

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 12-1302
Issued: February 22, 2013**

Appearances:

Lenin V. Perez, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2012 appellant, through counsel, filed a timely appeal from a May 10, 2012 decision by the Office of Workers' Compensation Programs (OWCP) regarding an overpayment in the amount of \$36,772.58. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment in the amount of \$36,772.58 for the period October 1, 1992 through July 30, 2011; (2) whether OWCP properly denied waiver of recovery of the overpayment in the compromised amount of \$18,400.00; and (3) whether OWCP gave due regard to relevant factors in setting the rate of recovery from continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's counsel contests the overpayment decision, noting that appellant is 84 years old, that the overpayment was not his fault, and that the collection of the overpayment presents an undue financial and mental hardship.

FACTUAL HISTORY

On December 19, 1990 appellant, then a 62-year-old mail handler, sustained a traumatic injury to his back while sweeping mail trays. OWCP accepted his claim for subluxations at C6, L3 and L4; permanent aggravation of degenerative arthritis of the lumbar spine; and an aggravation of arthritis of the hips. Appellant stopped work on September 27, 1992 and did not return. He elected to receive compensation benefits under FECA in lieu of benefits from the Office of Personnel Management.

On July 26, 2011 the Social Security Administration (SSA) advised OWCP of appellant's SSA rate with Federal Employees' Retirement System (FERS) and without FERS for the periods commencing October 1992.² On September 2, 2011 OWCP issued a preliminary determination that appellant was overpaid in the amount of \$36,772.58 from October 1, 1992 through July 30, 2011 because he received FECA benefits and retirement benefits concurrently beginning October 1, 1992.³ It made a preliminary determination that he was at fault with regard to the

² Effective October 1992, appellant's SSA rate with FERS was \$939.60 and without FERS was \$814.50; effective December 1992 his rate with FERS was \$962.80 and without FERS was \$838.80; effective December 1993 appellant's rate was \$993.00 with FERS and \$860.60 without FERS; effective December 1994 his rate with FERS was \$1,020.70 and without FERS \$884.70; effective December 1995 appellant's rate with FERS was \$1,047.10 and without FERS \$907.60; effective December 1996 his rate with FERS was \$1,077.40 and without FERS \$933.90; effective December 1997 appellant's rate with FERS was \$1,100.090 and without FERS \$953.50; effective December 1998 his rate with FERS was \$1,114.20 and without FERS \$965.80; effective December 1999 appellant's rate with FERS was \$1,140.90 and without FERS \$989.00; effective December 2000 his rate with FERS was \$1,180.70 and without FERS \$1,023.50; effective December 2001 appellant's rate with FERS was \$1,212.60 and without FERS \$1,051.10; effective December 2002 his rate with FERS \$1,229.60 and without FERS \$1,065.80; effective December 2003 appellant's rate with FERS \$1,255.40 and without FERS \$1,088.10; effective December 2004 his rate with FERS was \$1,289.20 and without FERS \$1,117.50; effective December 2005 appellant's rate with FERS was \$1,342.00 and without FERS \$1,163.20; effective December 2006 his rate with FERS \$1,386.30 and without FERS \$1,201.60; effective December 2007 appellant's rate with FERS was \$1,418.10 and without FERS \$1,229.20; effective December 2008 his rate with FERS \$1,500.30 and without FERS \$1300.50 (this rate continued for the next three years).

³ For the period October 1 through November 30, 1992, OWCP determined that the 28 days offset was \$115.48, which resulted in an overpayment in the amount of \$251.58. For the period December 1, 1992 through November 30, 1993, it determined that appellant's 28-day FERS offset was \$119.08, which resulted in an overpayment in the amount of 1,552.29. For December 1, 1993 through November 30, 1994, OWCP determined that his 28-day FERS offset was \$122.22, which resulted in an overpayment of \$1,593.23. For December 1, 1994 through November 30, 1995, it determined that the 28-day offset was \$125.64, which resulted in an overpayment in the amount of \$1,785.63. For December 1, 1995 through November 30, 1996, OWCP determined that the 28-day offset was \$128.77, which resulted in an overpayment in the amount of \$1,683.21. For December 1, 1996 through November 30, 1997, it determined that the 28-day offset was \$132.46, which resulted in an overpayment in the amount of \$1,726.71. For December 1, 1997 through November 30, 1998, OWCP determined that the 28-day offset was \$135.23, which resulted in an overpayment in the amount of \$1,762.82. For December 1, 1998 through November 30, 1999, it determined that the 28-day offset was \$136.98, which resulted in an overpayment in the amount of \$1,636.50. For December 1, 1999 through November 30, 2000, OWCP determined that the 28-day offset was \$140.22, which resulted in an overpayment in the amount of \$1,832.88. For December 1, 2000 through June 30, 2001, it determined that the 28-day offset was \$145.11, which resulted in an overpayment in the amount of

FOOTNOTE 3 CONTINUED ON NEXT PAGE

overpayment as he should reasonably have known that his retirement payments from social security were based in part on his federal earnings. OWCP provided appellant instructions for contesting the overpayment and the finding of fault and sent financial forms to him to complete.

By letter dated September 22, 2011, appellant, through counsel, requested a prerecoupment hearing before an OWCP hearing representative and argued that the overpayment arose through no fault of his own. He disagreed with the amount of the overpayment and requested the documentation of how it was calculated. Appellant's counsel noted that appellant was 83 years old.

By letter dated January 12, 2012, OWCP informed appellant and his attorney that a telephonic hearing would be conducted on February 16, 2012 at 9:15 a.m. The letter provided instructions as to how to call in. At the hearing held on February 16, 2011 appellant's attorney did not call in and appellant did not feel comfortable representing himself. The hearing representative gave appellant's attorney an extension of time to submit financial information.

By letter dated March 12, 2012, appellant's counsel contended that the overpayment occurred through no fault of appellant. He noted that appellant was 84 years old and that collection of the overpayment would cause hardship. Counsel stated that if appellant was required to pay back the overpayment he could only afford about \$25.00 a month. He submitted financial forms showing that appellant had an income of \$4,135.85 a month.⁴ Appellant listed monthly expenses of \$4,010.00.⁵

By decision dated May 10, 2012, an OWCP hearing representative found that an overpayment had occurred in the amount of \$36,772.58. Appellant was found not at fault in the creation of the overpayment. Due to his life expectancy, the principal was compromised by

CONTINUATION OF FOOTNOTE 3. \$1,098.69. For July 1 through November 30, 2001, OWCP determined that the 28-day offset was \$145.38, which resulted in an overpayment in the amount of \$794.40. For December 1, 2001 through November 30, 2002, it determined that the 28-day offset was \$149.08, which resulted in an overpayment in the amount of \$1,943.36. For December 1, 2002 through November 30, 2003, OWCP determined that the 28-day offset was \$151.20, which resulted in an overpayment in the amount of \$1,971.08. For December 1, 2003 through November 30, 2004, it determined that the 28-day offset was \$154.43, which resulted in an overpayment in the amount of \$2,018.62. For December 1, 2004 through November 30, 2005, OWCP determined that the 28-day offset was \$158.49, which resulted in an overpayment in the amount of \$2,066.03. For December 1, 2005 through November 30, 2006, it determined that the 28-day offset was \$165.05, which resulted in an overpayment in the amount of \$2,151.54. For December 1, 2007 through November 30, 2008, OWCP determined that the 28-day offset was \$170.49, which resulted in an overpayment in the amount of \$2,222.46. For December 1, 2008 through July 30, 2011, it determined that the 28-day offset was \$184.43, which resulted in an overpayment in the amount of \$6,402.36. The total of these overpayments was \$36,772.58.

⁴ Appellant stated that he receives monthly income from social security in the amount of \$1,454.00, FECA benefits in the amount of \$1,173.00; Veterans Administration benefits in the amount of \$797.00; local teamster payment in the amount of \$364.81; and a state teamster payment in the amount of \$347.04.

⁵ Appellant's monthly expenses were: rent: \$1,001.00; Comcast TV: \$126.56; electric: \$155.00; telephone: \$55.00; long distance calling card: \$40.00; newspaper: \$21.00; house cleaning: \$300.00; medication through Caremark: \$53.00, supplements (magnesium, fiber choice and juice plus): \$81.75; food (including laundry and toilet supplies): \$600.00; clothes and shoes: \$100.00; 1999 Honda repairs: \$100.00; auto insurance: \$150.00; gas: \$300.00; Sun pass: \$25.00; Church: \$100.00; Dry cleaning: \$40.00; AAA Road Service: \$12.00; prescription glasses: \$50.00; cook: \$200.00; eating out: \$300.00; and drivers: \$200.00.

reducing the overpayment to \$18,400.00. The evidence supported that the collection of the overpayment would not result in severe financial hardship or be against equity and good conscience, so waiver was denied. The hearing representative directed recovery of the overpayment by deduction of \$225.00 a pay period from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d)(2) of FECA 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 receiving benefits under subchapter [3] of chapter 84 of this title or benefits under title [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 federal 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 chapter 84 of this title.”⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$36,772.58. Appellant received FERS benefits from October 1, 1992 through July 30, 2011 without offset for the portion of social security from claimant’s retirement compensation. Due to his receipt of a portion of the social security benefits claimant earned as a federal employee as part of his FERS retirement concurrent with the receipt of benefits under FECA, he received a prohibited dual benefits. An OWCP overpayment calculation worksheet found that FERS offset in this amount was not made against the compensation appellant received under FECA. This created the overpayment of compensation. The Board finds that appellant received an overpayment of compensation in the amount of \$36,772.58 for the period October 1, 1992 through July 30, 2011.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁷ provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery

⁶ 5 U.S.C. § 8116(d)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e), 2.1000.11(a)-(b) (January 1997); FECA Bulletin No. 97-9 (issued February 3, 1997) (FECA benefits have to be adjusted for the FERS portion of the SSA benefits, the portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit).

⁷ 20 C.F.R. §§ 8101(4) and 8114; *see also* 20 C.F.R. § 10.5(s).

would defeat the purpose of FECA or would be against equity and good conscience. Thus a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.

According to 20 C.F.R. § 10.436 recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁸ An individual's liquid assets include but are not limited to the value of stocks, bonds, savings accounts, mutual funds and certificates of deposit.⁹ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.¹⁰

Section 10.437 provides that 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.¹¹ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹²

ANALYSIS -- ISSUE 2

Appellant requested waiver of recovery of the overpayment and provided information on an overpayment recovery questionnaire. He reported a monthly income of \$4,135.85. An OWCP hearing representative determined that appellant's actual monthly income was \$4,288.03. She noted that although he listed his OWCP income as \$1,173.00, this was increased to \$1,223.25 on March 11, 2012. The hearing representative also noted that appellant was paid compensation every 28 days, which actually resulted in a monthly income of \$1,325.28. She noted that his monthly income, with these adjustments, was \$4,288.03. The calculations are supported by the evidence of record. The hearing representative allowed the full amount of appellant's expenses in the amount of \$4,010.31. Accordingly, appellant's income was \$277.72 greater than his expenses.

⁸ *Id.* at § 8129(b).

⁹ *See Maria A. McCarthy*, Docket No. 94-219 (issued June 9, 1995).

¹⁰ 20 C.F.R. § 10.436. OWCP's procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹¹ *Id.*

¹² *Id.*

The Board find that OWCP properly determined that recovery of the overpayment would not defeat the purpose of FECA. Although counsel argued that it was against equity and good conscience to collect the debt due to appellant's advanced age and that he was not at fault in the creation of the overpayment, the Board finds that OWCP properly took these matters into consideration when it compromised the amount of the overpayment, reducing it from \$36,772.58 to \$18,400.00. Further, there is no evidence that appellant relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received. Pursuant to its regulations, OWCP properly found that recovery of the overpayment would not be against equity or good conscience.

As the evidence in this case fails to support that the recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying a waiver of recovery of the compromised overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 provides that when an overpayment has been made to an individual because of an error of factor law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹³

Section 10.441 of OWCP's regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, 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.¹⁴

Under OWCP's procedures, the compromise of all or part of the overpayment and any charges may be made depending upon the individual claimant's financial circumstances in order to set a repayment schedule. Compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established.¹⁵ Compromise is a matter which rests in the discretion of OWCP.¹⁶

ANALYSIS -- ISSUE 3

In setting the rate of recovery from appellant's continuing compensation, an OWCP hearing representative considered the fact that recovery of the principal balance of \$38,772.58

¹³ 20 C.F.R. § 10.436.

¹⁴ *Id.* at § 10.441(a).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 10, *Debt Liquidation*, Chapter 6.300.5 (May 2004). See *Jorge E. Diaz*, 53 ECAB 403 (2002).

¹⁶ *D.C.*, Docket No. 10-1046 (issued January 19, 2011); *Jorge E. Diaz*, *supra* note 15; *Linda D. Lane*, 46 ECAB 727 (1995).

with interest would take appellant 84.73 months to repay, or over seven years to repay. By compromising the amount of the overpayment to equal \$18,400.00, it was determined that he could repay this balance over his remaining life expectancy of 85.2 months.

OWCP took several factors into consideration in setting the rate of recovery from appellant's continuing compensation, including financial circumstances, the extent of the overpayment and the amount of time it would take to recover the debt. It determined that the debt would be collected by deducting \$225.00 from each of appellant's continuing compensation payments.

The Board finds that OWCP did not act unreasonably in determining the amount to be taken out of appellant's continuing compensation checks. Appellant's monthly income was \$4,288.03 and his monthly expenses were listed as \$4,010.31. The difference between these two amounts is \$277.72. OWCP acted within its discretion when it determined that it would collect the compromised overpayment of \$18,400.00 by deducting \$225.00 from each of appellant's continuing compensation payments.

CONCLUSION

The Board finds that OWCP properly found an overpayment in the amount of \$36,772.58; properly denied waiver of recovery of the overpayment in the compromised amount of \$18,400.00; and determined that OWCP gave due regard to relevant factors in setting the rate of recovery for continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 10, 2012 is affirmed.

Issued: February 22, 2013
Washington, DC

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

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

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