

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE B. KOVACS, claiming as widower of CYNTHIA A. KOVACS and
DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER, Lakehurst, NJ

*Docket No. 02-1645; Submitted on the Record;
Issued October 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined the amount of compensation for appellant and two surviving children in accordance with sections 8133(a)(1)-(2), 8101(9) and (11) and 8116(d)(2) of the Federal Employees' Compensation Act.

On August 9, 2000 the employee died in an airplane accident while in the performance of duty. The employee was survived by a husband, appellant in this case, and two children.

An April 25, 2001 memorandum of a conference attended on that date by appellant, an Office claims examiner and an employing establishment representative, indicated that the conference was held to provide additional information to appellant regarding the Federal Employees' Compensation Act, Office of Personnel Management (OPM) and Social Security Administration (SSA) death benefits. One focus of the discussion was the SSA offset that precluded payment of benefits to appellant's two children. It was noted that in death cases, benefits are reduced by the survivor's SSA benefits that are attributable to the employee's federal service. The Office claims examiner provided appellant with a copy of the SSA's "FERS [Federal Employees Retirement System] Dual Benefits Calculation" that showed the amount of the SSA benefit attributable to his wife's federal service and advised that this amount must offset the benefits paid to each child. The worksheet showed that the amount of the SSA offset was \$1,097.60, per child, increasing in December 2000 to \$1,136.10. The claims examiner advised that, as these amounts completely offset the benefits for each child (\$728.74), no benefits were payable.

On July 16, 2001 a conference was held and attended by appellant, the Office claims examiner and representatives from the SSA and the employing establishment¹ to further discuss appellant's entitlements with regard to SSA and OPM benefits.

On January 25, 2002 the Office requested that appellant submit election forms in which he and his two children would elect between compensation benefits and OPM benefits. The Office notified appellant that Federal Employees' Compensation Act benefits and OPM benefits were not payable for the same period of time and if appellant elected benefits under the Federal Employees' Compensation Act he could concurrently receive benefits from the Thrift Savings Plan and SSA survivor benefits with the following exception:

"5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to [f]ederal [s]ervice. [If you receive] SSA benefits based on the [f]ederal service of an employee, your compensation benefits are reduced by the amount of SSA benefits attributable to your wife's [f]ederal service."

The Office further indicated that appellant's benefits every four weeks would be \$2,186.20 and each of his two children would be entitled to \$728.74 in benefits with a SSA offset of \$1,097.60 for a payment of zero every four weeks if they elected to receive SSA benefits. The Office also provided the amount of benefits payable if appellant elected the option of benefits only for himself and if he elected benefits for just one child.

On March 5, 2002 appellant elected Federal Employees' Compensation Act benefits for himself and SSA benefits for his two children.

By decision dated April 3, 2002, the Office granted appellant 50 percent of the employee's pay for the period July 15, 2001 to March 23, 2002 for a payment of \$12,791.63. The Office noted that appellant's continuing checks would be in the amount of \$2,460.92 every four weeks. The Office further noted that, when an employee was covered under FERS, SSA benefits attributable to the employee's federal service were deducted from benefits. The Office indicated that appellant had elected Federal Employees' Compensation Act benefits for himself but that, as he was not entitled to SSA survivor from his wife's employment, an offset was not applied to his Federal Employees' Compensation Act survivor benefits. The Office noted that appellant elected SSA benefits for his two children but that a Federal Employees' Compensation Act offset applied to the two children due to their receipt of SSA benefits.

The Board finds that the Office properly determined the amount of appellant's compensation in accordance with sections 8133(a)(1)-(2), 8101(9),(11) and 8116(d)(2) of the Federal Employees' Compensation Act.

The terms of the Federal Employees' Compensation Act² are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to

¹ A representative from OPM participated in the conference by telephone.

² 5 U.S.C. §§ 8101-8193.

enlarge the terms of the Federal Employees' Compensation Act or to make an award of benefits under any terms other than those specified in the statute.³

Section 8133(a) of the Federal Employees' Compensation 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.

(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.”

The Office's implementing regulations at 20 C.F.R. § 10.410 provide that, in the case of death, the rates of compensation payable would be allocated as follows:

“(a) If there is no child entitled to compensation, the employee's surviving spouse will receive compensation equal to 50 percent of the employee's monthly pay until death or remarriage....

“(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.”⁵

“Widower” and “child” are defined, as in section 8101(9) and 8101(11)⁶ of the Act. “Widower” is defined as “the husband living with or dependent for support on the decedent at the time of her death or living apart for reasonable cause or because of her 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 of the Federal Employees' Compensation Act 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

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

⁴ 5 U.S.C. § 8133(a).

⁵ 20 C.F.R. § 10.410(a)-(b).

⁶ 5 U.S.C. § 8101(9),(11).

under [S]ubchapter III of [C]hapter 84 of this title or benefits under [T]itle 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 [T]itle II of the Social Security Act, compensation payable under this subchapter based on the [F]ederal 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 [C]hapter 84 of this title.”⁷

Appellant is the employee’s widower and the decedent had two children. Appellant elected SSA benefits for the children, rather than under the Federal Employees’ Compensation Act benefits. He elected Federal Employees’ Compensation Act benefits only for himself. Therefore, appellant was entitled to 50 percent of the employee’s monthly pay pursuant to 8133(a)(1) of the Federal Employees’ Compensation Act.⁸

On appeal appellant asserts that in its April 3, 2002 decision the Office incorrectly interpreted section 8133 as it relates to SSA offsets. Although he did not state his specific objection, it appears that he believes he should be entitled to benefits of 75 percent of the monthly pay of the decedent, rather than 50 percent, based on the argument that the SSA benefits of the children should not be used to offset the benefits payable to the parent that are due to the existence of surviving children.⁹ In other words, since the benefits are payable to the parent, not the children, SSA benefits of the children should not be used to offset the benefits.

As noted above, the terms of the Federal Employees’ Compensation Act 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 Federal Employees’ Compensation Act or to make an award of benefits under any terms other than those specified in the statute. Unless appellant’s contentions are in keeping with the scope or intent of the Federal Employees’ Compensation Act, *i.e.*, unless the statute authorizes payment of the kind demanded by appellant, the Office’s denial of such demand must be affirmed.¹⁰

There is no provision in the Federal Employees’ Compensation Act, either in specific terms or by way of implication, for payment to a widow or widower alone of more than 50 percent of the monthly pay of a deceased employee. If appellant’s two children had elected to receive Federal Employees’ Compensation Act benefits, appellant would have been entitled to receive 45 percent of the decedent’s monthly pay for himself and 15 percent for each child, up to

⁷ 5 U.S.C. § 8116(d)(2); *see also* 20 C.F.R. § 10.421(d); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 11(a)-(b) (February 1995); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁸ *See Janet K. George*, 54 ECAB ____ (Docket No. 02-825, issued December 3, 2002); *Wanda Avant (James A. Avant)*, 40 ECAB 1155 (1989).

⁹ This issue was raised at the July 16, 2001 conference. (R 70-82)

¹⁰ *Edward G. Ferris*, *supra* note 3.

a maximum of 75 percent, subject to the SSA offset. Since the children did not elect Federal Employees' Compensation Act benefits, appellant was entitled to 50 percent of the deceased employee's monthly pay. Since the Federal Employees' Compensation Act does not provide for payment of more than 50 percent of a deceased employee's monthly pay to a widow or widower alone, the Office properly determined that appellant was entitled to benefits in the amount of 50 percent of the employee's monthly pay.

The decision of the Office of Workers' Compensation Programs dated April 3, 2002 is affirmed.

Dated, Washington, DC
October 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member