

FACTUAL HISTORY

The record reveals that appellant's husband, the employee, died in the performance of duty on September 25, 2003 when he fell off a bridge. At the time of his death, the employee was covered by Federal Employees' Retirement Systems (FERS), part Social Security Act and part Office of Personnel Management. On October 5, 1993 appellant filed a claim for death benefits (Form CA-5). At the time of her application, she and her two minor daughters were in receipt of death benefits from the Social Security Act in the amount of \$1,487.00 per month. On October 1, 1994 appellant elected to receive compensation under the Federal Employees' Compensation Act effective September 26, 1993 in lieu of Social Security Act benefits.¹ The Office paid compensation to appellant and her daughters effective September 15, 1993.

On May 17, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$57,764.80 for the period September 25, 1993 to October 2, 2004 due to its failure to reduce compensation by the amount of the employee's benefits attributable to his employment under FERS. It informed appellant that she was at fault in the creation of the overpayment as she was aware or should have been reasonably aware that she received an incorrect payment. The Office determined that the FERS offset was not made for the correct amount from September 25, 1993 to December 31, 1999 or January 1, 2000 to October 2, 2004. It noted that the amount FERS offset during the stated periods was \$30,873.20 while the correct amount of the offset should have been \$88,638.00. The difference in amounts resulted on an overpayment of \$57,764.80. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On June 4, 2007 appellant requested a telephonic prerecoupment hearing and waiver of the overpayment contending that she was not at fault in its creation. She also contended that repayment of the overpayment would cause severe financial hardship. In a June 4, 2007 OWCP-20 form, appellant stated that she did not have any of the incorrectly issued compensation checks in her possession. She was not aware that she received incorrect payments and noted that the overpayment did not occur as a result of any error on her part. Every year, appellant reported any changes in the status of her dependents and their receipt of Social Security Act benefits. She reported monthly income of \$5,252.00 which represented \$882.00 in Social Security Act benefits, \$1,762.00 in compensation benefits under the Federal Employees' Compensation Act and \$2,608.00 in salary. Appellant also reported monthly expenses of \$5,222.00 which included \$1,972.00 for mortgage and property taxes, \$600.00 for food, \$200.00 for clothing, \$456.00 for utilities, \$500.00 for life insurance premiums and credit card payments, \$600.00 for automobile insurance, transportation to work and medical and dental costs, \$444.00 for a student loan and \$450.00 for a home equity loan. She had \$120.00 cash on hand and \$3,100.00 in a checking

¹ On October 7, 1994 the Office stated that appellant had withdrawn her claim for Social Security Act death benefits and refunded all the benefits she had received.

account, totaling \$3,220.00. Appellant also listed \$100,000.00 in a Federal Employees' Thrift Savings Plan account. She submitted supporting financial documents.

By decision dated July 14, 2008, an Office hearing representative finalized the overpayment. However, appellant was found without fault in creation of the overpayment. The hearing representative found no evidence that she made an incorrect statement as to a material fact governing her entitlement to compensation or that she failed to furnish information necessary to the correct computation of her compensation. She denied waiver of recovery of the overpayment, finding that appellant had monthly income of \$5,333.00 and expenses of \$5,222.00 which established that her monthly income exceeded her monthly expenses.² Appellant also had over \$100,000.00 in assets. The hearing representative directed recovery of the overpayment at a rate of \$500.00 per month from her continuing compensation payments.³

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d)(2) of the Federal Employees' Compensation 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 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 [f]ederal service of that employee covered by chapter 84 of this title.”⁵

² The hearing representative noted that appellant received monthly compensation under the Federal Employees' Compensation Act in the amount of \$1,843.45 every 28 days.

³ Following the issuance of the hearing representative's July 14, 2008 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8116(d)(2).

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).

ANALYSIS -- ISSUE 1

Appellant's husband died in the performance of duty on September 25, 2003 when he fell off a bridge. At the time of the employee's death, he was covered by FERS. On October 5, 1993 appellant filed a claim form for death benefits and on October 1, 1994, elected to receive compensation benefits under the Federal Employees' Compensation Act rather than Social Security Act death benefits effective September 26, 1993. The record establishes that the amount of compensation paid to her was not correctly offset by the employee's Social Security Act benefits attributable to her husband's employment under FERS during the period September 25, 1993 to December 31, 1999 and that no FERS offset was made during the period January 1, 2000 to October 2, 2004. The Board finds that this created an overpayment in compensation for the period September 25, 1993 to October 2, 2004 in the amount of \$57,764.80. The record contains an Office overpayment worksheet calculating the overpayment during the time frame in question. Appellant does not dispute that she received the overpayment or the amount. The Office explained how the overpayment occurred and provided the accounting to her with the preliminary notice of overpayment. The Board finds that appellant received a \$57,764.80 overpayment of compensation from September 25, 1993 to October 2, 2004.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁶ Section 8129(b) of the Federal Employees' Compensation Act⁷ 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 Federal Employees' Compensation Act or would be against equity and good conscience.⁸

Section 10.436 of the implementing regulations⁹ provide that recovery of an overpayment would defeat the purpose of the Federal Employees' Compensation Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.¹⁰ An individual is deemed to need substantially all

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ 5 U.S.C. § 8129(b).

⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁹ 20 C.F.R. § 10.436.

¹⁰ An individual's assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1)(b) (December 23, 2004).

of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹²

Section 10.438 of the regulations provide that 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 Federal Employees' Compensation Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹³

ANALYSIS -- ISSUE 2

The Office hearing representative found that appellant was not at fault in the creation of the overpayment. In determining that appellant was not entitled to waiver of the overpayment, she reviewed appellant's income, expenses and assets as listed in her June 4, 2007 OWCP-20 form. Appellant had monthly income of \$5,330.00, monthly expenses of \$5,222.00 and \$103,220.00 in assets. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴ The Board finds that, as appellant's monthly income of \$5,333.00 exceeds her monthly expenses of \$5,222.00 by \$111.00, she is not entitled to waiver as she does not need substantially all of her income to meet current ordinary and necessary expenses. Moreover, she has \$100,000.00 in other assets.¹⁵

There is no evidence that appellant relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period September 25, 1993 through October 2, 2004. The Board finds that, pursuant to its regulations, the Office properly determined that recovery of the overpayment would not be against equity or good conscience.

¹¹ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438.

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (October 2004).

¹⁵ See *Eloise K. Hahn*, Docket No 01-1199 (issued June 25, 2002) (the employee's contribution to the Thrift Savings Plan, and the contribution's earnings, are considered assets for purposes of determining waiver).

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.¹⁶ With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“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.”¹⁷

ANALYSIS -- ISSUE 3

The Office found that appellant could repay the overpayment by withholding \$500.00 every 28 days from her continuing compensation. It took into consideration the financial information appellant submitted and, the factors set forth in sections 10.433 and 10.434,¹⁸ in order to determine a rate of that recovery minimized any resulting hardship. The Office considered the amount of appellant's assets and determined that her monthly income exceeded her monthly expenses.¹⁹ Therefore, it properly required repayment of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$57,764.80, during the period September 25, 1993 to October 2, 2004. The Board further finds that the Office properly denied waiver of recovery of the overpayment. The Board also finds that it properly directed recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments.

¹⁶ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹⁷ 20 C.F.R. § 10.441(a).

¹⁸ *Id.* at §§ 10.433, 10.434.

¹⁹ Appellant's resource base also greatly exceeds that required to demonstrate hardship in repaying the debt. *See Eloise K. Hahn*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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