

FACTUAL HISTORY

On October 4, 1988 appellant, then a 41-year-old rural carrier, sustained a right knee injury as a result of getting in and out of tanks and walking up and down steps on a deck. The Office accepted his claim for right knee sprain. On February 2, 1989 appellant filed a claim alleging that he sustained a right knee injury as a result of a motor vehicle accident on that date. The Office accepted his claim for right knee sprain and localized right lower leg osteoarthritis.¹ Appellant received appropriate total disability compensation.

In a Federal Employee Retirement System (FERS) and social security dual benefits calculations fax transmittal dated December 22, 2005, a social security representative indicated that prior to May 2001 he was receiving disability benefits. The representative further indicated that beginning in May 2001 appellant concurrently received FERS retirement benefits and social security benefits. The social security representative prepared a dual benefits calculation worksheet noting figures for social security benefits with FERS benefits and social security benefits without FERS benefits for the period May 2001 to December 2005.

In a January 4, 2006 FERS overpayment calculation worksheet, the Office noted that, for the period May 1, 2001 to December 24, 2005, it failed to deduct a 28-day FERS offset amount from appellant's benefits. This resulted in an overpayment of \$8,882.61.

On February 21, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$8,882.61 from May 1, 2001 to December 24, 2005 because he was in receipt of social security benefits attributable to his federal employment at the same time that he was receiving compensation benefits under the Federal Employees' Compensation Act, which constituted a dual receipt of benefits. His compensation benefits had not been offset by the amount of social security benefits he received attributable to his federal service. Appellant was found not at fault in creating the overpayment and was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents within 30 days.

By letter dated February 28, 2007, appellant, through his representative, requested a prerecoupment hearing before an Office hearing representative. He did not submit a completed OWCP-20 form. At the June 27, 2007 hearing, appellant was given another OWCP-20 form. Following the hearing, he did not submit any OWCP-20 form, but he submitted a list of monthly expenses which included: \$35.00 for AT&T telephone service, \$85.00 for PG&E, \$4.25 for the West County Times newspaper, \$23.84 for garbage collection, \$44.47 for Verizon telephone service, \$71.25 for an American Association of Retired People credit card, \$90.66 for 21st Century insurance, \$95.00 for Chevron credit card, \$117.01 for COMCAST, \$82.91 for American Automobile Association (AAA) home insurance, \$21.83 for Department of Motor Vehicle registration, \$4.50 for AAA membership, \$76.76 for county property taxes, \$27.00 for

¹ The claims were assigned file number xxxxxx031 and xxxxxx529 and combined into master claim.

East Bay Municipal Utility District, \$21.00 for Bubble Wash, \$100.00 for groceries, \$120.00 for meals out, \$25.00 for Kaiser, \$234.25 for his father's funeral, \$125.00 for car repair, \$65.00 for car maintenance, \$70.00 for gardener, \$57.33 for "SWA," \$75.00 for Wal-Mart, \$32.50 for cleaners, \$12.00 for Puritan Pride, \$40.00 for Costco, \$29.16 for "Johnson," \$14.00 for Staples, \$26.83 for Macy's, \$400.00 for "Margo," \$400.00 for "Darnell," \$400.00 for his 57 grandchildren, \$50.00 for recreation, \$100.00 for the senior center, \$10.00 for plumbing and \$60.00 for pruning, totaling \$3,246.54. Appellant's monthly income included \$2,189.00 in workers' compensation benefits, \$820.00 in social security compensation benefits and \$77.54 from a Teamsters' benefit plan, totaling \$3,086.54. He did not report on any assets.

By decision dated September 18, 2007, an Office hearing representative finalized the overpayment. She reduced appellant's monthly income to \$2,736.54, basing it only on net monthly workers' compensation benefits of \$1,839.00. The hearing representative also reduced his monthly expenses to \$1,588.80 as he did not submit any documentation to support his claimed expense of \$400.00 each for his 57 grandchildren, "Margo" and "Darnell" as dependents or payments for his father's funeral, car repair, "Johnson," "SWA" and Puritan Pride. She found that the funeral and car repair expenses were one-time payments. The hearing representative further found that appellant was not entitled to waiver of recovery of the overpayment as his monthly income exceeded his monthly expenses by more than \$50.00. She directed recovery of the overpayment at a rate of \$550.00 per month from his continuing compensation payments.

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 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

² 5 U.S.C. § 8116(d)(2).

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 social security benefits, the portion of the social security 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).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$8,882.61. The record indicates that the Office accepted his traumatic injury claims for right knee sprain and localized right lower leg osteoarthritis and he was paid disability compensation under the Act. The record also reflects that appellant was in receipt of social security retirement benefits from May 1, 2001 to December 24, 2005. The portion of the social security benefits of appellants earned as a federal employee as part of his FERS retirement and the receipt of benefits under the Act he received concurrently for this period is a prohibited dual benefit.⁴ An Office overpayment calculation worksheet found that the FERS offset in the amount of \$8,882.61 was not made against the compensation he received under the Act. The Board finds that this created an overpayment of compensation. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board finds that appellant received an overpayment of \$8,882.61 from May 1, 2001 to December 24, 2005.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁵ Section 8129(b) of the Act⁶ provides that an overpayment of 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.⁷

Section 10.436 of the implementing regulations⁸ provide that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: 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.⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁰

⁴ *Id.*

⁵ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

⁶ 5 U.S.C. § 8129(b).

⁷ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁸ 20 C.F.R. § 10.436.

⁹ An individual assets must exceed a resource based on \$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 individual's assets not exempt from recoupment. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1)(b) (December 23, 2004).

¹⁰ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

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 in 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

Section 10.438 of the 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 of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹²

ANALYSIS -- ISSUE 2

The Office hearing representative found that appellant was not at fault in the creation of the overpayment. In determining that he was not entitled to waiver of recovery of the overpayment, the hearing representative reviewed appellant's income and expenses as set forth by his financial records. Appellant had monthly income of \$2,736.54. The Office hearing representative reduced his monthly expenses from \$3,246.54 to \$1,588.80, noting that he had provided financial documentation for only \$779.47 of the expenses claimed. She disallowed monthly expenses of \$400.00 for appellant's 57 grandchildren and for "Margo," "Darnell" and "Johnson" as they were not dependents. The hearing representative also disallowed \$57.33 for "SWA," \$12.00 for Puritan Pride and \$234.25 for his father's funeral and \$125.00 for his car repair, which represented one-time expenses and lacked supporting documentation.¹³ The Board finds the Office properly disallowed these expenses as it is appellant's burden of proof to establish that the expenses are ordinary and necessary.¹⁴

The Board finds that it was reasonable for the Office to allow ordinary and necessary living expenses of \$1,588.80. Appellant's income of \$2,736.54 per month exceeded his allowable monthly expenses of \$1,588.80 by \$1,147.74 per month. Therefore, the Board finds that appellant does not qualify for waiver of the recovery of the overpayment under the defeat the purpose of the Act standard.¹⁵

Further, there is no evidence in this case and appellant did not allege that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he

¹¹ 20 C.F.R. § 10.437.

¹² *Id.* at § 10.438.

¹³ *Id.* at § 10.437(b).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.6(a)(3) (May 2004).

¹⁵ See *supra* note 6; *George A. Rodriguez*, 57 ECAB 224 (2005) (Office procedures state that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00); *Nina D. Newborn*, 47 ECAB 132 (1995).

received for the period May 1, 2001 through December 24, 2005. Pursuant to its regulations, the Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

LEGAL PRECEDENT -- ISSUE 3

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.¹⁶ With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations 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.”¹⁷

ANALYSIS -- ISSUE 3

After determining that appellant was not entitled to waiver of the recovery of the overpayment, the Office found that he could repay the overpayment by withholding \$550.00 per month from his continuing compensation. The record indicates that, after \$550.00 is added to his ordinary and necessary monthly expenses, his monthly income still exceeded expenses by \$1,147.74. The Board finds that the Office gave due regard to appellant's financial circumstances and did not abuse its discretion in determining that repayment of the overpayment could be accomplished by withholding \$550.00 per month from his continuing compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,882.61, for which he was without fault because he received workers' compensation benefits while also receiving social security benefits during the period May 1, 2001 through December 24, 2005; that the Office properly denied waiver of the recovery of the overpayment; and that the Office properly directed recovery of the overpayment at the rate of \$550.00 per month from appellant's continuing compensation payments.

¹⁶ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹⁷ 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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