

FACTUAL HISTORY

This case has been previously before the Board. The facts and the law as set forth in the Board's prior decisions are hereby incorporated by reference.¹

The Office accepted that, as a result of appellant's employment-related injury on June 24 1986, he sustained a sprain of the lumbosacral (joint) (ligament) and spinal stenosis, lumbar region. It paid compensation and medical benefits.

In a Federal Employee Retirement System (FERS) and Social Security Administration dual benefits calculation fax transmittal completed on January 17, 2009, a social security representative indicated that from the period from September 1, 1998 through February 14, 2009 appellant was concurrently receiving 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 that period.

In a FERS overpayment calculation worksheet, the Office noted that, for the period September 1, 1998 through February 14, 2009, it failed to deduct a 28-day FERS offset amount from appellant's benefits. It noted that this resulted in an overpayment of \$20,281.73.²

On April 1, 2009 the Office made a preliminary determination that appellant received an overpayment in the amount of \$20,281.73 from September 1, 1998 through February 14, 2009 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 (the Act), which constituted a dual receipt of benefits. Appellant's compensation benefits had not been offset by that amount. He 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 request a prerecoupment hearing. Appellant was informed that at the prerecoupment hearing he would be able to present evidence or arguments disputing

¹ *David Rundell*, Docket No. 99-1974 (issued May 22, 2001).

² The Office calculated the overpayment figure by noting overpayments due to appellant receiving dual benefits as follows: from September 1 through November 30, 1998, \$422.11 (based on 91 days with a 28-day FERS offset of \$129.88); from December 1, 1998 through November 30, 1999, \$1,714.72 (based on 365 days with a 28-day FERS offset of \$131.54); from December 1, 1999 through November 30, 2000, \$1,761.64 (based on 366 days with a 28-day FERS offset of \$134.77); from December 1, 2000 through June 30, 2001, \$1,055.31 (based on 212 days with a 28-day FERS offset \$139.38); from July 1 through November 30, 2001, \$762.65 (based on 153 days with a 28-day FERS offset \$139.38); from December 1, 2001 through November 30, 2002, \$1,868.67 (based on 365 days with a 28-day FERS offset of \$143.35); from December 1, 2002 through November 30, 2003, \$1,893.96 (based on 365 days based on 28-day FERS offset of \$145.29); from December 1, 2003 through November 30, 2004, \$1,939.02 (based on 366 days with a 28-day FERS offset of \$148.34); from December 1, 2004 through November 30, 2005, \$1,986.64 (based on 365 days with a 28-day FERS offset of \$152.40); December 1, 2005 through November 30, 2006, \$2,067.20 (based on 365 days with a 28-day FERS offset of \$158.58); from December 1, 2006 through November 30, 2007, \$2,135.90 (based on 365 days with a 28-day FERS offset of \$163.85); from December 1, 2007 through November 30, 2008, \$2,192.34 (based on 366 days with a 28-day FERS offset of \$167.72); and from December 1, 2008 through February 14, 2009, \$481.57 (based on a 28-day FERS offset of \$177.42). The total of these overpayments is \$20,281.73.

the occurrence of the amount of the overpayment and/or support his belief that he was without fault in creating the overpayment and argue that the overpayment should be waived. He was also sent financial forms to complete.

On April 27, 2009 appellant requested a telephone conference before an Office hearing representative by checking a line on the Office's Overpayment Action Request Form. By checking this line, he further indicated that he was submitting his completed OWCP-20 and financial documentation. These items were not submitted. At that time, appellant also indicated that he believed that the overpayment occurred through no fault of his own and that he requested a waiver. He stated that he did not create the problem and questioned why it took 11 years to catch the mistake.

By decision dated May 5, 2009, the Office hearing representative finalized the overpayment finding. Although appellant was found to be without fault in the creation of the overpayment, the Office found that he had not justified waiver of recovery of the overpayment. The hearing representative directed recovery of the overpayment by deducting \$250.00 from each of appellant's continuing compensation payments until the overpayment was paid in full, including interest. However, on May 13, 2009 the Office modified its payment instructions and indicated that it would withhold \$150.00 from continuing compensation payments. It issued appeal rights at this time.³

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d)(2) of the Act⁴ 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 [C]hapter 84 of this title or benefits under title [2] 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 [2] 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

³ The Board notes that while this appeal was pending, the Office issued a June 6, 2008 “[c]orrection to [l]etter dated [May 5, 2009]” wherein it changed the amount to be deducted from continuing compensation payments to \$175.00. Because this Office decision was issued while the case was pending on the same issue before the Board, the June 6, 2008 “Correction” is null and void. See *Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ 5 U.S.C. § 8116(d)(2).

security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$20,281.73. The record reflects that from September 1, 1998 through February 14, 2009, he received compensation benefits under the Act at the same time that he received social security benefits attributable to his federal employment. The portion of appellant’s social security benefits that he 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.⁶ His compensation benefits had not been offset by the amount of social security benefits he received attributable to his federal service. An Office overpayment calculation worksheet found that the FERS offset in the amount of \$20,281.73 was not made against the compensation appellant 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 \$20,281.73 for the period September 1, 1998 through February 14, 2009.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): Adjustment 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.⁷

Office regulations, at 20 C.F.R. § 10.438, state:

“(a) 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. This information will also be used to determine the repayment schedule, if necessary.

⁵ *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) (Federal Employees’ Compensation Act benefits have to be adjusted for the FERS portion of the Social Security Act benefits, the portion of the Social Security Act benefit earned as a federal employee is part of the FERS retirement package and the receipt of the Federal Employees’ Compensation Act benefits and federal retirement concurrently is a prohibited dual benefit).

⁶ *Id.*

⁷ 5 U.S.C. § 8129.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”⁸

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$20,281.73 overpayment, he bears responsibility for providing the financial information necessary to support a request for waiver of the recovery. The Office requested that he provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. Appellant did not respond by submitting financial documentation within the 30-day time period. The Office noted that his failure to submit the requested information would result in the denial of the waiver. The Board finds that the Office properly denied waiver of the recovery of the overpayment pursuant to 20 C.F.R. § 14.438(b).⁹

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.¹⁰ Section 10.441(a) of the Office’s 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.”¹¹

The statutory authority for the Office to charge interest on an overpayment is found in 31 U.S.C. § 3717(a)(1) and (g)(11). Section 3717(a)(1) provides in relevant part that the head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person. Section (g)(1) states that section 3717 does not apply if a statute, regulations required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges.¹²

⁸ 20 C.F.R. § 10.438.

⁹ See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁰ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹¹ 20 C.F.R. § 10.441.

¹² 29 U.S.C. § 3717(a)(1), (g)(1).

Inasmuch as the Act does not prohibit the charging of interest on overpayments, the Office has the requisite statutory authority to assess interest on an overpayment.¹³

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. As noted, he failed to timely complete the financial documents. In cases where the claimant is being paid compensation on the periodic rolls and the claimant does not respond to the preliminary overpayment decision, a final decision should be issued without conducting a conference and the debt should be recovered from such benefits as quickly as possible.¹⁴ Furthermore, without the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441, the Office was unable to consider his financial circumstances. The Board finds that the Office did not abuse its discretion in following its regulations and deducting \$150.00 every four weeks from appellant's continuing compensation. Furthermore, the Board finds that the Office acted within its authority in assessing interest on the overpayment amount.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$20,281.73 from September 1, 1998 through February 14, 2009, when he received workers' compensation benefits while also receiving social security benefits. The Board further finds that the Office properly denied waiver of the recovery of the overpayment. Finally, the Board finds that the Office properly directed recovery of the overpayment at the rate of \$150.00 from each of appellant's continuing compensation payments.

¹³ *Jorge O. Diaz*, 51 ECAB 124 (1999).

¹⁴ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (October 2004).

¹⁵ See *Jorge O. Diaz*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 5, 2009 is affirmed.

Issued: April 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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