

Appellant was placed on the periodic rolls effective September 24, 1990. While on compensation, he began receiving disability benefits from the Social Security Administration (SSA) on July 1, 2001. The Office, however, failed to offset the portion of appellant's social security benefit that was based upon his federal civilian service.

In an April 9, 2009 fax transmittal from the SSA, Michael Brennan stated that the "period eligible for FERS [Federal Employee Retirement System] offset is July 2001 [through] May 2004 and October 2004 through the current month." He indicated that appellant was receiving disability benefits from November 1990 through June 2001 and from June through September 2004. Mr. Brennan provided SSA rates with a FERS offset and without a FERS offset from July 2001 through December 2008.¹

The record contains a FERS and social security dual benefits calculation worksheet specifying the social security benefits appellant would have received every 28 days without FERS offset versus the amounts he should have received with FERS offset for the period July 2001 to April 11, 2009. The worksheet reflects that the Office's failure to deduct the FERS offset for the applicable period resulted in an overpayment of \$10,150.47.

By notice dated April 9, 2009, the Office advised appellant of its preliminary determination that he received an overpayment in the amount of \$10,150.47 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 Federal Employees' Compensation Act. This constituted a prohibited dual receipt of benefits. The Office stated that, according to the SSA, with the exception of the period between June 1 through September 30, 2001, appellant had received social security retirement benefits since July 1, 2001. It found him 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.

On May 4, 2009 appellant requested a precoupment hearing. He stated that repayment of the overpayment amount would create a financial hardship.

Appellant submitted an overpayment recovery questionnaire dated May 4, 2009. His monthly income consisted of social security benefits of \$1,073.00 and compensation benefits of \$2,609.84, for a total monthly income of \$3,682.84. Additional household income included social security benefits for his wife in the amount of \$1,770.00 and benefits from Los Angeles County for his daughter in the amount of \$740.00, for a total monthly household income of \$6,192.84.² Appellant noted savings in the amount of \$10,714.0 and annual stock dividends in the approximate amount of \$50.00. Assets included 34 shares of Wells Fargo stock. Appellant

¹ The actual figures provided show SSA rates with FERS/without FERS with effective dates ranging from July 2001 to December 2008 as follows: July 2001 -- \$725.40/\$638.50; December 2001 -- \$744.50/\$655.00; December 2002 -- \$754.80/\$664.10; December 2003 -- \$770.70/\$678.10; October 2004 -- \$978.70/\$861.10; December 2004 -- \$1005.10/\$884.30; December 2005 -- \$1046.30/\$920.50; December 2006 -- \$1080.80/\$950.80; December 2007 -- \$1105.60/\$972.60; December 2008 -- \$1169.70/\$1029.00.

² Appellant indicated that benefits for his daughter would cease effective November 27, 2009, resulting in a monthly household income of \$5,452.84.

stated that his home was a liability, rather than an asset, due to the housing crisis in California. He listed monthly expenses of \$5,405.54 as follows: utilities -- \$551.28; auto insurance -- \$68.15; mortgage -- \$1,650.00; home equity line of credit -- \$468.95; food -- \$500.00; clothing -- \$50.00; pest control -- \$89.00; home security -- \$41.99; Macy's -- \$50.00; Sears -- \$500.00; Chase -- \$500.00; gardener -- \$60.00; housekeeper -- \$253.00; N. CA conference of Seventh Day Adventists -- \$623.17. Appellant stated that he had no invoices to document his expenses, as they were shredded and discarded when paid and the bank held his cancelled checks. He noted that he had additional expenses, which included automobile repairs, gasoline, personal grooming, veterinary, dental and other medical and pharmacy expenses.

During an August 14, 2009 telephonic hearing, appellant requested waiver of the overpayment amount based on financial hardship, noting that he and his wife were in their 70's and were 100 percent disabled. He stated that the balance of his savings account was now lower than the \$10,000.00 amount previously noted. The hearing representative advised appellant to submit financial documentation supporting his request for waiver, including verification of his mortgage, insurance, credit card and home maintenance payments. He provided appellant 60 days to submit additional evidence.

The record contains an undated report of a Saturn multi-point vehicle inspection. The report was received by the Office on October 28, 2009.

By decision dated November 17, 2009, the Office hearing representative found that appellant received an overpayment of \$10,150.47 for the period July 1, 2001 to April 11, 2009, with the exception of the period between June 1 through September 30, 2001, due to underdeduction of a retirement benefit offset. Although appellant was found to be without fault in the creation of the overpayment, the hearing representative denied waiver of the overpayment because he failed to provide the supporting financial documentation requested during the hearing. She noted, however, that based upon the information provided prior to the hearing, appellant had household income of \$5,452.84 and undocumented expenses of approximately \$4,820.00 a month, resulting in approximately \$600.00 a month in discretionary income. Therefore, appellant should be able to afford a monthly payment of \$300.00, to be deducted from his monthly compensation payment. A waiver of charges/compromise of principal worksheet reflected that the debt would be repaid within 35.4 months, which is less than his life expectancy of 171.6 months.

On appeal, counsel states that appellant was unable to submit supporting documentation to the Office until October 2009 because he sustained a heart attack on September 16, 2009. He also contends that appellant's life expectancy is shorter than the 12-year figure used by the hearing examiner.³

³ The Board notes that appellant submitted additional evidence on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). On appeal, counsel references supporting documents reportedly submitted after the August 14, 2009 hearing but prior to the Office's November 17, 2009 decision. The only document of record submitted by appellant during the applicable time period was the undated vehicle inspection report received by the Office on October 28, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act⁴ 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.⁵ 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.⁶

Section 8116(d)(2) of the Act⁷ 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 [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that -- ”

* * *

“(2) in the case of benefits received on account of age or death under title [2] of the [SSA,] 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.”⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation beginning July 1, 2001 due to underdeduction of a retirement benefit offset. The case is not in posture for a decision, however, as to the amount or period of the overpayment.

The record reflects that appellant received compensation benefits under the Act at the same time that he received social security benefits attributable to his federal employment. The portion of his 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

⁴ 5 U.S.C. §§ 8101-8193

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d)(2).

⁸ *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 SSA 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).

constitutes a prohibited dual benefit.⁹ The Office's failure to offset appellant's compensation benefits by the amount of social security benefits he received attributable to his federal service resulted in an overpayment of compensation.

The Office found that appellant received an overpayment of \$10,150.47 for the period July 1, 2001 to April 11, 2009. The evidence of record, however, is insufficient to establish either the period or amount of the overpayment. The Board finds therefore that the case must be remanded for further development.

On April 9, 2009 SSA stated that appellant's benefits should have been offset from July 2001 through May 2004 and from October 2004 through April 2009. It also indicated that appellant was receiving disability benefits from November 1990 through June 2001 and from June through September 2004. SSA did not state, however, whether she was receiving dual benefits through April 2009. Additionally, while the report provided SSA rates with a FERS offset and without a FERS offset for the period July 2001 through December 2008, it did not provide information on the period from December 2008 through April 2009.

By decision dated November 17, 2009, the Office hearing representative found that appellant received an overpayment of \$10,150.47 for the period July 1, 2001 to April 11, 2009, with the exception of the period between June 1 through September 30, 2001, due to underdeduction of a retirement benefit offset. She relied, in part, on the FERS and social security dual benefits calculation worksheet. The Office hearing representative did not explain however, how she determined the amount of the overpayment. Such an explanation is particularly important in light of the fact that the record prior to the November 17, 2009 decision does not contain a printout of compensation payments received by appellant from July 1, 2001 to April 11, 2009.

It is well established that the Office, as part of its adjudicatory function, must make findings of fact and provide a statement of reasons for the decision reached.¹⁰ In an overpayment situation, it must explain the basis for its finding of overpayment and a clear statement indicating how the overpayment was calculated.¹¹ In this case, the Office hearing representative failed to provide such an explanation and the Board is unable to make a determination as to the accuracy of her findings. The case will therefore be remanded to the Office for proper findings as to the period and amount of the overpayment in compensation. After such further development as it deems necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation due to underdeduction of a retirement benefit offset. The Board finds, however, that the case is not in

⁹ 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). *A.L.*, 61 ECAB ____ (Docket No. 09-1529, issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁰ See *Robert N. Johnson*, 51 ECAB 480 (2000); see also 20 C.F.R. § 10.126.

¹¹ See *Jenny M. Drost*, 56 ECAB 587 (2005).

posture for a decision as to the period and amount of the overpayment. The Board further finds that the case is not in posture for a decision regarding waiver or recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and remanded for further action consistent with this decision.¹²

Issued: March 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² As the Board has set aside the Office's finding on the duration and amount of the overpayment, the case is not in posture for a decision regarding waiver or recovery of the overpayment from continuing compensation benefits.