

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET K. GEORGE, claiming as widow of ANGELOS GEORGE and
DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER,
Lakehurst, NJ

*Docket No. 02-825; Submitted on the Record;
Issued December 3, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined the amount of appellant and four surviving children's compensation in accordance with sections 8133(a)(1)-(2), 8101(6)+(9) and 8116(d)(2) of the Federal Employees' Compensation Act.

On August 9, 2000 the employee was killed in an airplane accident while in the performance of duty. The employee was survived by a wife and four children.

The Office determined that the employee's wife and four children were entitled to the compensation under the Act at the rate of 75 percent of appellant's salary for the period August 10 to September 9, 2000. The Office determined that appellant was entitled to compensation at the rate of 45 percent; and her 4 children were entitled to 7.5 percent for a total of 75 percent of the employee's monthly pay.

In a decision dated September 6, 2000, the Office notified appellant that under the Act she would be entitled to 45 percent of the employee's pay for the period of August 10 to September 9, 2000 for a payment of \$2,527.54; and that her four children were entitled to 7.5 percent of the employee's pay for the same period for a payment of \$421.26. The Office noted that appellant's continuing checks would be for \$4,079.01 every four weeks. The Office further noted that Social Security Administration (SSA) death benefits which were attributable to the federal service of an employee covered under the Federal Employees' Retirement System (FERS) would be deducted from Federal Employees' Compensation Act (FECA) benefits and that a determination of the employee's benefits attributable to federal service had not yet been determined.

In a FERS and SSA dual benefits calculation worksheet dated March 20, 2001, the SSA determined that appellant's four children would be entitled to SSA death benefits in the amount of \$573.60 per child monthly.

By letter dated September 6, 2000, the Office requested that appellant make an election between the Act compensation and Office of Personnel Management (OPM) compensation. The Office indicated in pertinent part:

“5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by the portion of the Social Security (SSA) benefits based on age or death that are attributable to [f]ederal [s]ervice. Because you would be receiving SSA benefits based on the [f]ederal [s]ervice of an employee, your compensation benefits would be reduced by the amount of Social Security benefits attributable to your husband’s federal service.”

On October 12, 2000 a conference was held between appellant, the Office claims examiner and a representative of the SSA to provide informational services so that appellant could make an informed choice as to her entitlements under the Act and SSA as she had not yet submitted the requisite CA-5 election form. The conference participants noted that appellant could not receive dual benefits from the Act and SSA and that, if she chose to receive “benefits from both programs, then the FECA FERS offset applies against the compensation benefits payable to that individual.”

In a memorandum dated March 21, 2001, the Office received information from the SSA indicating that a FERS offset needed to be implemented as both appellant and her children had SSA payments comprised of FERS contributions which on a monthly basis equalled \$518.50. The offset for all five compensation recipients would be \$478.62.

In letters dated April 5 and 19, 2001, the Office notified appellant that an election of benefits was required and requested that she participate in a conference to further discuss her rights and entitlements.

In a July 18, 2001 conference memorandum, the Office noted that appellant, her attorney, an Office representative, a SSA representative and an OPM representative gathered to further discuss appellant’s entitlements with regard to the Act, SSA and OPM benefits. The discussion focused on a third-party settlement and any affect this would have on appellant’s benefit entitlements. Appellant withdrew her application for Social Security benefits because there was an offset in her FECA benefits under the Act.

On August 2, 2001 the Office requested that appellant submit election forms in which she and her four children would elect between compensation benefits under the Act and benefits payable under OPM. The Office notified appellant that FECA benefits under the Act and OPM benefits were not payable for the same period of time. If appellant elected FECA benefits under the Act she could concurrently receive benefits from the Thrift Savings Plan and survivor benefits provided by the SSA with the following exception:

“5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by the portion of the Social Security (SSA) benefits based on age or death that are attributable to federal service. Because you would be receiving SSA benefits based on the federal service of an employee, your compensation benefits would be reduced by the amount of Social Security benefits attributable to your husband’s federal service.”

The Office further indicated that appellant's FECA benefits every four weeks would be \$2,393.98 with no SSA offset as she withdrew her application for SSA benefits; and her four children would be entitled to \$421.56 of FECA benefits with a SSA offset of \$501.00 for a payment of zero every four weeks if they elected to receive SSA benefits.

In a letter dated October 24, 2001, appellant elected FECA benefits for herself and for her two children Krystina George and Kaitlyn George; she did not elect FECA benefits for her two other daughters Kelly George and Kerry George who were entitled to SSA benefits only.

In an Office memorandum dated January 2, 2002, the Office noted that an underpayment of benefits under the Act was paid to appellant and two children who elected FECA benefits under the Act.¹ The Office noted that there was an underpayment of FECA benefits from the period of August 12 to December 29, 2001 to appellant of \$11,579.54. From the period August 10, 2000 to December 29, 2001 Krystina and Kaitlyn George were underpaid FECA benefits under the Act in the amount of \$8,440.87.

By decision dated February 4, 2002, the Office granted appellant 45 percent of the employee's pay; and appellant's two daughters, Krystina and Kaitlyn 15 percent respectively. The Office indicated that the first check would cover the period of August 12 to December 29, 2001 in the amount of \$11,579.54 for appellant; and \$8,440.87 each for appellant's two daughters Krystina and Kaitlyn. The Office notified appellant that the continuing benefit amount every four weeks would be for \$4,050.75 for herself and two children.

The Board finds the Office properly determined the amount of appellant's compensation in accordance with sections 8133(a)(1)-(2), 8101(6)+(9) and 8116(d)(2) of the Act.

The terms of the Act² are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.³

Section 8133 of the Act⁴ provides:

“(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule:

- (1) To the widow or widower, if there is no child, 50 percent.

¹ The Office indicated that ongoing compensation benefits were interrupted because election forms had not been submitted by appellant. Election statements were submitted in October 2001 and benefits were reinstated with an explanation as to the calculation of respective underpayments for appellant and her two children who elected FECA benefits.

² 5 U.S.C. §§ 8101-8193.

³ See *Virginia Chappell*, 45 ECAB 275 (1993); *Edward G. Ferris*, 38 ECAB 460, 462 (1987).

⁴ 5 U.S.C. § 8133.

(2) To the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child not to exceed a total of 75 percent for the widow or widower and children.”⁵

The Office’s implementing regulations at 20 C.F.R. § 10.410⁶ provide that, in the case of death, the rates of compensation payable would be allocated as follows:

“(b) If there is a child entitled to compensation, the compensation for the surviving spouse will equal 45 percent of the employee’s monthly pay plus 15 percent for each child, but the total percentage may not exceed 75 percent.”⁷

Widow and children are defined as in section 8101(6) and 8101(9)⁸ of the Act. Widow is defined as “the wife living with or dependent for support on the decedent at the time of his death or living apart for reasonable cause or because of his desertion.” Child is defined as “one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children.”

Section 8116(d)(2) of the Act⁹ also 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 Federal service of that employee covered by chapter 84 of this title.”¹⁰

As appellant was the employee’s widow and the decedent had four children, she was entitled to 45 percent of the employee’s monthly pay pursuant to section 8133(a)(2) of the Act.¹¹

⁵ *Id.*

⁶ 20 C.F.R. § 10.410(b).

⁷ *Id.*

⁸ 5 U.S.C. § 8101(6), (9).

⁹ Section 8116(d)(2).

¹⁰ *Id.*; see also Federal (FECA) Procedure Manual, Part 2 – Claims, *Dual Benefits*, Chapter 2.1000.4e (February 1995); Federal (FECA) Procedure Manual, Part 2 – Claims, *Dual Benefits*, Chapter 2.1000.11(a)-(b), (February 1995).

¹¹ See *Wanda Avant*, 40 ECAB 1155 (1989).

As section 8101(9) of the Act defines “child,” the decedent’s four children were entitled to compensation.¹² However, appellant elected that Krystina and Kaitlyn receive FECA benefits and that Kelly and Kerry receive SSA benefits. Thus, Krystina and Kaitlyn were eligible to receive compensation. As the total compensation cannot exceed 75 percent of the employee’s pay, the 30 percent remaining, after payment of 45 percent to the widow, must be divided equally among the children who elected to receive FECA benefits.¹³ Therefore, the children were entitled to 15 percent each of the employee’s monthly pay. Therefore, the Board finds that the Office properly determined that appellant was entitled to 45 percent of the employee’s monthly pay and that her two children who elected FECA benefits were entitled to 15 percent respectively.¹⁴

The decision of the Office of Workers’ Compensation Programs dated February 4, 2002 is hereby affirmed.

Dated, Washington, DC
December 3, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹² 5 U.S.C. § 8101(9).

¹³ See Federal (FECA) Procedure Manual, Chapter 2.700, Exhibit 1 (January 1987), which indicates that in the event there is a widow and three or more children, the widow is entitled to 45 percent, and the children are entitled to the remaining 30 percent divided equally. See *Beverly Grunder* (*Franklin W. Grunder*), 36 ECAB 459 (1985).

¹⁴ The Board notes that at the time the Office issued its decision appellant was not in receipt of SSA benefits and therefore the issue of whether there was the appropriate offset, as set forth in section 8116(d)(2) of the Act, is not before the Board.