



\$1,720.71 from May 1 through July 4, 2009 because she received workers' compensation benefits that were not offset by her social security benefits; (3) whether the Office properly denied waiver of the overpayments as appellant was without fault in the creation of the overpayment; (4) whether the Office properly determined that it would recover the overpayments by deducting from continuing compensation payments \$150.00 for the overpayment created from May 1, 2006 through April 30, 2008 and \$20.00 for the overpayment created from May 1 through July 4, 2009.

### **FACTUAL HISTORY**

On August 28, 1997 appellant, then a 54-year-old management analyst, filed a claim alleging that on August 26, 1997 she sustained an injury to her low back in the performance of duty. The Office accepted the claim for acute lumbar muscle strain and an aggravation of preexisting spondylolisthesis and degenerative disc disease. It paid appellant compensation for total disability beginning February 21, 2000.

In (EN1032 forms) dated June 23, 2006, June 3, 2007 and June 1, 2008, appellant related that she received a disability retirement check but did not receive benefits from the Social Security Administration (SSA) for federal service.<sup>2</sup>

On May 6, 2009 SSA provided appellant's benefit rate with and without federal service from May 2006 to May 2009. In a June 22, 2009 Form EN1032, appellant related that she was uncertain whether the annuity she received from SSA was for federal service.

In a July 22, 2009 telephone call, SSA indicated that appellant received regular SSA retirement benefits from May 1, 2006 to April 30, 2008 and beginning May 1, 2009.

On July 22, 2009 the Office calculated that appellant received an overpayment of \$1,720.71 for the period May 1 to July 4, 2009 because it did not offset her compensation from SSA regular retirement benefits based on her federal service.<sup>3</sup> On July 28, 2009 it calculated that she received an overpayment of \$12,754.70 for the period May 1, 2006 to April 30, 2008 because it did not deduct her SSA retirement benefits based on federal service from her compensation.<sup>4</sup>

On August 21, 2009 the Office advised appellant of its preliminary determination that she received an overpayment of \$1,720.71 for the period May 1 to July 4, 2009 because she received SSA benefits attributable to her federal service at the same time as compensation benefits from

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<sup>2</sup> In response to a letter from the employing establishment dated March 12, 2009, appellant indicated that she received benefits from SSA and did not know whether the benefits were calculated based on earnings in federal service.

<sup>3</sup> The Office found that the 28-day offset was \$238.25 from May 1 through 9, 2009 and \$741.23 for each 28-day period from May 10 to July 4, 2009, for a total overpayment of \$1,720.71.

<sup>4</sup> The Office determined that the offset each 28 days was \$217.54 from May 1 to 13, 2006, \$468.55 from May 13 to November 25, 2006, \$481.22 from November 26 to December 23, 2006, \$483.979 from December 24, 2006 to December 22, 2007, \$492.14 from November 24 to December 22, 2007 and \$495.14 for the period December 23, 2007 through April 30, 2008, for a total overpayment of \$12,754.70.

the Office. In another letter of the same date, the Office advised her of its preliminary determination that she received an overpayment of \$12,754.70 for the period May 1, 2006 through April 30, 2008 as she received benefits from the Office which were not offset by the SSA benefits she received attributable to her federal service. The Office, in both letters, notified appellant of its preliminary determination that she was without fault in creating the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On September 16, 2009 appellant submitted an overpayment recovery questionnaire and requested a decision based on the written evidence. She requested waiver and indicated that SSA advised her that she qualified for a program that would increase her disability benefits but that she would still be considered on SSA disability rather than regular retirement. Appellant listed monthly income as \$4,408.00 and monthly expenses as \$4,058.68. She noted that her monthly income would decrease after an anticipated divorce. On a separate sheet, appellant listed the monthly income of her spouse as \$3,902.00 and his monthly expenses as \$3,286.00. She listed assets totaling \$86,954.90 from her checking and savings accounts and her thrift savings plan. Appellant listed as an asset cabin property purchased for \$90,000.00 three years prior. She estimated her husband's assets as \$229,887.23 but noted that they would be divided after the divorce and were currently frozen. Appellant also listed her medical expenses and transportation costs.

In separate decisions dated September 24, 2009, the Office determined that appellant received an overpayment of \$12,754.70 for the period May 1, 2006 through April 30, 2008 and an overpayment of \$1,720.71 for the period May 1 through July 4, 2009 because it failed to offset SSA benefits attributable to federal service from her compensation benefits. It determined that she was not entitled to waiver because she had adequate income, real property and assets to repay the overpayment. The Office determined that it would deduct \$150.00 from her continuing compensation payments to repay the overpayment created from May 1, 2006 through April 30, 2008 and deduct \$20.00 from continuing compensation to repay the overpayment created from May 1 through July 4, 2009.

On appeal, appellant argues that she would experience hardship repaying the overpayment. She noted that the amount of her assets is uncertain because she does not know how the judge will divide the assets when she and her husband divorce. Appellant asserts that her assets will be cut in half after the divorce settlement and that repaying \$150.00 a month may mean that she is unable to keep her home.

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

Section 8116(d) of the Federal Employees' Compensation Act<sup>5</sup> (FECA or the Act) requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

on federal service, her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.<sup>6</sup>

Office procedures provide that, while SSA benefits are payable concurrently with FECA benefits, FECA benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee's federal service.<sup>7</sup> The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant has received SSA benefits, the Office will obtain information from SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed with FERS covered earnings. The Office will then deduct the hypothetical benefits from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from the FECA benefit to obtain the amount of compensation payable.<sup>8</sup>

### ANALYSIS -- ISSUES 1 & 2

Appellant received compensation for total disability beginning February 21, 2000. On May 6, 2009 SSA provided information showing that she earned regular retirement benefits from May 1, 2006 through April 30, 2008 and beginning May 1, 2009. SSA indicated that a portion of her benefits were based on federal service. Consequently, appellant received an overpayment as she received compensation benefits under the Act at the same time that she received social security benefits attributable to her federal employment.<sup>9</sup>

SSA informed the Office what appellant's benefit rate was with and hypothetically without federal service from May 2006 through May 2009. Based on this information, the Office calculated that she received an overpayment of \$1,720.71 for the period May 1 through July 14, 2009.<sup>10</sup> It further found that appellant received an overpayment of \$12,754.70 for the period May 1, 2006 through April 20, 2008.<sup>11</sup> Appellant does not challenge fact or amount of the overpayment and the record supports the Office's determination that she received an overpayment of \$1,720.71 from May 1 through July 14, 2009 and an overpayment of \$12,754.70 from May 1, 2006 through April 20, 2008.

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<sup>6</sup> *Id.* at § 8116(d); *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.100.11(a), (b) (February 1995).

<sup>8</sup> FECA Bulletin No. 97-09 (issued February 3, 1997).

<sup>9</sup> *See supra* note 6.

<sup>10</sup> *Supra* note 3.

<sup>11</sup> *Supra* note 4.

### LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act<sup>12</sup> provides that an overpayment must be recovered 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.” Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.<sup>13</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>14</sup> An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.<sup>15</sup> Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings and supplies.<sup>16</sup>

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 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.<sup>17</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>18</sup>

### ANALYSIS -- ISSUE 3

The Office found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the

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<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.436. Office procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at § 10.436.

<sup>18</sup> *Id.* at § 10.437(b)(1).

purpose of the Act or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of the Act, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base as determined by the Office's procedures.<sup>19</sup>

The Office found that appellant did not require substantially all of her income to meet ordinary and normal living expenses and that her assets exceeded the applicable resource base. She indicated on the overpayment recovery questionnaire that she had personal assets from her checking and savings account and her thrift savings plan totaling \$86,954.00.<sup>20</sup> Appellant also estimated her husband's assets, noting that these assets would be divided after the divorce and were currently frozen. As her assets exceed the \$8,000.00 resource base specified for an individual with a spouse, the Office properly found that recovery would not defeat the purpose of the Act.

The evidence further does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that she relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt. Consequently, the Office properly denied waiver of the overpayment of \$12,754.70 for the period May 1, 2006 through April 30, 2008 and the overpayment of \$1,720.71 for the period May 1 through July 4, 2009.

On appeal, appellant contends that she needs all of her monthly income to meet expenses. As her assets far exceed the applicable resource base, however, she is not entitled to waiver on the grounds of hardship.<sup>21</sup> Appellant further argues that her financial circumstances would change after her divorce. If her financial circumstances significantly change, she can again request waiver and submit supporting financial information.<sup>22</sup>

#### **LEGAL PRECEDENT -- ISSUE 4**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>23</sup> Section 10.441(a) of the regulations provide:

“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 same. If no refund is made, [the Office] shall decrease later payments of

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<sup>19</sup> *Id.* at § 10.436.

<sup>20</sup> The employee's contribution to the Thrift Savings Plan, and the contribution's earnings, are considered assets for the purposes of determining waiver. *See Eloise K. Hahn*, Docket No. 01-1199 (issued June 25, 2002).

<sup>21</sup> *D.C.*, 61 ECAB \_\_\_ (Docket No. 09-2042, issued August 9, 2010).

<sup>22</sup> 20 C.F.R. § 10.438(b).

<sup>23</sup> *Ronald E. Ogden*, 56 ECAB 278 (2005); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

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>24</sup>

### **ANALYSIS -- ISSUE 5**

The Office determined that it would recover the overpayment by deducting \$150.00 from continuing compensation for the overpayment created from May 1, 2006 through April 30, 2008 and \$20.00 from continuing compensation for the overpayment created from May 1 through July 4, 2009. In setting the rate of recovery, it reviewed appellant’s current financial circumstances and considered that she had disposable monthly income after expenses and also sufficient assets to repay the overpayment. As the Office gave due regards to relevant factors, the Board will affirm its finding on the rate of recovery from continuing compensation.<sup>25</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of \$12,754.70 from May 1, 2006 through April 30, 2008 and an overpayment of \$1,720.71 from May 1 through July 4, 2009 because she received workers’ compensation benefits that were not offset by her social security benefits. The Board further finds that the Office properly denied waiver of the overpayments created from May 1, 2006 through April 30, 2008 and May 1 through July 4, 2009 and properly determined that it would recover the overpayments by deducting \$150.00 from continuing compensation payments for the overpayment created from May 1, 2006 through April 30, 2008 and \$20.00 from continuing compensation payments for the overpayment created from May 1 through July 4, 2009.

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<sup>24</sup> 20 C.F.R. § 10.441(a).

<sup>25</sup> See *D.C.*, *supra* note 21; *K.K.*, 61 ECAB \_\_\_\_ (Docket No. 09-207, issued October 2, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 24, 2009 is affirmed.

Issued: February 1, 2011  
Washington, DC

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

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

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