

FACTUAL HISTORY

On August 17, 1990 appellant, then a 59-year-old coal mine inspector, injured his low back while in the performance of duty. The Office accepted the claim for low back strain and expanded his claim to include a herniated disc at L4-5 and authorized a lumbar laminectomy at L4-5. Appellant stopped work on August 16, 1990 and voluntarily retired on June 12, 1992. He received appropriate disability compensation and was placed on the periodic compensation rolls on January 22, 1991.

In a Federal Employee Retirement System (FERS) and SSA dual benefits calculations fax transmittal dated February 22, 2008, the SSA representative noted that prior to August 1994 appellant was receiving disability benefits. The representative further noted that beginning in August 1994 appellant received FERS retirement benefits and SSA compensation attributed to his federal employment concurrently. The SSA prepared a dual benefits calculation worksheet noting figures for SSA benefits with FERS benefits and SSA benefits without FERS benefits for the period August 1994 to December 2007.

In a letter dated March 5, 2008, the Office advised appellant that he had been erroneously receiving FERS and SSA dual benefits. It noted that a portion of the SSA benefits earned as a federal employee was part of the FERS retirement package and that the receipt of Federal Employees' Compensation Act (the Act) benefits and federal retirement benefits concurrently was a prohibited dual benefit. The Office further indicated that SSA benefits which were attributable to federal service of an employee covered under the Act must be adjusted for the FERS portion of the SSA benefits. It noted that appellant's compensation for the four-week period prior to the offset was \$3,220.18, that the SSA deduction was \$189.88, which would result in \$3,030.30 in compensation after the offset.

In a March 6, 2008 FERS overpayment calculation worksheet, the Office noted that, for the period August 1, 1994 to February 16, 2008, it failed to deduct a 28-day FERS offset amount from appellant's benefits. This resulted in an overpayment of \$27,734.67.¹

In a March 7, 2008 preliminary overpayment determination, the Office found that appellant was erroneously overpaid benefits for the period August 1, 1994 to February 16, 2008 because appellant was in receipt of SSA retirement benefits attributable to his federal employment at the same time that he was receiving compensation benefits under the Act, which constituted a dual benefit. It noted that appellant was in receipt of social security retirement benefits based on age. The Office determined that appellant's compensation benefits were not offset by the amount of SSA benefits he received attributable to his federal service and therefore an overpayment of compensation was created. It noted that the total amount of the overpayment was \$27,734.67. The Office determined that appellant was not at fault in creating the overpayment. It advised him that he had 30 days to submit evidence or arguments regarding the

¹ The Office noted that the overpayment was originally calculated for the period of August 1, 1994 to March 15, 2008 in the amount of \$27,924.55. However, it adjusted the total amount to reflect the actual period in which the SSA offset was not deducted from appellant's compensation, from August 1, 1994 to February 16, 2008, which amounted to an adjusted overpayment of \$27,734.67.

overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

On April 7, 2008 appellant requested that the Office make a decision based on the written record. He asserted that the overpayment occurred because of no fault of his own. In a statement dated April 1, 2008, appellant's son-in-law, James B. Cox, Jr., noted that appellant and his wife recently moved into his residence due to appellant's progressive Alzheimer's disease. Mr. Cox indicated that appellant sought waiver of overpayment noting that recovery of the overpayment would cause a severe financial hardship on his family as his income was limited to disability and social security benefits and any reduction would adversely affect his standard of living. He noted that recovery would be against equity and good conscience due to the financial hardship repayment would create and specifically noted that appellant would not have purchased a home, a car or provided economic assistance to his children had his benefits not supported these decisions. Appellant submitted an undated overpayment questionnaire and financial documents. He indicated that his income was \$4,782.22 and his expenses were \$3,830.76. The overpayment questionnaire noted a monthly payment of rent or mortgage of \$1,097.76, food of \$500.00, clothing of \$100.00, utilities of \$1,000.00, home owners insurance of \$83.30, church pledge of \$505.00, credit union payment of \$344.70, Kohl's credit card of \$100.00, Chase credit card of \$50.00 and a Visa credit card of \$50.00. Assets included cash on hand of \$50.00, checking account of \$1,133.04, savings account balance of \$7,304.71, a certificate of deposit of \$25,000.00 and \$1,077.00, for a total of \$24,564.75.

On April 17, 2008 the Office finalized the overpayment determination, finding that appellant received a \$27,734.67 overpayment of compensation, for the period August 1, 1994 to February 16, 2008, for which he was without fault. It noted how the overpayment occurred and further found that appellant was not eligible for waiver as recovery of the overpayment would not defeat the purpose of the Act and it would be against equity and good conscience. The Office found that he was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted. It found that the sum of \$500.00 would be withheld every 28 days from his continuing compensation effective May 11, 2008.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d)(2) of the Act² 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 III of chapter 84 of this title or benefits under title II of the Social Security Act shall be entitled to all such benefits, except that --”

* * *

“(2) in the case of benefits received on account of age or death under title II of the Social Security Act, compensation payable under this subchapter

² 5 U.S.C. § 8116(d)(2).

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.”³

ANALYSIS -- ISSUE 1

The record indicates that on September 28, 1990 appellant’s claim was accepted for a low back strain and a herniated disc at L4 to L5 and he was paid disability compensation under the Act. The record also reflects that appellant was in receipt of SSA retirement benefits based on age from August 1, 1994 to February 16, 2008. The Office properly found that this created an overpayment in compensation. It also properly determined that for the period August 1, 1994 to February 16, 2008 appellant received an overpayment of \$27,734.67. The record contains an Office overpayment calculation worksheet calculating the overpayment during the timeframe in question. Appellant does not dispute that he received the overpayment in question nor does he dispute the amount of the overpayment. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received a \$27,734.67 overpayment of compensation from August 1, 1994 to February 16, 2008.

LEGAL PRECEDENT -- ISSUE 2

Sections 10.441(a) of Title 20 of the Code of Federal Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or her attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides “[a]djustment or recovery by the United States may not be made when 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.”⁴

Section 10.436 of Title 20 of the Code of Federal Regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [Federal] FECA monthly benefits) to meet current ordinary and necessary living expenses and

³ *Id.*; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 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 SSA benefits, the portion of the SSA benefit 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).

⁴ *Id.*; 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.436.

“(b) The individual’s assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the claimants assets not exempted from recoupment in (iv) below. The first \$4,800[.00] or more, depending on the number of the individual’s dependents, is also exempted from recoupment as a necessary emergency resource.

“An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50[.00]. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50[.00]).

“Both conditions in (a) and (b) above must be met to defeat the purpose of the Act. When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time. It is the individual’s burden to show otherwise by submitting evidence that recovery of the overpayment would cause financial hardship of a nature sufficient to justify waiver.”⁶

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.⁷ To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss, conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose. In making such a decision, the individual’s present ability to repay the overpayment is not considered.⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in creating the overpayment. Because he is without fault, the Office may recover the overpayment only if recovery would not defeat the purpose of the Act or be against equity and good conscience.

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

⁷ See 20 C.F.R. § 10.437.

⁸ See *Jorge O. Diaz*, 51 ECAB 124, 129 (1999).

Appellant requested waiver of the overpayment and provided information on an overpayment recovery questionnaire. He indicated that his income was \$4,782.22 and his expenses were \$3,830.76. The questionnaire revealed that appellant had monthly expenses which included rent or mortgage of \$1,097.76, food of \$500.00, clothing of \$100.00, utilities of \$1,000.00, other expenses of home insurance of \$83.30 and a pledge to church of \$505.00, credit union payment of \$344.70, Kohl's credit card of \$100.00, Chase credit card of \$50.00 and a Visa credit card of \$50.00. Assets included cash on hand of \$50.00, checking account of \$1,133.04, savings account balance of \$7,304.71, a certificate of deposit of \$25,000.00 and \$1,077.00 for a total of \$34,564.75. The record establishes that his current income exceeds his monthly expenses by more than \$50.00, therefore he is deemed not to need substantially all of his income to meet his ordinary and necessary living expenses. Because appellant has income which exceeds his monthly expenses by more than \$50.00, as set forth by the Office in its procedure manual, the Board concludes that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act.⁹

Appellant indicated that recovery of the overpayment would cause a severe financial hardship on his family. The Board notes that his allegations that he would experience severe financial hardship are inadequate to substantiate that recovery would be against equity and good conscience. As noted, "severe financial hardship" is determined by the same criteria set forth in section 20 C.F.R. § 10.436, under which it was found that appellant was not entitled to waiver. Appellant noted that recovery would be against equity and good conscience and noted that he would not have purchased a home, a car or provided economic assistance to his children had his benefits not supported these decisions. The evidence is insufficient to support his allegations that, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹⁰ Appellant has not sufficiently shown that he would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place.¹¹

Appellant asserts on appeal that he did not know nor was he expected to know that he was not permitted to receive social security benefits without a corresponding offset to his compensation benefits, rather the fault lies with the social security administration who knew in 1994 that he was receiving both compensation benefits and retirement social security. He further noted that he was 77 years old and had Alzheimer's disease. The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse. Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹² As the evidence in this case fails to support that recovery of

⁹ *Supra* note 6.

¹⁰ *See Wayne G. Rogers*, 54 ECAB 482 (2003).

¹¹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (May 2004).

¹² *Carroll R. Davis*, 46 ECAB 361 (1994).

the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board find that the Office did not abuse its discretion by denying waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹³ Section 10.441(a) of the regulations¹⁴ provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] 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.”¹⁵

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. The record supports that, in requiring repayment of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments, the Office took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.433 and 10.434,¹⁶ and found that this method of recovery would minimize any resulting hardship on appellant. The overpayment questionnaire indicates that appellant has monthly income of \$4,782.22 and his expenses were \$3,830.76. The Office considered the amount of appellant's assets and the extent of his monthly income exceeded his monthly expenses. Therefore, it properly required repayment of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of \$27,734.67 in compensation from August 1, 1994 to February 16, 2008. The Board also finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment. The Board further finds that the Office properly determined to recover the overpayment from continuing compensation payments.

¹³ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez* 51 ECAB 295 (2000).

¹⁴ 20 C.F.R. § 10.441(a).

¹⁵ *Id.*

¹⁶ 20 C.F.R. §§ 10.433, 10.434.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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