

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

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| R.C., Appellant |) | |
| |) | |
| and |) | Docket No. 09-2131 |
| |) | Issued: April 2, 2010 |
| DEPARTMENT OF LABOR, OCCUPATIONAL |) | |
| SAFETY & HEALTH ADMINISTRATION, |) | |
| Jacksonville, FL, Employer |) | |

Appearances: *Case Submitted on the Record*
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 18, 2009 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 17, 2009. Pursuant to 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 in compensation in the amount of \$17,049.23 for the period September 1, 2003 through August 2, 2008 when he received compensation benefits under the Federal Employees' Compensation Act¹ (FECA) that were not offset by his Social Security Administration (SSA) benefits; and (2) whether the Office properly denied waiver of the overpayment.

On appeal, appellant's attorney asserts that his SSA benefits were not subject to offset and that the Office by collecting the overpayment prior to a final decision of the Board.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 25, 1994 appellant, then a 55-year-old safety compliance officer on temporary duty in Glynco, Georgia, sustained an employment-related back injury when he stepped into a hole and fell. The claim was accepted for permanent aggravation of preexisting herniated disc at L5-S1 and left radiculopathy. Appellant underwent back surgery on July 23, 1996. On March 14, 1997 he sustained an employment-related tendinitis of the left elbow and left shoulder,² and was placed on the periodic rolls effective April 16, 1997. Appellant has not returned to work.³

By decision dated August 8, 2008, the Office reduced appellant's monetary compensation to zero on the grounds that he did not fully cooperate with a February 14, 2008 functional capacity evaluation.⁴ On August 3, 2008 the SSA informed the Office of appellant's SSA rate with Federal Employee Retirement System (FERS) benefits and without FERS benefits for the period September 2003 through December 2007. In an August 12, 2008 letter, the Office informed appellant that, because he had been receiving FERS and SSA benefits and was not entitled to receive both FERS benefits and FECA benefits, his FECA benefits would be adjusted to reflect the FERS portion of his SSA benefits. An Office worksheet found in the record showed the SSA rate with FERS, SSA rate without FERS, monthly FERS offset, and 28-day FERS offset for this period.⁵ On August 18, 2008 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$17,049.23 had been created. It included an overpayment calculation worksheet⁶ and explained that the overpayment resulted because, for the period September 1, 2003 through August 2, 2008 appellant had received SSA benefits including a FERS benefit while receiving FECA benefits. The Office made a preliminary determination that appellant was without fault and provided appellant with an overpayment questionnaire and advised him of the importance to furnish financial information. On August 27,

² The left upper extremity claim was initially adjudicated under Office No. xxxxxx919, and by decision dated January 27, 2004, the Office denied authorization for left shoulder surgery. The claims were doubled, and in a September 22, 2004 decision. Appellant filed an appeal with the Board of the September 22, 2004 decision, and by order dated May 13, 2005, the Board dismissed the appeal on the grounds that, as the matter was in interlocutory posture, the Board did not have jurisdiction to review the case.

³ By decision dated February 19, 1999 appellant's compensation was suspended for failure to attend a scheduled impartial evaluation. In a July 8, 1999 decision, an Office hearing representative reinstated wage-loss compensation and the examination was rescheduled.

⁴ Appellant requested a review of the written record, and in an April 17, 2009 decision, an Office hearing representative affirmed the August 8, 2008 decision. Appellant filed an appeal with the Board, Docket No. 09-2095, that will be adjudicated separately.

⁵ The FERS offset calculation showed that for the period September 2 to December 1, 2003, the 28-day offset was \$245.91; for the period December 1, 2003 to December 1, 2004, \$251.08; for the period December 1, 2004 to December 1, 2005, \$257.91; for the period December 1, 2005 to December 1, 2006, \$268.43; for the period December 1, 2006 to December 1, 2007, \$277.29; and for the period beginning December 1, 2007, \$283.66.

⁶ The worksheet indicated that for the period September 1 to November 30, 2003 appellant received \$799.21 in compensation that should have been offset; from December 1, 2003 to November 30, 2004, \$3,281.97; from December 1, 2004 to November 30, 2005, \$3,362.04; from December 1, 2005 to November 30, 2006, \$3,499.18; from December 1, 2006 to November 30, 2007, \$3,614.67; and from December 1, 2007 to August 2, 2008, \$2,492.16, for a total overpayment in compensation of \$17,049.23.

2008 appellant disagreed that an overpayment occurred and requested a prerecoument hearing.⁷ On November 14, 2008 he elected FECA benefits, effective August 31, 2008, and on November 17, 2008 changed his request for a hearing to a review of the written record. In a March 12, 2009 letter, the SSA explained appellant's SSA benefits, noting that he reached full retirement age beginning in September 2003. By decision dated April 17, 2009, an Office hearing representative finalized the preliminary overpayment determination, denied waiver and returned the record to the Office for collection of the overpayment debt.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of the Act requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service, and that, 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.⁸

Office 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 the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁹ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant has received SSA benefits, the Office will obtain information from SSA on the amount of the claimant's SSA 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 benefit computed without the FERS covered earnings. The Office 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 the FECA benefit to obtain the amount of compensation payable.¹⁰

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic roll in April 1997 and received FECA benefits until his monetary compensation was reduced to zero, effective August 31, 2008. The SSA provided information establishing that he received SSA old age benefits beginning on September 1, 2003, his full retirement age, and continuing, and in August 2008, the SSA informed the Office that appellant's FECA benefits were not offset by the amount of his SSA benefits attributable to his federal employment under FERS. SSA records provided described the offset calculations for this

⁷ On September 5, 2008 the SSA informed the Office that appellant also received SSA retirement benefits for the period August 2000 to July 2003 that would be subject to offset, and in a preliminary determination dated September 26, 2008, the Office notified appellant that an overpayment in compensation in the amount of \$7,175.08 had been created for this period. Following his request for a prerecoument review of the written record, by decision dated April 23, 2009, an Office hearing representative finalized the \$7,175.08 overpayment and denied waiver. Appellant filed an appeal with the Board, Docket No. 09-2132, that will be adjudicated separately.

⁸ 5 U.S.C. § 8116(d); see *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.100.11 (a), (b) (February 1995).

¹⁰ FECA Bulletin 97-09 (issued February 3, 1997).

period that yielded an overpayment in compensation in the amount of \$17,049.23.¹¹ As appellant is not entitled to receive both FECA benefits and that portion of his SSA benefits attributable to his federal employment, the Office properly determined that an overpayment in compensation in the amount of \$17,049.23 was created.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”¹³ Section 10.438 of Office regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁶ Appellant, however, had the responsibility to provide financial information to the Office,¹⁷ and did not do so.

In its preliminary determination dated August 18, 2008, the Office clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting his income and expenses. As a result, the Office did not have the necessary financial

¹¹ *Supra* notes 5 and 6.

¹² *Janet K. George, supra* note 8.

¹³ 5 U.S.C. § 8129.

¹⁴ Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Supra* note 14.

¹⁷ 20 C.F.R. § 10.438.

information to determine if recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience. Consequently, as appellant did not submit the financial information required under section 10.438 of Office regulations, which was necessary to determine his eligibility for waiver, the Office properly denied waiver of recovery of the overpayment in compensation in the amount of \$17,049.23.¹⁸

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act, and appellant's FECA benefits were reduced to zero effective August 31, 2008.

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$17,049.23 for the period September 1, 2003 through August 2, 2008 because he received FECA benefits that were not offset by SSA benefits and that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 2, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁸ *Id.*