

**United States Department of Labor
Employees' Compensation Appeals Board**

J.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
RESEARCH LABORATORY, Washington, DC,
Employer**

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**Docket No. 07-1108
Issued: October 22, 2007**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 19, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 16, 2007, which found that he received an overpayment of compensation in the amount of \$16,484.63. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$16,484.63 because he received Social Security Administration (SSA) benefits for the period May 1, 2002 through September 30, 2006, a period in which he also received compensation benefits; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that the overpayment would be collected by deducting \$200.00 from his continuing compensation.

FACTUAL HISTORY

On March 10, 1989 appellant, then a 51-year-old electronics mechanic, fell down some steps and landed on his right knee. The Office accepted his claim for a right knee contusion and tear of the right medial meniscus and paid appropriate benefits. On January 9, 1997 appellant was placed on the periodic compensation rolls as he was unable to return to work. On May 1, 2002 he became eligible for and started to receive social security retirement benefits.

In EN1032-0494 forms signed by appellant on July 24, 2002, June 20, 2003, July 18, 2004, July 20, 2005 and June 8, 2006, he responded "no" to the question of whether he received benefits from the SSA as part of an annuity for federal service.¹ By his signature, he certified that all the statements made in response to the questions on the form were true, complete and correct to the best of his knowledge and belief.

In a December 17, 2004 letter, the employing establishment advised appellant that their records indicated that he was a FERS retirement pension participant and that, in his last EN1032-0494 form submission to the Office, he had indicated that he did not receive benefits from the SSA as part of an annuity for federal service. Appellant was advised that, under section 8116(d)(2) of the Federal Employees' Compensation Act (FECA), compensation benefits must be offset by the Office if FERS employees were receiving SSA retirement benefits. It explained that the offset was calculated by using only those contributions made to the SSA while employed by the Federal Government. To clarify appellant's present receipt or nonreceipt of SSA benefits, he was requested to check off the appropriate statement that applied to him. By his signature dated January 15, 2005, appellant placed a checkmark by the response indicating that he was currently in receipt of SSA benefits. Appellant did not answer the second part of the response which stated: "I do ___ do not ___ know whether my SSA benefits [have] been calculated using any of my federal service earnings."

In a letter dated January 15, 2005, appellant explained that his social security benefits were based on his years of working in the private sector and that he did not need his federal service to be eligible for social security. He stated that he did not receive his social security as part of an annuity for federal service, as he was not receiving an annuity. Appellant advised that he checked this with the SSA in Wilmington, NC and was told that he could receive his full social security as well as full compensation.

In January 24 and December 12, 2005 memoranda to the Office, the employing establishment indicated that any SSA benefits that appellant was receiving must be considered as retirement benefits. Since appellant was also a FERS pension employee, his compensation payments must be offset by any part of his SSA benefit that was calculated by using his federal employment earnings. The employing establishment stated that, although appellant had worked in the private sector and stated that he earned his credits there, he could not possibly know which years of his FERS earnings were used to calculate his SSA benefit.

¹ The forms request that claimant's "report any benefits received from the SSA which you receive as part of an annuity under the Federal Employees' Retirement System (FERS). DO NOT report any benefits received from SSA on account of employment in the private sector." (Emphasis in the original.)

On October 25, 2006 the Office issued a preliminary finding that an overpayment of \$16,484.63 occurred for the period May 1, 2002 through September 30, 2006 because appellant received social security benefits since 2002 but failed to report them as required. The Office further found that appellant was at fault in creating the overpayment because he knew or should have reasonably known that he was accepting compensation to which he was not entitled. The Office advised that, if appellant disagreed with the fact or amount of overpayment, he could submit supporting evidence or arguments and request a prerecoupment hearing within 30 days. The Office provided FERS overpayment calculation worksheets which showed the SSA rate with FERS and the SSA rate without FERS for relevant time periods² and how the monthly FERS offset was arrived from which a total overpayment of \$16,484.63 resulted.

On November 15, 2006 appellant contested the overpayment and requested waiver. He did not dispute the fact or amount of the overpayment. In a November 24, 2006 letter, appellant advised that in May 2002, when he went to the SSA in Wilmington, NC, to file for social security and medicare, he spoke to SSA claims examiner, who informed him that workers' compensation payments were not considered to be an annuity or a pension and there would be no deduction in either his workers' compensation or SSA checks. When he questioned that advice, the claims examiner verified the information with her supervisor. Appellant reiterated that he properly answered his yearly EN1032 compensation forms because he was not receiving an annuity from the Office of Personnel Management. He asserted that he did not need his time under FERS to qualify for SSA benefits because he worked for the private sector for 22 years. Appellant stated that he had written the employing establishment regarding this matter in January 2005 and never heard anything back. He alleged that he was not at fault in creating the overpayment as he was not aware that any deduction had to be made to either his social security or workers' compensation payments and, when he questioned the decision, he was told there would be no deduction in SSA or workers' compensation payments. Appellant attached a December 20, 2006 letter from the SSA which stated: "[w]orkers' compensation does not offset retirement benefits. Disability benefits can be offset by workers' compensation but not retirement."

Appellant also submitted a completed overpayment recovery questionnaire. He reported his monthly income and expenses. Appellant's monthly income was \$6,128.20 and his expenses totaled \$4,650.00. He reported assets in the amount of \$8,815.16. Appellant reiterated his argument that he correctly completed his EN1032-0494 yearly compensation forms as the SSA told him that workers' compensation payments were not an annuity or a pension and that he was entitled to the full social security benefits.

² For the period May 1 through November 30, 2002, the FERS offset was \$273.50 which amounted to an overpayment of \$2,090.32. For the period December 1, 2002 through November 30, 2003, the FERS offset was \$277.38 which amounted to an overpayment of \$3,615.85. For the period December 1, 2003 through November 30, 2004, the FERS offset was \$283.20 which amounted to an overpayment of \$3,701.83. For the period December 1, 2004 through November 30, 2005, the FERS offset was \$290.77 which amounted to an overpayment of \$3,790.39. For the period December 1, 2005 through September 30, 2006, the FERS offset was \$302.68 which amounted to an overpayment of \$3,286.24.

By decision dated January 16, 2007, the Office finalized the overpayment of compensation in the amount of \$16,484.63 for the period May 1, 2002 through September 30, 2006 and that appellant was at fault in the creation of the overpayment. The Office advised that the overpayment would be collected by withholding \$200.00 from his continuing compensation benefits effective January 21, 2007. The Office provided appellant with a copy of FECA Bulletin No. 97-9, issued on February 3, 1997, which addressed dual benefits and the deduction from compensation benefits of social security benefits attributable to federal services in FERS cases.³

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act 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 [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] 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 [2] of the [SSA,] 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 [C]hapter 84 of this title.”⁴

FECA Bulletin 97-9 states: “FECA benefits have to be adjusted for the FERS portion of SSA benefits. The portion of the SSA benefit earned as a [f]ederal [e]mployee is part of the FERS retirement package and the receipt of FECA benefits and [f]ederal retirement concurrently is a prohibited dual benefit.”⁵

ANALYSIS -- ISSUE 1

The evidence reflects that appellant was a FERS retirement pension participant and was in receipt of social security retirement benefits since May 1, 2002. During the period

³ The FECA Bulletin quotes the provisions of 5 U.S.C. § 8116(d)(2), which requires the receipt of disability and death benefits under the Act be reduced by the amount of any social security old age or death benefits paid that are attributable to the federal service of the employee. The bulletin explained that only benefits actually received by the claimant from SSA were subject to deduction from compensation benefits and stated that this was not an election but rather a deduction from compensation benefits payable.

⁴ 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).

⁵ FECA Bulletin No. 97-9 (issued February 3, 1997).

May 1, 2002 through September 30, 2006, he received SSA retirement benefits, which included the FERS portion earned as a federal employee. Appellant also received compensation for total disability. Because he concurrently received compensation for total disability and SSA retirement benefits during the period May 1, 2002 through September 30, 2006, the Board finds that he erroneously received a dual benefit. Appellant has not contested the fact or the amount of the overpayment. The Board notes that the Offices worksheets properly follow the methodology provided in FECA Bulletin 97-9 for calculating the offset of SSA benefits “attributable to federal service” to obtain the amount of compensation payable. As appellant received more SSA benefits than which he was entitled for the period May 1, 2002 through September 30, 2006, an overpayment in the amount of \$16,484.63 was created. Thus, the Board will affirm the fact and the amount of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

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 The Office may not waive the overpayment of compensation unless appellant was without fault.⁸ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁹

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”¹⁰

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹¹

⁶ 5 U.S.C. § 8129(b).

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

⁸ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. Thus, the issue is whether, at the time of acceptance of the compensation payment, appellant knew or should have known that it was incorrect.

Appellant argued that he was not responsible for the creation of the overpayment because a representative from the SSA told him that workers' compensation benefits were not considered an annuity or pension and his social security benefits would not be affected by his receipt of workers' compensation benefits. He further argued that his social security was not based upon his earnings under FERS. The record shows that appellant became eligible for and began receiving social security on May 1, 2002. The record establishes that in May 2002 appellant demonstrated an awareness of incorrect benefits when he spoke with a representative from the SSA regarding the possibility of dual benefits by receiving compensation from both SSA and FERS. The very nature of appellant's May 2002 inquiry into the possibility of dual benefits reasonably shows that he knew or should have known he was accepting incorrect payment. Appellant noted that the SSA did not consider his workers' compensation payments an annuity. He submitted a letter from the SSA advising that his social security benefits would not be affected by the payment of benefits from the Office. However, this evidence does not establish that his Office benefits would not be affected by the SSA. The evidence establishes that appellant reasonably should have known in May 2002 that he was accepting a payment which was incorrect.

The fact that appellant knew of the dual benefits in May 2002 and continued to accept both compensation under SSA and FERS establishes that he is at fault in the creation of the overpayment under the third criterion noted above. As the evidence establishes that he is at fault in the creation of the overpayment in compensation that occurred in this case, the Board finds that he is not entitled to waiver of recovery of the overpayment.¹²

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹³ The implementing regulations provide that, 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.¹⁴

¹² *Sinclair L. Taylor*, 52 ECAB 227 (2001).

¹³ 5 U.S.C. § 8129(a).

¹⁴ 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 3

The Office found that recovery of the \$16,484.63 overpayment could be recovered by deducting \$200.00 from appellant's continuing compensation. It is appellant's responsibility to provide information about income, expenses and assets.¹⁵ The record reflects that he reported a monthly income of \$6,128.20 and expenses of \$4,650.00. Thus, the financial evidence indicated that appellant's monthly income exceeded his expenses by \$1,478.20. Appellant additionally listed \$8,815.16 in assets on his overpayment questionnaire. The Office took this into account so as to minimize hardship in recovering the overpayment. The Board finds that the Office properly followed its regulations in this case. The Office properly determined that the \$16,484.63 overpayment could be recovered by deducting \$200.00 from appellant's continuing compensation.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$16,484.63 during the period May 1, 2002 through September 30, 2006 due to the concurrent receipt of social security benefits and workers' compensation benefits. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, is ineligible for waiver of the overpayment. The Office also properly directed recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments.

¹⁵ *Id.*

¹⁶ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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