

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

)	
F.T., Appellant)	
)	
and)	Docket No. 08-1618
)	Issued: February 9, 2009
DEPARTMENT OF DEFENSE, NAVAL AIR)	
STATION JOINT RESERVE BASE,)	
FORT WORTH, TX, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2008 appellant filed a timely appeal from a decision of the Office of Workers’ Compensation Programs dated April 24, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found an overpayment for the period February 7 through September 1, 2007 in the amount of \$1,801.57; (2) whether the Office properly denied waiver of the recovery of this overpayment; and (3) whether the Office properly determined that \$100.00 would be deducted from each continuing compensation payment until the amount was paid in full.

FACTUAL HISTORY

This case has previously been before the Board. The facts of this case are presented in the previous Board decisions and are hereby incorporated by reference.¹ The facts relevant to the current issue are set forth below.

On August 13, 2007 appellant informed the Office that he had elected to receive social security benefits. On August 14, 2007 the Office contacted the Social Security Administration (SSA) to ask for dual benefits calculations. On August 21, 2007 the SSA informed the Office that effective February 2007, the amount of appellant's checks were \$768.00 with Federal Employees' Retirement System (FERS) and would have been \$504.00 without FERS.

On August 30, 2007 the Office made a preliminary determination that appellant was overpaid benefits in the amount of \$1,801.57 because he was in receipt of both full social security benefits payments and full disability compensation during the period February 7 through September 1, 2007, for which he was not at fault. It calculated that appellant's net payment for this period was \$14,142.53² but that he was only entitled to a payment of \$12,340.96 for this period. The Office found that the difference between these two figures amounted to an overpayment in the amount of \$1,801.57.

Effective September 2, 2007, the Office began reducing appellant's compensation by the FERS offset amount of \$243.69 every 28 days.

On September 10, 2007 appellant requested a precoupment hearing, noted that the overpayment occurred through no fault of his own and requested a waiver of the recovery. He also noted that his income has been cut in half because his wife just had surgery and was not working. Appellant submitted financial forms wherein he indicated that he had \$500.00 cash on hand and \$0.00 in the bank. On the refund questionnaire he indicated monthly income of \$778.00 in social security benefits, \$739.00 in the Office payment and \$673.00 from the Department of Veterans Affairs. Appellant listed expenses of \$1,314.93 for house payment, \$500.00 for food, \$300.00 for clothing, \$628.00 for utilities, \$502.02 for car payment and \$158.00 for Allstate Insurance. He further broke his expenses down as follows: wife's insurance \$34.80, car insurance \$158.00, house payment \$1,314.93, taxes \$375.00, telephone \$114.00, electricity \$212.00, water \$54.00; car payment: \$502.02, gas \$34.00 (summer), gasoline \$90.00, food \$400.00, medicine \$200.00 and church tithes \$200.00. Appellant submitted copies of bills in support thereof.³

¹ Docket No. 05-1864 (issued May 1, 2006); Docket No. 05-85 (issued July 19, 2005); and Docket No. 04-411 (issued July 14, 2004).

² The Office noted that the compensation period February 7 through September 1, 2007 included 207 days.

³ These bills evince that appellant had the following monthly bills: \$1,314.93 for house payment, \$84.85 for Direct TV, \$286.36 for electric and \$502.03 for car payment. Appellant showed proof of periodic payments for his automobile insurance (\$989.04); estimated property taxes for 2007 (\$3,880.31) and Allstate insurance bill (\$716.10 for six-month premium).

A telephonic hearing was scheduled for February 12, 2008 but did not take place. By letter dated February 28, 2008, the hearing representative noted that he would review the written record and gave appellant additional forms to complete. He instructed appellant to submit copies of the last few months of bank statements and bills showing expenses. Appellant completed forms indicating that he had a monthly income of \$2,632.70 (\$784.00 social security, \$465.70 civil service benefits, \$670.00 navy retirement, \$700.00 spouse's income) and monthly expenses of \$3,697.93 (including \$325.00 for food, \$400.00 for clothing, \$355.00 for utilities, \$508.00 for car payment and \$1,749.93 for mortgage). He listed \$500.00 in checking and \$500.00 in savings and no other assets. Appellant contended that he was not at fault in the creation of the overpayment. He submitted no supporting documentation at this time.

In a decision dated April 24, 2008, the hearing representative affirmed the preliminary determination that appellant received an overpayment of \$1,801.57, for which he was found without fault in the creation of the overpayment, but affirmed the denial of waiver of the recovery of the overpayment as he found that appellant had not submitted the necessary financial information. Furthermore, he assessed a repayment schedule of \$100.00 per month from every compensation check.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act limits the right to receive compensation:

“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 the title or benefits under title II of the Social Security Act shall be entitled to all such benefits, except that....”

* * *

“[I]n 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.⁴”

ANALYSIS -- ISSUE 1

The record supports that appellant received full workers' compensation benefits concurrent with full SSA benefits from February 7 to September 1, 2007. The portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of the benefits under the Act and federal retirement benefits concurrently is a prohibited

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 2.1000.11(a)-(b) (February 1995).

dual benefit.⁵ The SSA notified the Office of the applicable SSA rates for appellant and their effective dates and, based on that information the Office was able to calculate the dual benefits he received from February 7 to September 1, 2007. On August 21, 2007 the SSA informed the Office that appellant's SSA rate was \$768.00 with FERS and \$504.00 without FERS. The monthly difference was \$264.00. Multiplying by 12 and dividing by 13 to convert the monthly difference to a 28-day difference (the Office pays compensation every 28 days), the Office determined that it should have offset appellant's compensation by \$243.69 every 28 days. The total number of days in the overpayment period was 207. The amount of the overpayment was \$8.70 per day (\$243.69 divided by 28) and when this figure is multiplied by 207 days, the product is \$1,801.57 or the amount found by the Office for the overpayment. Accordingly, the Office properly determined that appellant received an overpayment in the amount of \$1,801.57.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁷ This information will also be used to determine the repayment schedule, if necessary.⁸ Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁹

ANALYSIS -- ISSUE 2

The Office properly found that appellant was not at fault in creating the overpayment. Although appellant was without fault in creating the overpayment, he nevertheless bears the responsibility for providing the financial information necessary to support his request for waiver of the overpayment. In response to the hearing representative's February 28, 2008 letter, appellant submitted a completed recovery questionnaire but did not submit the required financial documentation. In her letter, the hearing representative made it clear that appellant was to attach supporting financial documents to support the income and expenses listed so that the Office could determine whether he was entitled to a waiver or determine the proper repayment schedule. Appellant had previously submitted some copies of bills, however, he never submitted proof of income or copies of bank statements which would verify his allegation that he had no money in the bank. Because he failed to submit the complete requested financial documentation, the Office had no choice but to deny his request for waiver. As the regulations provide, failure to

⁵ FECA Bulletin No. 97-9 (issued February 3, 1997). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.438(a).

⁹ *Id.* at § 10.438(b).

submit the requested information within 30 days of the request shall result in denial of waiver. The Board will therefore affirm the Office's hearing representative's decision denying waiver.¹⁰

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.¹¹

ANALYSIS -- ISSUE 3

The Office determined that the overpayment would be recovered by withholding \$100.00 from each of appellant's continuing compensation checks until the payment was repaid in full. As appellant did not submit the necessary supporting financial documentation, the Board finds that the Office did not abuse its discretion in setting this repayment schedule.¹²

CONCLUSION

The Board finds that the Office properly found an overpayment in the amount of \$1,801.57, properly denied waiver of this overpayment and properly determined that \$100.00 would be deducted from each continuing compensation payment until the amount was paid in full.

¹⁰ Appellant submitted new documents on appeal. As the Board's review is limited to the evidence in the case record at the time the Office made its decision over which the Board has jurisdiction, the Board cannot review this evidence submitted for the first time on appeal. *D.E.*, 58 ECAB ____ (Docket No. 07-27, issued April 6, 2007).

¹¹ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 24, 2008 is affirmed.

Issued: February 9, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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