



## **FACTUAL HISTORY**

In March 1993, the Office found that appellant, then a 48-year-old operating room nurse, sustained several back and lower extremity conditions in the performance of duty. She stopped work for various periods and received compensation for intermittent disability. Appellant retired and began to receive Social Security Administration (SSA) retirement benefits in September 2006. In Forms EN1032 completed on July 17, 2007 and July 7, 2008, she responded “No” in response to a question regarding whether she had received benefits from the SSA as part of an annuity for federal service. Each form covered the 15 months prior to its completion and had a certification clause, which required appellant to report any change in income from federally assisted disability or benefit programs.

In a November 10, 2008 letter, the Office advised appellant of its preliminary determination that she received a \$9,432.27 overpayment of compensation because her compensation payments for the period September 1, 2006 to October 25, 2008 were not reduced based on the SSA/Federal Employees Retirement System (FERS) applicable offset amount. It found that she began to receive SSA retirement benefits in September 2006 and noted that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package. The receipt of Office benefits concurrently was a prohibited dual benefit for the period September 1, 2006 to October 25, 2008.

The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material. On July 17, 2007 and July 7, 2008 appellant completed EN1032 forms that required her to report any change in income from federally assisted disability or benefit programs. However, she failed to notify the Office of her receipt of SSA benefits on the forms. The overpayment was calculated to be comprised of \$1,051.21 for the period September 1 to November 30, 2006 (SSA 28-day-offset amount of \$323.45); \$4,354.71 for the period December 1, 2006 to November 30, 2007 (28-day-offset amount of \$334.06); and \$4,026.35 for the period December 1, 2007 to October 25, 2008 (28-day-offset amount of \$341.63).<sup>1</sup> The Office directed appellant to complete an enclosed financial information questionnaire within 30 days of November 10, 2008.

In a December 8, 2008 letter, appellant contended that she was not at fault in the creation of the \$9,432.27 overpayment because she was not aware that her SSA benefits were part of her federal annuity or that receiving both SSA and Office benefits would constitute a dual recovery. In the financial information questionnaire completed on December 8, 2008 appellant indicated that she had \$4,647.23 in monthly income, \$4,611.91 in monthly expenses and \$85,235.98 in assets.

In a January 29, 2009 decision, the Office determined that appellant received a \$9,432.27 overpayment of compensation because her compensation payments for the period September 1, 2006 to October 25, 2008 were not reduced based on the SSA/FERS applicable offset amount. It found that she was at fault in creating the overpayment of compensation, thereby precluding

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<sup>1</sup> The record contains documents from the SSA delineating the offset figures that the Office used to calculate the overpayment.

waiver and that the overpayment would be recovered by deducting \$100.00 from her compensation payments every 28 days. The Office considered the financial information questionnaire submitted by appellant.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>2</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>3</sup> Section 8129(a) of the Act provides, in pertinent part:

“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>4</sup>

Section 8116(a) of the Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>5</sup>

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

The Board finds that appellant received a \$9,432.27 overpayment of compensation because her compensation payments for the period September 1, 2006 to October 25, 2008 were not reduced based on the SSA/FERS applicable offset amount. Receiving both SSA and Office compensation for this period constituted an impermissible double recovery. The record contains documents from the SSA delineating the offset figures that the Office used to calculate the overpayment. The Office properly calculated that the \$9,432.27 overpayment was comprised of \$1,051.21 for the period September 1 to November 30, 2006 (SSA 28-day-offset amount of \$323.45); \$4,354.71 for the period December 1, 2006 to November 30, 2007 (28-day-offset amount of \$334.06); and \$4,026.35 for the period December 1, 2007 to October 25, 2008 (28-day-offset amount of \$341.63).

### **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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> *Id.* at § 8116(a).

payments to which an individual is entitled.<sup>6</sup> 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 this subchapter or would be against equity and good conscience.”<sup>7</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>8</sup>

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....”<sup>9</sup>

Section 10.433(c) of the Office’s regulations provide:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>10</sup>

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

The Office found that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material. In EN1032 forms completed on July 17, 2007 and July 7, 2008, appellant failed to report her SSA benefits. On each form, she responded “No” in response to a specific question regarding whether she had received benefits from the SSA as part of an annuity for federal service. Each form covered the 15 months prior to its completion and had a certification clause which required appellant to report any change in income from federally assisted disability or benefit programs. On appeal, appellant contends that she did not know that SSA benefits were an annuity for

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<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8129(b).

<sup>8</sup> *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> *Id.* at § 10.433(c).

federal service or were considered to be part of her FERS retirement package. She also claimed that she did not know that receiving the two forms of benefits constituted a double recovery under the Act. The EN1032 form states, "Report any benefits received from the SSA which you receive as part of an annuity under the FERS." The EN1032 forms, however, advised appellant specifically that she had a FERS annuity which included SSA benefits and, through a clearly worded certification clause, of the materiality of reporting such benefits. For these reasons, appellant failed to provide information which she knew or should have known to be material. The Office properly found her at fault in the creation of the \$9,432.27 overpayment. Therefore, it is subject to waiver.

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

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

"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 the 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."<sup>11</sup>

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

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.<sup>12</sup> Therefore, the Office properly required repayment of the overpayment by deducting from appellant's compensation payments every 28 days.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received a \$9,432.27 overpayment of compensation. The Board finds that whether the Office properly determined that she was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every 28 days.

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<sup>11</sup> *Id.* at § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>12</sup> The financial information submitted by appellant indicated that appellant had more than \$85,000.00 in assets.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 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