

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

R.D., Appellant

and

**DEPARTMENT OF LABOR, BUREAU OF
LABOR STATISTICS, Atlanta, GA, Employer**

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**Docket No. 11-412
Issued: September 22, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 17, 2010 appellant filed a timely appeal from the November 26, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 appellant received a \$9,339.99 overpayment of compensation; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment for the period July 1, 2000 to March 4, 2003; and (3) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation for the period March 5, 2003 to April 12, 2008, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on July 1, 1999 appellant, then a 61-year-old part-time economic assistant, sustained aggravation of chondromalacia of her left patella due to stepping out of a car at work. OWCP authorized several surgeries and accepted that appellant sustained a right thumb ligament tear as a consequence of the accepted injury. Appellant did not return to work and OWCP paid compensation for total disability.

The record contains EN1032 forms that appellant completed reporting her income, earnings and employment activities for the 15-month period prior to the completion of each form. In the portion for reporting federal benefits or payments other than OWCP compensation, each Form EN1032 stated, "Report any benefits received from the Social Security Administration (SSA) which you receive as part of an annuity under the Federal Employees' Retirement System (FERS). DO NOT report any benefits received from the SSA on account of employment in the private sector." Each Form EN1032 asked, "Do you receive benefits from the SSA as part of an annuity for Federal service? Yes or No."² The first Form EN1032 appellant completed was dated June 5, 2004 and the period covered by the form is March 5, 2003 to June 5, 2004. The EN1032 forms completed collectively covered the period March 5, 2003 to June 18, 2007.³ On each Form EN1032, appellant stated "No" in response to the question regarding receipt of SSA benefits.

In an April 11, 2008 decision, OWCP reduced appellant's compensation to zero effective April 13, 2008 based on her capacity to earn wages as a secretary. In a February 18, 2010 decision, the Board reversed OWCP's loss of wage-earning capacity determination.⁴

In processing the claim for reinstatement of disability benefits, the SSA, in a document dated April 13, 2010, notified OWCP that appellant began receiving social security retirement benefits effective July 1, 2000.⁵ Appellant's compensation benefits were subject to a Federal Employment Retirement System (FERS) offset and the document listed appellant's SSA benefit rates with and without FERS.

In a May 4, 2010 letter, OWCP advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$9,339.99 for the period July 1, 2000 to April 12, 2008. OWCP stated that effective July 1, 2000 appellant's compensation benefits were subject to a FERS offset, but indicated that monies paid through April 12, 2008 were not reduced by the offset.⁶ OWCP made a preliminary determination that

² Each Form EN1032 also contained a section requiring a signature to certify the veracity of the statements made on the form. The section warned of possible criminal penalties for making false statements or misrepresentations of material facts in claiming compensation.

³ The other EN1032 forms were completed on June 14, 2005, June 6, 2006 and June 10, 2007.

⁴ Docket No. 09-1237 (issued February 18, 2010).

⁵ The document was entitled, "FERS SSA Dual Benefits Calculations Fax Transmittal."

⁶ The record contains calculations showing that OWCP did not offset \$9,339.99 of the FERS portion of appellant's SSA benefits for the period July 1, 2000 to April 12, 2008. OWCP began paying appellant the correct amount of compensation beginning April 13, 2008.

she was at fault in the creation of the overpayment because she did not report on various EN1032 forms that she received SSA benefits that were part of an annuity for federal service under FERS. OWCP found that appellant was aware or reasonably should have been aware of her responsibility to report these SSA benefits because a portion of each Form EN1032 explicitly asked her to report such SSA benefits. OWCP further advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant submitted a Form OWCP-20, completed on May 11, 2010. She noted that she received \$663.00 in SSA payments each month and her husband received \$1,626.00 in SSA payments. Appellant's husband also had retirement benefits of \$311.00 per month from the Chrysler Corporation. She listed \$2,518.48 in monthly household expenses and \$2,445.00 in assets, mostly from checking and savings accounts.

Appellant requested a prerecoupment hearing, which was held on September 10, 2010. At the hearing appellant was represented by counsel. Appellant stated that she began receiving SSA benefits for age when she turned 65 years old in July 2003.⁷ She noted that the forms she filled out stated she should report her income, so she called OWCP and was told that the SSA benefits had nothing to do with workers' compensation. Appellant could not recall who gave her this advice. She asserted that each time she received a form from OWCP she inquired how to fill it out. OWCP's hearing representative asked appellant about her understanding of the section of the EN1032 forms which directed her to report SSA benefits. Appellant indicated that this portion of the forms prompted her to call OWCP and ask whether she had to report her SSA benefits which she received for age and not disability. Appellant stated that she reported "No" to the questions regarding SSA benefits on the EN1032 forms because OWCP told her that she did not have to report the SSA benefits she received for age.

The completed Form OWCP-20 and appellant's income and expenses were discussed. Appellant stated that she was now receiving compensation payments of \$1,941.00 every 28 days plus the other monies listed on the form. Appellant stated that when her compensation benefits were reinstated she received a lump-sum payment of about \$50,000.00. She indicated that she paid off outstanding expenses and now had a remaining balance of about \$28,000.00. Appellant noted that she had to replace her air conditioning system (at an estimated cost of \$6,200.00) and would pay for the system out of these monies.

In a November 26, 2010 decision, an OWCP hearing representative determined that appellant received a \$9,339.99 overpayment of compensation. Appellant was not at fault in the creation of the overpayment with respect to the period July 1, 2000 to March 4, 2003. The first Form EN1032 appellant completed was dated June 5, 2004 and covered the 15 months prior to the date she completed and signed the form, the period March 5, 2003 to June 5, 2004. There

⁷ Other evidence of record shows that she began receiving such benefits in July 2000.

was no indication that appellant failed to provide information which she knew or should have known to be material prior to the period covered by the initial Form EN1032 and, therefore, she would be without fault in creating the overpayment prior to March 5, 2003. With respect to the period July 1, 2000 to March 4, 2003, the overpayment was not subject to waiver. It found that given appellant's monthly income, monthly expenses and assets, recovery of the overpayment for this period would not defeat the purpose of FECA or be against equity and good conscience. OWCP further found that appellant was at fault in the creation of the overpayment with respect to the period March 5, 2003 to April 12, 2008. It discussed appellant's failure to report SSA benefits on EN1032 forms covering the period March 5, 2003 to April 12, 2008 and explained that this was a material omission. OWCP found that, with respect to the period March 5, 2003 to April 12, 2008, the finding of fault for this period precluded waiver of the overpayment for the same period.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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 her duty.⁸ Section 8129(a) of FECA 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.”⁹

Section 8116(d)(2) of FECA¹⁰ 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

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(d)(2).

payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$9,339.99 overpayment of compensation. A portion of the SSA benefits earned by a federal employee who is part of the FERS retirement plan is considered part of the retirement plan. Since the receipt of FECA benefits and federal retirement benefits concurrently is a prohibited dual benefit, SSA benefits which are attributable to the federal service of an employee covered under FECA must be adjusted for the FERS portion of SSA benefits.¹² In paying compensation from July 1, 2000 to April 12, 2008, OWCP did not make such an adjustment in appellant’s benefits, even though she is part of the FERS retirement plan and was in receipt of SSA benefits since July 1, 2000. The record contains evidence which shows that OWCP did not offset \$9,339.99 of the FERS portion of appellant’s SSA benefits between July 1, 2000 and April 12, 2008. Therefore, OWCP properly determined that appellant received a \$9,339.99 overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP’s discretion pursuant to statutory guidelines.¹³ These statutory guidelines are found in section 8129(b) of FECA which states: “Adjustment or recovery [of an overpayment] 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.”¹⁴ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of her 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

¹¹ *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).

¹² See *supra* notes 10 and 11.

¹³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁴ 5 U.S.C. § 8129(b).

OWCP from data provided by the Bureau of Labor Statistics.¹⁵ According to 20 C.F.R. § 10.437, 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 her position for the worse.¹⁶ 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 FECA was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁷

ANALYSIS -- ISSUE 2

The Board notes that OWCP properly determined that appellant was not at fault in the creation of the overpayment for the period July 1, 2000 to March 4, 2003. The first Form EN1032 appellant completed was dated June 5, 2004 and covered the 15 months prior to the date she completed and signed the form, the period March 5, 2003 to June 5, 2004. There is no evidence that appellant failed to provide information which she knew or should have known to be material prior to the period covered by the initial Form EN1032 and, therefore, she would be without fault in creating the overpayment prior to March 5, 2003.

For the period July 1, 2000 to March 4, 2003, however, appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The record reveals that appellant has assets of over \$20,000.00.¹⁸ Therefore, appellant's assets exceed the allowable resource base.¹⁹ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her income to meet current ordinary and necessary living expenses. Appellant also has not established that recovery of the overpayment for the period July 1, 2000 to March 4, 2003 would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she

¹⁵ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedure provides 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).

¹⁶ 20 C.F.R. § 10.437(a), (b).

¹⁷ *Id.* at § 10.437(b)(1).

¹⁸ Most of these assets were remaining monies from an approximately \$50,000.00 lump sum of compensation appellant received from OWCP.

¹⁹ Appellant's asset resource base was \$8,000.00 because she had a spouse and no dependents. *See supra* note 15.

relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.²⁰

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive recovery of the overpayment for the period July 1, 2000 to March 4, 2003.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA 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.²¹ 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.”²² No waiver of payment is possible if appellant is not “without fault” in helping to create the overpayment.²³

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 provide 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....”²⁴

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP 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

²⁰ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²¹ 5 U.S.C. § 8129(a).

²² *Id.* at § 8129(b).

²³ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

²⁴ 20 C.F.R. § 10.433(a).

circumstances and the individual's capacity to realize that he or she is being overpaid."²⁵

ANALYSIS -- ISSUE 3

Appellant contends that she did not understand that the EN1032 forms she completed beginning June 5, 2004 required her to report her SSA benefits. The Board finds that the explicit wording of the EN1032 forms clearly advised appellant of this responsibility. Appellant claimed that when she began receiving SSA benefits she contacted OWCP about whether to report SSA benefits on the EN1032 forms but was told that she did not have to report such benefits because they had nothing to do with workers' compensation. However, a review of the record gives no indication that appellant at any time contacted OWCP by telephone or in writing regarding receipt of SSA benefits or the completion of the EN1032 forms. The Board further notes that the strongly worded certification clause of the forms clearly informed appellant of the materiality of providing the requested information.

OWCP found that appellant omitted the reporting of the receipt of SSA benefits for the period March 5, 2003 to April 12, 2008. The Board finds, however, that appellant actually failed to report her SSA benefits (which were part of an annuity for federal service) on EN1032 forms covering the period March 5, 2003 to June 18, 2007.²⁶ When she failed to report her SSA benefits on the EN1032 forms covering the period March 5, 2003 to June 18, 2007, she failed to provide information which she knew or should have known to be material. As explained above, the language of the forms clearly advised appellant of her responsibility to report her SSA benefits and informed her that the providing of this information was material. Therefore, appellant was at fault in the creation of the overpayment of compensation for the period March 5, 2003 to June 18, 2007. No waiver of payment is possible if a claimant is at fault in the creation of an overpayment for a given period and, thus, recovery of the overpayment may not be waived for the period March 5, 2003 to June 18, 2007 on this basis.

Although appellant was not at fault in the creation of the overpayment for the period June 19, 2007 to April 12, 2008, she is not entitled to waiver of recovery of the overpayment for this period. For the reasons discussed above, recovery of the overpayment for this period would not defeat the purpose of FECA or be against equity and good conscience. Appellant has over \$20,000.00 in assets and therefore her assets well exceed the assets resource base. Thus, it would be proper to deny waiver for this period of the overpayment.²⁷

CONCLUSION

The Board finds that appellant received a \$9,339.99 overpayment of compensation. The Board further finds that OWCP would not be entitled to waiver of recovery of the overpayment for the period July 1, 2000 to April 12, 2008. The overpayment determination is modified to find

²⁵ 20 C.F.R. § 10.433(c).

²⁶ The record does not contain a Form EN1032 covering the period June 19, 2007 to April 12, 2008.

²⁷ See *supra* notes 18 and 19.

that appellant was not at fault in the creation of the overpayment for the period June 19, 2007 to April 12, 2008. Appellant is not entitled to waiver for the same period found by OWCP, July 1, 2000 to April 12, 2008.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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