merits.

FACTUAL HISTORY

On October 1, 1989 appellant, then a 41-year-old budget analyst, filed an occupational disease claim (Form CA-2) for an emotional condition sustained in the performance of duty due to an adversarial relationship with her supervisor. OWCP accepted the claim for chronic post-traumatic stress disorder, recurrent major depression, adjustment disorder with depressed mood, and amnesic disorder. It paid appellant wage-loss compensation on the daily and periodic rolls.

On June 9, 2010 OWCP issued a letter advising appellant to notify it upon receipt of Social Security Administration (SSA) retirement benefits. Section 8116(d)(2) of FECA required that a claimant's continuing compensation benefits be reduced if he or she began receiving SSA retirement benefits based on his or her age and federal service. OWCP noted that it was notifying her of this requirement as she was approaching her 62nd birthday, the minimum age at which an individual is eligible to receive SSA age-related retirement benefits. It noted that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery. Consequently, if appellant had been approved for SSA retirement benefits, or were currently receiving SSA retirement benefits, she was to contact OWCP immediately so that it could begin the process of making any necessary adjustments to her compensation benefits.

Appellant completed Form EN1032 annually from July 23, 2010 through July 31, 2018, noting assignment of a Civil Service Active number and receipt of monthly SSA benefits.

On February 4, 2019 OWCP provided SSA with a Federal Employees Retirement System FERS/SSA dual benefits calculation form for its completion. On March 4, 2019 it received the completed FERS/SSA dual benefits calculation form, wherein SSA calculated SSA benefit rates with a FERS offset and without a FERS offset from July 2014 through December 2018. Beginning July 2014, SSA rate with FERS was \$1,099.70 and without FERS was \$17.20. Beginning December 2014, SSA rate with FERS was \$1,118.30 and without FERS was \$17.40. Beginning December 2016, SSA rate with FERS was \$1,121.60 and without FERS was \$17.40. Beginning December 2017, SSA rate with FERS was \$1,144.00 and without FERS was \$17.70. Beginning December 2018, SSA rate with FERS was \$1,176.00 and without FERS was \$18.10.

By letter dated March 13, 2019, OWCP informed appellant that the portion of SSA age-related retirement benefits attributable to her federal service would be deducted from her 28-day periodic rolls compensation payments in the amount of \$1,068.83.

In a FERS offset calculation form dated March 13, 2019, OWCP used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods, and calculated a total overpayment in the amount of \$62,341.97. It found that, during the period July 1 through November 30, 2014: an overpayment had been created in the amount of \$5,460.08, for the period December 1, 2014 through November 30, 2015; an overpayment had been created in the amount

of \$13,247.09, for the period December 1, 2015 through November 30, 2016; an overpayment had been created in the amount of \$13,283.39, for the period December 1, 2016 through November 30, 2017; an overpayment had been created in the amount of \$13,286.80, for the period December 1, 2017 through November 30, 2018; an overpayment had been created in the amount of \$13,552.73; and for the period December 12, 2018 through March 2, 2019, an overpayment had been created in the amount of \$3,511.87.

On March 14, 2019 OWCP issued a preliminary determination that appellant was overpaid compensation in the amount of \$62,341.97 for the period July 1, 2014 through March 2, 2019 because the SSA/FERS offset was not applied to payments for this period. It determined that she was without fault in the creation of the overpayment due to the complexity of benefits administration and could not have reasonably known about the improper payments. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she was entitled to request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. It further notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In response, appellant provided a Form OWCP-20, signed March 20, 2019, with information regarding her income, assets, and expenses. She did not submit supporting documentation.

By decision dated April 16, 2019, OWCP determined that appellant had received an overpayment of compensation in the amount of \$62,341.97 because the SSA/FERS offset had not been applied to payments for the period July 1, 2014 through March 2, 2019. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery because the financial information submitted did not establish that recovery would defeat the purpose of the act or be against equity and good conscience. OWCP required recovery of the overpayment by withholding \$150.00 from appellant's continuing compensation payments beginning May 26, 2019. The appeal rights attached to the decision explained that appellant's only right of review was to the Board.

On May 17, 2019 OWCP issued a debit demand letter with information regarding recovery of the overpayment.

On May 21, 2019, by letter dated May 15, 2019, appellant requested reconsideration of OWCP's April 16, 2019 final overpayment decision. She contended that she was financially unable to repay the overpayment.

On August 13, 2019 appellant, through her then counsel, again requested reconsideration of OWCP's April 16, 2019 final overpayment decision. Counsel noted that appellant had previously requested reconsideration and argued that OWCP should vacate the overpayment.

By decision dated November 6, 2019, OWCP denied modification of the April 16, 2019 decision under 5 U.S.C. § 8128(a). It noted that appellant's May 15, 2019 letter had not been imaged into the electronic case record until after issuance of the May 17, 2019 debit demand letter. OWCP found that appellant's reconsideration request failed to establish error pursuant to 20 C.F.R. § 10.609. It noted, however, that the appeal rights accompanying the April 16, 2019 decision specified that if she disagreed with the decision she had the right to request review by the Board within 180 days, and that such request should not have been sent to OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to review an award for or against compensation.⁴ OWCP's regulations provide standards to be met before a request for reconsideration of the merits of a given claim is granted.⁵ A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ However, section 10.440(b) of OWCP's regulations specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that section 8128(a) of FECA does not apply to such a final overpayment determination.⁷

ANALYSIS

The Board finds that OWCP improperly reviewed the merits of appellant's claim.

On May 21, 2019 appellant requested reconsideration of OWCP's April 16, 2019 final overpayment determination and submitted a letter containing argument in support of her request. Additionally, she requested reconsideration, through counsel, on August 13, 2019. By merit decision dated November 6, 2019, OWCP denied modification of the April 16, 2019 decision under 5 U.S.C. § 8128(a). It found that appellant did not submit evidence or argument establishing error in the final overpayment determination under 5 U.S.C. § 8128(a) and associated OWCP regulations, including those set forth at 20 C.F.R. § 10.609.

Section 10.440(b) of OWCP's regulations, however, specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that 5 U.S.C. § 8128(a) does not apply to such a final overpayment determination.⁸ The Board finds that OWCP erred in applying 5 U.S.C. § 8128(a) and its associated regulations in its November 6, 2019 decision. Therefore, the Board shall modify OWCP's November 6, 2019 decision, denying modification of

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

⁶ *Id.* at § 10.607(a). According to OWCP procedures, the one-year period of requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

⁷ *Id.* at § 10.440(b).

⁸ *See id.*

the April 16, 2019 final overpayment determination to reflect that the basis of the denial was not her failure to meet the standards for modification under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.609, rather, it was the fact that 5 U.S.C. § 8128(a) does not apply to a final overpayment determination of OWCP.⁹

On appeal appellant contends that OWCP should have waived the overpayment and improperly calculated the rate of recovery. She further argued that she began working in 1966 and has never received retirement benefits under FERS. These arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP improperly reviewed appellant's request for reconsideration of a final overpayment determination on its merits.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2019 merit decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: February 12, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *E.H.*, Docket No. 19-0016 (issued October 20, 2020); *P.J.*, Docket No. 19-1479 (issued May 8, 2020). See also *Charles E. Nance*, 54 ECAB 447 (2003).