

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

T.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brockton, MA, Employer**

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**Docket No. 11-1188
Issued: December 7, 2011**

Appearances:
John L. Whitehouse, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant, through his attorney, filed a timely appeal from a March 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 a \$4,685.42 overpayment of compensation because she concurrently received Social Security Administration (SSA) benefits from October 1, 2001 to December 19, 2010 while receiving FECA benefits; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 7, 1994 appellant filed an occupational disease claim alleging that she suffered from pain in her right shoulder and lower back as a result of working as a flat sorter operator for five years. OWCP accepted her claim for right bicipital tendinitis and aggravation of chronic lumbosacral strain. Appellant was immediately placed on light duty and returned to full duty on May 30, 1996. She stopped work again on July 7, 1998. Appellant was placed on the periodic rolls for temporary total disability beginning September 24, 1999.

In a form dated December 6, 2010, SSA notified OWCP that appellant began receiving social security retirement benefits effective October 1, 2001. The document listed appellant's SSA's benefit rates with and without the Federal Employee Retirement System (FERS) offset.

In a letter dated December 10, 2010, OWCP advised appellant that she had been receiving SSA benefits and that the concurrent receipt of SSA benefits as part of the FERS retirement package and the receipt of compensation under FECA was prohibited. Therefore, it would adjust appellant's compensation benefits effective December 19, 2010.

In a February 4, 2011 letter, OWCP advised appellant that it made a preliminary determination that she received an overpayment in the amount of \$4,685.42 for the period October 1, 2001 to December 19, 2010.² It stated that as a federal employee covered under FERS, she began collecting social security benefits on October 1, 2001. Thus, the payments appellant received from OWCP for temporary total disability should have been offset by the money she paid into SSA while she was a federal worker but it was not. This resulted in an overpayment for the period October 1, 2001 to December 19, 2010. OWCP determined that appellant was not at fault in the creation of the overpayment because she was not aware or could not reasonably have been expected to know that it had paid compensation incorrectly. It informed her that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed

² OWCP calculated that from October 1, 2001 to November 30, 2001 appellant received 61 days of temporary total disability which should have been offset by \$34.52 or \$1.23 a day, which resulted in an overpayment of \$77.49 for this period. From December 1, 2001 through November 30, 2002, appellant was paid for 365 days of temporary total disability, but the payments should have been offset by \$35.35 or \$1.26 a day, which resulted in a total overpayment of \$459.90 for this period. From December 01, 2002 through November 30, 2003, her payments should have been offset by \$35.08 or \$1.25 a day, which resulted in an overpayment of \$456.25 for this period. From December 1, 2003 to November 30, 2004, appellant's payments should have been offset by \$35.82 or \$1.28 a day, which resulted in an overpayment of \$468.48 for the period. From December 1, 2004 to November 30, 2005, her payments should have been offset by \$37.38 or \$1.33 a day, which resulted in an overpayment of \$485.45 for this period. From December 1, 2005 to November 30, 2006, appellant's payments were offset by \$39.14 or \$1.39 a day, which resulted in an overpayment of \$507.35. From December 1, 2006 to November 30, 2007, her payments should have been offset by \$40.34 or \$1.44 a day, which resulted in an overpayment of \$525.60 for this period. From December 1, 2007 through November 30, 2008, appellant's payments should have offset by \$41.26 or \$1.47 a day, which resulted in an overpayment of \$538.02 for this period. From December 1, 2008 to November 30, 2009, her payments should have been offset by \$43.66 or \$1.56 a day, which resulted in an overpayment of \$569.40 for this period. From December 1, 2009 through November 30, 2010, appellant's payments should have been offset by \$43.75 or \$1.56 a day, which resulted in an overpayment of \$569.40. From December 1 to 18, 2010 her payments should have been offset by \$43.75 or \$1.56 a day, which resulted in an overpayment of \$28.08.

financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

On February 25, 2011 appellant requested that OWCP make a decision based on the written evidence on the issues of fault and possible waiver of the overpayment. She indicated that she believed the overpayment occurred through no fault of her own and requested a waiver.

Appellant submitted a Form OWCP-20, completed on February 25, 2011. She noted a monthly income of \$3,858.48, which included \$1,094.10 in SSA payments, \$123.00 in VA benefits, and \$2,641.38 in workers' compensation benefits. Appellant also reported assets of \$100.32 exclusively in her savings account. She noted \$3,922.88 in monthly household expenses, which included \$1,160.00 in rent, \$540.00 in food, \$180.00 in utilities, \$1192.88 in other expenses and \$850.00 in monthly payments for debt. Appellant reported the difference between her monthly income and monthly expenses was a deficit of \$64.40. In an attachment, she stated that her "other expenses" included \$410.11 in medication, \$175.00 in dental care, \$140.00 in gasoline, \$50.00 for parking, \$85.00 for car insurance, \$5.00 in excise tax and \$327.77 for automobile loan payments. Appellant also noted the amount owed on her debts and monthly payments. She stated that she was not aware of any incorrect payments until she received OWCP's December 10, 2010 letter and that she always reported her social security benefits to OWCP.

By decision dated March 10, 2011, OWCP finalized the finding of overpayment in the amount of \$4,685.42 for the period October 1, 2001 through December 19, 2010. It further finalized the preliminary finding that appellant was without fault, but denied waiver of recovery finding that he did not provide sufficient evidence establishing that adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.³

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵

Section 8116(d)(2) of FECA⁶ provides for limitations on the right to receive compensation and states in pertinent part: (d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also

³ The Board notes that OWCP's statement that it made a "preliminary finding that the claimant is with fault" appears to be made in error as its February 4, 2011 preliminary finding found that appellant was without fault.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d)(2).

receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that -- (2) in the case of benefits received on account of age or death under title [2] of the [SSA], compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of \$4,685.42. The record reflects that she was a federal employee covered under FERS who began collecting SSA benefits on October 1, 2001. FECA provides, however, that the receipt of FECA benefits and federal retirement benefits concurrently is a prohibited dual benefit and that SSA benefits that are attributable to the federal service of an employee covered under FECA must be adjusted for the FERS portion of SSA benefits.⁸ From October 1, 2001 through December 19, 2010 appellant received compensation benefits. The record shows that during this period OWCP did not offset the FERS portion of appellant's SSA benefits. During the periods in question offsets should have been made in the amounts of: \$77.49, \$459.90, \$456.25, \$468.48, \$485.45, \$507.35, \$525.60, \$538.02, \$569.40, \$569.40 and \$28.08, totaling \$4,685.42. Therefore, OWCP properly determined that appellant received a \$4,685.42 overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her 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.¹⁰ Additionally recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice

⁷ *Id*; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (February 1995); *Franklin L. Bryan*, 56 ECAB 310 (2005); *A.L.*, Docket No. 09-1529 (issued January 13, 2010).

⁸ See *supra* notes 6 and 7.

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

¹⁰ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependants 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 6.200.6(a)(1)(b) (June 2009).

that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

ANALYSIS -- ISSUE 2

OWCP determined that appellant was not at fault in creating the overpayment. However, the fact that appellant was not at fault does not, of itself, establish a basis for waiver of recovery of the overpayment.¹² Appellant must still repay the overpayment unless recovery would defeat the purpose of FECA or recovery would be against equity and good conscience.¹³ In its March 10, 2011 decision, OWCP denied waiver of recovery finding that she did not provide sufficient evidence supporting that adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience. On appeal, counsel contends that recovery of the overpayment would defeat the purpose of FECA because her actual monthly earnings are more than her monthly expenses.

The Board finds that the evidence of record establishes that appellant's monthly expenses exceed her monthly income. Appellant indicated on her overpayment recovery questionnaire that her monthly income totaled \$3,858.48 and her monthly expenses totaled \$3,922.88, which resulted in a deficit of \$64.40. OWCP did not address this questionnaire or explain why recovery of the overpayment would not cause hardship in light of the financial evidence. Because it denied waiver without giving due consideration to the evidence timely submitted, the Board finds that OWCP did not properly exercise its discretion in the matter.¹⁴ The Board will set aside the March 10, 2011 decision on the issue of waiver and remand the case for proper exercise of discretion. After such development as may be necessary, OWCP shall issue an appropriate final decision on whether appellant is entitled to waiver.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in compensation in the amount of \$4,685.42 from October 1, 2001 to December 19, 2010. The Board also finds that further development is warranted on the issue of waiver of recovery.

¹¹ *Id.* at § 10.437(a)(b).

¹² *L.S.*, 59 ECAB 350 (2008); *Jorge O. Diaz*, 51 ECAB 124 (1999).

¹³ *Supra* note 7.

¹⁴ *See W.H.*, Docket No. 09-2048 (issued May 24, 2010).

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment. The decision is set aside on the issue of waiver of the recovery of the overpayment and the case is remanded for further action consistent with this opinion.

Issued: December 7, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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