



disc disease of the lumbosacral and cervical spine. Appellant began receiving compensation benefits effective August 5, 2002.

On December 1, 2005 appellant began receiving social security benefits pursuant to her retirement at age 65. The record contains an October 26, 2007 Federal Employees' Retirement System (FERS)/Social Security Administration (SSA) dual benefits calculation worksheet, which reflects that appellant, who was entitled to FERS coverage, continued to receive compensation benefits while simultaneously receiving social security benefits from December 1, 2005 through the date of the form. SSA notified the Office that appellant had received benefits since December 1, 2005, and provided a breakdown of rates with and without FERS offset.

A November 5, 2007 memorandum to file indicates that appellant received dual benefits (FERS and SSA) from December 1, 2005 through October 28, 2007. The Office noted that it is required to deduct from FECA benefits that portion of social security benefits attributable to federal service. Based upon the October 26, 2007 SSA Dual Benefits Calculations response, the Office determined that, from December 1, 2005 through November 30, 2006, the monthly SSA rate with FERS was \$1,169.20; the SSA rate without FERS was \$459.00; and the monthly FERS offset amount was \$710.20. For December 1, 2006 through October 27, 2007, the monthly SSA rate with FERS was \$1,207.70; the SSA rate without FERS was \$474.00; and the monthly FERS offset amount was \$733.70. The Office converted the monthly offset amounts of \$710.20 and \$733.70, to 28-day rates of \$655.57 and \$677.26 for the respective periods by multiplying each resulting offset amount by 12 (months) and divided the total by 13 (months). That figure was then multiplied by the number of plates in the periodic rolls during the applicable period. The calculations were as follows:

December 1, 2005 through November 30, 2006:

$\$710.20$  multiplied by 12 (months) equals  $(\$8,522.40)$  divided by 13 (months) =  $\$655.57$  per 28-day period;  $\$655.57$  multiplied by 13.035714 (# of periodic plates) =  $\$8,545.82$

December 1, 2006 through October 27, 2007:

$\$733.70$  multiplied by 12 (months) equals  $(\$8,804.40)$  divided by 13 =  $\$677.26$  per 28-day period;  $\$677.26$  multiplied by 11.8214285714 (# of periodic plates) =  $\$8,006.18$

**TOTAL OVERPAYMENT:** December 1, 2005 through October 27, 2007 =  $\$16,552.00$ .

On November 19, 2007 the Office issued a preliminary finding that an overpayment of compensation in the amount of \$16,552.00 had been created by appellant's receipt of a prohibited dual benefit. It found that she was not entitled to the portion of social security benefit received from December 1, 2005 through October 27, 2007 that was based on credits earned while she was working in the Federal Government. The Office provided a memorandum, identical to the above-referenced November 5, 2007 memorandum, explaining its calculation of the overpayment. Appellant was found to be without fault. She was advised of actions available to her if she objected to the fact or amount of overpayment or believed that she should receive a

waiver, including the right to request a prerecoupment hearing or a final decision based on the written evidence currently of record. Appellant was further advised to submit a detailed explanation of her reasons for seeking a waiver; a completed overpayment recovery questionnaire; and supporting documents, to include copies of tax returns, bank account statements, bills, and cancelled checks and pay slips. The Office informed appellant that failure to submit the required documentation within 30 days would result in denial of a waiver.<sup>1</sup>

By decision dated January 3, 2008, the Office found appellant had received an overpayment of compensation in the amount of \$16,552.00 due to her receipt of compensation and social security benefits from December 1, 2005 through October 27, 2007. It found that, although appellant was not at fault in the creation of the overpayment, she was not entitled to waiver. The Office found that appellant had failed to respond to the preliminary notice of overpayment, or to provide any financial information or documents justifying waiver. It noted that appellant received \$1,611.00 in monthly compensation benefits and at least \$1,200.00 in monthly social security benefits, and noted that there was no evidence to establish that she had assets worth less than \$800.00, or that recovery would defeat the purpose of the Act, or be against equity or good conscience. The Office ordered repayment by deducting \$150.00 every four weeks from her continuing compensation.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> Section 8116 provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.<sup>4</sup> Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay.<sup>5</sup> FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of social security benefits because the portion of the social security benefit earned as a federal employee is part of the

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<sup>1</sup> The Board notes that appellant submitted additional evidence after the Office rendered its January 3, 2008 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *D.E.*, 58 ECAB \_\_\_ (Docket No. 07-27, issued April 6, 2007); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal.

<sup>2</sup> On appeal, appellant contends that the amount of overpayment was repaid, as evidenced by a November 6, 2007 letter from OPM, which indicated that her overpayment of \$36,804.83 had been paid in full. However, the overpayment to which appellant referred resulted from her receipt of disability benefits from August 6, 2002 through August 30, 2007. Upon appellant's retroactive election of FECA benefits for that period, the Office processed compensation payments for the period August 5, 2002 through August 31, 2007, deducting the amount of \$36,804.83 owed to OPM. The issue of reimbursement to OPM in the amount of \$36,804.83 is unrelated to the overpayment created by appellant's simultaneous receipt of SSA benefits and compensation benefits from December 1, 2005 through October 27, 2007, and is not before the Board on appeal.

<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 20 C.F.R. § 10.421(c); *see L.J.*, 59 ECAB \_\_\_ (Docket No. 07-1844 (issued December 11, 2007)).

FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>6</sup> When the Office discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The record supports that appellant received full FECA compensation benefits and social security benefits from December 1, 2005 through October 27, 2007. The portion of the social security benefits appellant earned as a federal employee was part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>8</sup> The SSA notified the Office of the applicable social security rates for appellant and their effective dates. Based on these rates, the Office was able to calculate the dual benefits appellant received from December 1, 2005 through October 27, 2007. The Board has reviewed these calculations and finds that the Office properly determined that appellant received dual benefits totaling \$16,552.00 for this period, thus creating an overpayment in compensation in that amount.

### **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.<sup>9</sup> If the Office 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.<sup>10</sup> This information will also be used to determine the repayment schedule, if necessary.<sup>11</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Office properly found that appellant was not at fault in creating the overpayment. Although appellant was without fault, she nevertheless bears the responsibility for providing the financial information necessary to support her request for waiver. Appellant did not respond to the Office's November 19, 2007 preliminary determination of overpayment. The Office instructed appellant to submit a completed overpayment recovery questionnaire within 30 days,

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<sup>6</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

<sup>8</sup> FECA Bulletin No. 97-9, *supra* note 6.

<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> *Id.* at § 10.434.

<sup>11</sup> *Id.* at § 10.438(a).

<sup>12</sup> *Id.* at § 10.438 (b).

and to attach financial documents to support the income and expenses listed, so that the Office could determine whether she was entitled to a waiver, or determine the proper repayment schedule. Appellant did not provide proof of income, copies of bank statements, or other evidence of her expenses. Because she failed to submit the requested financial documentation, the Office had no choice but to deny her request for waiver. As the regulations provide, failure to submit the requested information within 30 days of the request shall result in denial of waiver. The Board will therefore affirm the Office's decision denying waiver.

### **LEGAL PRECEDENT -- ISSUE 3**

The Office's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>13</sup>

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.<sup>14</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$150.00 per compensation period. As noted, appellant did not submit any financial documentation in response to the preliminary determination of overpayment. However, the Office observed that appellant received \$1,611.00 in monthly compensation benefits and at least \$1,200.00 in monthly social security benefits, and concluded that there was no evidence to establish that she had assets worth less than \$800.00. 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.<sup>15</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$16,552.00 for the period December 1, 2005 to October 27, 2007; properly denied waiver of the recovery of this overpayment; and properly set the rate of recovery of the overpayment at \$150.00 every 28 days from continuing compensation payments.

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<sup>13</sup> *Id.* at § 10.441(a).

<sup>14</sup> *Howard R. Nahikian*, 53 ECAB 406 (2002).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 3, 2008 is affirmed.

Issued: June 15, 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