



## **FACTUAL HISTORY**

On August 10, 1999 OWCP accepted that appellant, then a 63-year-old food inspector who worked an intermittent schedule, sustained employment-related bilateral carpal tunnel syndrome.<sup>2</sup> She stopped work on August 25, 1999 when she underwent bilateral carpal tunnel releases. Appellant returned to full duty on October 5, 1999. She sustained a recurrence of disability on March 6, 2000 and was placed on the periodic compensation rolls.

Other than working a few days in January 2001, appellant did not return to federal employment. She underwent transposition of the ulnar nerve at the right elbow on August 7, 2000 and of the left on September 18, 2000. Appellant had left thumb surgery on November 8, 2000 and January 24, 2002 and right thumb surgery on October 10, 2002. She was referred for vocational rehabilitation in January 2003 and returned to private employment as a hotel clerk on August 7, 2003.

By decision dated November 19, 2003, OWCP found that appellant's actual part-time earnings fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation accordingly.

On October 6, 2009 SSA informed OWCP that from January 1996 to December 2007 appellant received widow's benefits based on her husband's employment record and, December 2007, she began receiving retirement benefits on her record. SSA noted that she was not receiving disability benefits. SSA forwarded worksheets showing appellant's SSA rate with and without federal retirement (FERS) benefits from December 2007 through December 2009. OWCP thereafter reduced appellant's FECA benefits to reflect the contribution to her SSA benefits, effective July 4, 2010. A June 18, 2010 OWCP worksheet indicated that the 28-day FERS offset for this period totaled \$4,512.71.

On July 19, 2010 OWCP issued a preliminary finding that a \$4,512.71 overpayment of compensation had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she began receiving in December 2007 was based on credits earned while working in the Federal Government and constituted a prohibited dual benefit. OWCP noted that appellant's FECA benefits were adjusted effective July 4, 2010 but she was overpaid from December 1, 2007 through July 3, 2010. Appellant had received SSA benefits on her husband's employment record until December 2007, at which time she began receiving benefits based on her own federal employment. OWCP found her at fault in the creation of the overpayment because she had responded "no" on OWCP EN1032 forms which asked whether she was in receipt of benefits from SSA based on federal service. It explained that appellant should have been aware of the need to report SSA benefits based on federal service. On EN1032 forms signed by appellant on September 7, 2007, September 18, 2008, October 19, 2009 and November 4, 2010, she answered "no" to the form question: "Do you receive benefits from the SSA as part of an annuity for Federal Service?" Each form covered the 15 months prior to its completion and had a certification clause which required appellant to report any change in income from federally assisted disability or benefit programs.

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<sup>2</sup> Appellant worked as a chicken inspector at Tysons Foods. Additional accepted conditions are bilateral ulnar nerve neuritis and left trigger thumb.

On August 12, 2010 appellant requested that OWCP make a decision based on the written record. She disagreed that the overpayment occurred, with the amount of the overpayment and with the fault determination, stating that she did not start drawing SSA benefits on her employment record until June 2008. Appellant did not know SSA had anything to do with FERS and that she was told that she did not have to report the SSA benefit. She attached a completed overpayment questionnaire in which she reported monthly income of \$1,631.27, expenses of \$1,926.10 and that she intended to file for bankruptcy.

In an August 23, 2010 decision, OWCP found appellant at fault in the creation of the overpayment because she did not report receipt of SSA benefits based on federal service. It directed repayment by deducting \$130.00 every four weeks from her continuing compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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.<sup>3</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.<sup>4</sup> Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay.<sup>5</sup> FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because 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.<sup>6</sup> When OWCP discovers concurrent receipt of benefits, it must find an overpayment in compensation and give the usual due process rights.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that appellant received FECA wage-loss compensation based on a November 19, 2003 wage-earning capacity determination and SSA benefits from September 1, 2007 through July 3, 2010. The portion of the SSA benefits she earned as a federal employee was part of her FERS retirement package and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>8</sup> The SSA notified OWCP of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit she received from December 1, 2007 through July 3, 2010. The Board has reviewed these calculations and finds that OWCP properly determined that appellant

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.421(c); *see L.J.*, 59 ECAB 264 (2007).

<sup>6</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

<sup>8</sup> *Supra* note 6.

received dual benefits totaling \$4,512.71 for this period, thus creating an overpayment in compensation in that amount.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>9</sup>

Section 10.433(a) of OWCP’s regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”<sup>10</sup>

In determining whether a claimant is at fault in creating an overpayment, OWCP will consider the circumstances surrounding the overpayment. The degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in the creation of the overpayment in compensation because she failed to provide information which she knew or should have known to be material. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.<sup>12</sup> The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>13</sup>

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<sup>9</sup> 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

<sup>10</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>11</sup> *Id.* at § 10.433(b); *see Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>12</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>13</sup> *Sinclair L. Taylor*, *supra* note 10.

On OWCP EN1032 forms signed on September 7, 2007, September 18, 2008, October 19, 2009 and November 4, 2010, appellant failed to report receipt of her SSA benefits. On each form she responded “no” in response to a specific form question regarding whether she had received benefits from the SSA as part of an annuity for federal employment. Each form covered the 15 months prior to its completion and had a certification clause which required appellant to report any change in income from federally assisted disability or benefit programs. As appellant did not report her SSA benefit when clearly instructed to on OWCP’s EN1032 forms she certified by her signature, the Board finds that she failed to provide information which she knew or should have known to be material. OWCP properly found her at fault in the creation of the \$4,512.71 overpayment. Under section 10.433(a) of OWCP’s regulations, appellant is at fault and is not entitled to waiver of the overpayment in compensation.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

OWCP’s implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>15</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP did not give due regard to the relevant factors noted above in setting a rate of recovery of \$130.00 per compensation period. Appellant’s 28-day FECA compensation was reduced to \$136.16 on July 4, 2010. The record indicates that she has no discretionary income. The August 23, 2010 decision does not address how any of the factors pertaining to appellant’s financial circumstances were considered in setting the repayment schedule. The Board finds that OWCP abused its discretion in finding that appellant should repay her overpayment at the rate of \$130.00 per compensation period. The case will be remanded for OWCP to further develop the issue of recovery. After appropriate further development, OWCP shall issue a final decision on an appropriate rate of recovery from continuing compensation.

Lastly, the Board notes that OWCP’s procedures require that the potential for a permanent impairment is to be monitored by OWCP claims examiner and if it appears that a schedule award may be payable, the claims examiner should advise the claimant of his or her possible entitlement to such an award.<sup>16</sup> The record does not indicate that such was done in this case.

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<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.441(a).

<sup>16</sup> Federal (FECA) Procedure Manual, *supra* note 7, *Evaluating Potential Permanent Disability or Impairment*, Chapter 2.808.3 (January 2010).

**CONCLUSION**

The Board finds that OWCP properly found appellant at fault in the creation of an overpayment in compensation in the amount of \$4,512.71 for the period December 1, 2007 through July 3, 2010 and was thus not entitled to waiver. The Board, however, finds that OWCP abused its discretion by recovering \$130.00 every 28 days from appellant's continuing FECA compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside, in part. The case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 3, 2011  
Washington, DC

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

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

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