

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

V.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Liberty, TX, Employer**

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**Docket No. 09-1006
Issued: January 27, 2010**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 9, 2009 decision which found that she received an overpayment of compensation. 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 the Office properly determined that appellant received an overpayment of compensation in the amount of \$44,589.08 from March 12, 2001 through December 20, 2008, when she received workers' compensation benefits while also receiving social security benefits; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ In a January 28, 2005 decision, the Board found that the Office improperly terminated appellant's compensation benefits effective November 30, 2003 on the grounds that she refused an offer of suitable work. The facts and the history contained in the prior appeal are incorporated by reference.

The record reflects that appellant began working for the employing establishment in 1986 and was placed on the periodic rolls and began receiving compensation for total disability effective March 12, 2001. Prior to being placed on the periodic rolls, she filed claims for compensation, Form CA-7, which indicated that she was receiving payments from the Social Security Administration since November 8, 1999. Appellant continued to complete these and other Office reporting forms periodically noting the receipt of these Social Security Administration payments. On September 12, 2007 the Social Security Administration provided the Office with a breakdown of appellant's benefit rates since June 1999. On November 6, 2008 the Office contacted the Social Security Administration to obtain updated information.

In a Federal Employee Retirement System (FERS) and social security dual benefits calculations fax transmittal dated November 7, 2008, a social security representative indicated that appellant has been receiving payments since June 1999. For the period March 12, 2001 to December 20, 2008, the representative confirmed that appellant concurrently received FERS retirement benefits and social security benefits. The social security representative prepared a dual benefits calculation worksheet noting benefit rates and figures for social security benefits with FERS benefits and social security benefits without FERS benefits for the period March 12, 2001 to December 20, 2008.

In a January 8, 2009 FERS overpayment calculation worksheet, the Office noted that, for the period March 12, 2001 to December 20, 2008, it failed to deduct a 28-day FERS offset amount from appellant's benefits. This resulted in an overpayment of \$44,589.08.

On January 8, 2009 the Office made a preliminary determination that appellant received a \$44,589.08 overpayment from March 12, 2001 to December 20, 2008 because she was in receipt of social security retirement payments at the same time that she was receiving compensation benefits under the Federal Employees' Compensation Act, which constituted a dual receipt of benefits. The Office determined that her compensation benefits had not been offset by the amount of social security benefits she received attributable to her federal service. Appellant was found not at fault in creating the overpayment and 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 within 30 days. Appellant did not submit an overpayment recovery questionnaire.

In a memorandum of telephone call dated January 30, 2009, appellant contacted the Office to discuss the overpayment. She indicated that she had been advised by the Social

¹ Docket No. 04-1508 (issued January 28, 2005).

Security Administration that the benefits she was receiving from them were based on her earnings in the private sector. The Office indicated that the earnings were based on both her private-sector earnings and her federal employment. Appellant also noted that the Social Security Administration was supposed to make the reduction when a federal employee was receiving both Social Security Administration benefits and benefits from the Office. The Office noted that appellant was advised this only occurred if the Social Security Administration benefits were based on disability. It noted that she was advised that the Office was required to make the reduction if the Social Security Administration benefits were based on age. Appellant also questioned why this was not caught earlier since she had reported her Social Security Administration benefits since she had begun receiving them. It noted that this was why she was not found at fault and asked that she respond to the preliminary determination.

Appellant again contacted the Office on February 2, 2009 and advised that the Social Security Administration reiterated the information it previously provided. On February 2, 2009 the Office provided appellant a copy of the documentation it received from Social Security Administration. The record also reflects that on February 6, 2009, an individual with Social Security Administration contacted the Office regarding the offset of appellant's Social Security Administration benefits. It noted that explaining that appellant could not receive workers' compensation benefits and retirement benefits.

By decision dated February 9, 2009, the Office finalized the overpayment determination. It further found that appellant was not entitled to waiver of recovery of the overpayment as she did respond to the overpayment recovery questionnaire or show that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Office requested that appellant forward a check in the amount of \$44,589.08 within 30 days of the date of the letter or contact the Office to make arrangements for repayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d)(2) of the Act² 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

² 5 U.S.C. § 8116(d)(2).

attributable to [f]ederal service of that employee covered by chapter 84 of this title.”³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$44,589.08. The record indicates that the Office accepted her claim for aggravation of cervical disc disease and spinal stenosis. The Office also authorized a cervical laminectomy. Appellant was placed on the periodic rolls effective March 12, 2001 and received disability compensation under the Act. The record also reflects that appellant was in receipt of social security retirement benefits from March 12, 2001 through December 20, 2008. The portion of the social security benefits of appellant earned as a federal employee as part of her FERS retirement and the receipt of benefits under the Act she received concurrently for this period is a prohibited dual benefit.⁴ The Social Security Administration notified the Office of the applicable Social Security Administration rates for appellant and their effective dates. An Office overpayment calculation worksheet documented the FERS offset in the amount of \$44,589.08 that was not made against the compensation she received under the Act. The Board finds that this created an overpayment of compensation.

Although appellant alleges on appeal that she was advised that she was entitled to receive both benefits at the same time and submitted information from the Social Security Administration, the Board notes that appellant did not submit documentation to support this argument. As noted, the dual receipt of Social Security Administration benefits and workers' compensation benefits is a prohibited dual benefit. Appellant did not contest the calculated amount of the overpayment. The Board finds that appellant received an overpayment of \$44,589.08 from March 12, 2001 through December 20, 2008.

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.⁵ 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

³ *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) (FECA benefits have to be adjusted for the FERS portion of social security benefits, the portion of the social security benefit earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit).

⁴ *Id.*

⁵ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁶ 5 U.S.C. § 8129(b).

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

Section 10.436 of the implementing regulations⁸ provide that recovery of an overpayment would defeat the purpose of the 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.⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁰

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.¹¹

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.¹² This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act¹³ or be against equity and good conscience.¹⁴ Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the creation of the overpayment. In its January 8, 2009 preliminary overpayment determination, the Office informed appellant of

⁸ 20 C.F.R. § 10.436.

⁹ 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).

¹⁰ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹¹ 20 C.F.R. § 10.437.

¹² *Id.* at § 10.438.

¹³ 5 U.S.C. § 8129(b).

¹⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁵ *Id.* at § 10.438.

actions available to her if she believed that she should receive a waiver. It advised her to submit a completed overpayment recovery questionnaire as well as provide information and evidence regarding her income and expenses.

However, appellant did not submit an overpayment recovery questionnaire or supporting financial documentation. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.¹⁶ As appellant failed to submit the requested financial information, under section 10.438, the Office properly denied waiver of recovery of the overpayment. The individual who receives an overpayment is responsible for providing information about income, expenses and assets. Failure to submit such information within 30 days of the request shall result in a denial of waiver.¹⁷

The Board further finds that it does not have jurisdiction regarding repayment of the overpayment as the Office is not seeking recovery from continuing compensation benefits. The Board's jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits.¹⁸

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$44,589.08 from March 12, 2001 through December 20, 2008, when she received workers' compensation benefits while also receiving social security benefits. The Board also finds that the Office properly denied waiver of the recovery of the overpayment.¹⁹

¹⁶ *See id.*

¹⁷ *See id.; Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁸ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez* 51 ECAB 295 (2000).

¹⁹ Following issuance of the February 9, 2009 decision, and on appeal, appellant submitted additional evidence. As the Office has not considered this evidence in reaching a decision, the Board may not consider it for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 9, 2009 is affirmed.

Issued: January 27, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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