



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated June 3, 2005,<sup>1</sup> the Board affirmed June 17 and November 29, 2004 decisions denying his claims for an additional schedule award for permanent impairment of the right arm related to accepted right upper extremity strains and ruptured right biceps tendon. The facts of the case as set forth in the Board's decision are incorporated by reference. Appellant received compensation for total disability on the periodic rolls. While on compensation, he began receiving disability benefits from the Social Security Administration on August 1, 2007.

In a January 28, 2008 letter, the Office advised appellant that he had been receiving prohibited dual benefits under the Federal Employee Retirement System (FERS) and the Social Security Administration (SSA). It offset his compensation benefits in the amount of \$177.05 every four weeks, the amount of social security benefits attributable to his federal service while covered by the Federal Employees' Compensation Act.

In an August 12, 2009 letter, the Office advised appellant that it had deducted an incorrect amount of FERS offset from his continuing compensation beginning in January 2008. It deducted \$177.05 every 28 days beginning in January 2008, raised to \$187.32 in March 2009. However, the SSA advised the Office that it provided incorrect information. The appropriate deduction amount was \$220.62 every 28 days.<sup>2</sup> The Office noted that it would advise appellant of the amount of the overpayment created due to the underdeduction.

On August 13, 2009 the Office calculated that, from August 1, 2007 to August 1, 2009, it deducted \$3,592.35 in FERS offset but the correct amount was \$5,537.58, a difference of \$1,945.23.

By notice dated August 13, 2009, the Office advised appellant of its preliminary determination that he received an overpayment in the amount of \$1,945.23 from August 1, 2007 through August 1, 2009 because he was in receipt of social security benefits attributable to his federal employment at the same time that he was receiving compensation benefits under the Act. This constituted a prohibited dual receipt of benefits. The Office found appellant not at fault in creating the overpayment. Appellant was afforded 30 days to request a telephone conference, precoupment hearing or a final decision based on the record. The Office also requested financial information and any additional arguments supporting waiver of the overpayment.

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<sup>1</sup> Docket No. 05-746 (issued June 3, 2005).

<sup>2</sup> The record reflects several discrepancies regarding the correct amount of the FERS offset. In FERS and SSA dual benefits calculation fax transmittal completed on January 15, 2008, a social security representative noted that in August 2007, the social security rate with FERS was \$882.00 and \$704.50 without FERS. As of December 2007, the SSA rate with FERS was \$912.50 and the SSA rate without FERS was \$720.70. A June 9, 2009 worksheet showed that as of December 2008, the social security rate with FERS was \$965.40 and \$677.30 without FERS. The record also contains July 28, 2009 worksheets showing two different amounts for the social security rate without FERS on the following dates: August 2007, \$671.20 and \$625.80; December 2007 \$686.50 and \$640.20; December 2008 \$726.40 and \$677.30.

Appellant submitted an incomplete overpayment recovery questionnaire (Form OWCP-20) on September 4, 2009. He provided the amount of his monthly compensation and social security benefits, but wrote “N/A [not applicable]” in response to all other queries regarding his income, assets, expenses and debts. Appellant requested waiver as he was not at fault. He contended that recovery would add to his severe financial hardship.

By decision dated September 14, 2009, the Office hearing representative finalized the overpayment finding. Although appellant was found to be without fault in the creation of the overpayment, the Office found that he had not justified waiver of recovery of the overpayment as he failed to submit financial information as requested. The hearing representative directed recovery of the overpayment by lump-sum payment of \$1,945.23.<sup>3</sup>

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

Section 8102(a) of the Act<sup>4</sup> 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 his duty.<sup>5</sup> Section 8129(a) of the Act provides, in pertinent part, that when “an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”<sup>6</sup>

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee’s monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, or a total of 75 percent of monthly pay.<sup>7</sup>

Section 8116(d)(2) of the Act<sup>8</sup> 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

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<sup>3</sup> The September 14, 2009 decision contains a proposed schedule of deductions from continuing compensation payments beginning September 27, 2009 if appellant failed to repay the debt in full by lump-sum payment. The Office did not finalize this deduction schedule as of September 14, 2009. The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004). Therefore, the Board does not have jurisdiction over the recovery issue in this case.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8110(b).

<sup>8</sup> *Id.* at § 8116(d)(2).

under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the Social Security Act shall be entitled to all such benefits, except that --”

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“(2) in the case of benefits received on account of age or death under title [2] of the Social Security Act, compensation payable under this subchapter based on the [f]ederal 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...”<sup>9</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$1,945.23. The record reflects that, from August 1, 2007 through August 1, 2009, he received compensation benefits under the Act at the same time that he received social security benefits attributable to his federal employment. The portion of appellant’s social security benefits that he earned as a federal employee as part of his FERS retirement and the receipt of benefits under the Act he received concurrently for this period is a prohibited dual benefit.<sup>10</sup> His compensation benefits had not been offset by the correct amount of social security benefits he received attributable to his federal service. The Office calculated that it failed to deduct \$1,945.23 in FERS offset against the compensation appellant received under the Act. The Board finds that this created an overpayment of compensation.

There is no contrary evidence nor does appellant contest the fact and the amount of the overpayment. The Board finds that appellant received an overpayment of \$1,945.23 for the period August 1, 2007 through August 1, 2009.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b). Adjustment or recovery by the United States may not be made when 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.<sup>11</sup>

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<sup>9</sup> *Id.*, see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (January 1997); FECA Bulletin No. 97-9 (issued February 3, 1997) (the portion of Social Security Act benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits concurrently with federal retirement is a prohibited dual benefit).

<sup>10</sup> 5 U.S.C. § 8116(d)(2); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (January 1997); FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>11</sup> 5 U.S.C. § 8129.

Office regulations, at 20 C.F.R. § 10.438, state:

“(a) 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 Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) 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.”<sup>12</sup>

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

Although appellant was found without fault in creating the \$1,945.23 overpayment, he bears responsibility for providing the financial information necessary to support a request for waiver of the recovery. The Office requested that he provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. Appellant submitted an incomplete overpayment recovery questionnaire. He noted minimal information about household income but did not list any assets or expenses. The Board finds that the Office properly denied waiver of recovery of the overpayment pursuant to 20 C.F.R. § 14.438(b) as appellant failed to submit financial information as requested.<sup>13</sup>

On appeal, appellant does not contest the fact or amount of the overpayment. He asserts that the Office should have waived the overpayment as he was not at fault in its creation. As set forth above, appellant failed to submit financial information as requested. Therefore, the Office properly denied waiver of recovery of the overpayment.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,945.23 from August 1, 2007 to August 1, 2009, when he received workers' compensation benefits while also receiving social security benefits. The Board further finds that the Office properly denied waiver of the recovery of the overpayment.

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<sup>12</sup> 20 C.F.R. § 10.438.

<sup>13</sup> See *Madelyn Y. Grant*, 57 ECAB 533 (2006). See also *D.R.*, Docket No. 09-1537 (issued April 15, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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