

On appeal, counsel asserts that appellant was entitled to receive both retirement and FECA benefits and that recovery of the overpayment would defeat the purpose of FECA and be against equity and good conscience because it would cause extreme financial hardship.

FACTUAL HISTORY

On February 2, 2006 appellant, then a 55-year-old supervisory air marshal, filed a traumatic injury claim, alleging that he injured his right shoulder while doing pushups. The claim was accepted for right shoulder rotator cuff sprain/strain and right rotator cuff tear.² On March 15, 2006 appellant underwent acromioplasty and rotator cuff repair. He received appropriate continuation of pay and compensation and returned to modified duty on May 15, 2006. Appellant continued to receive intermittent compensation for medical and therapy appointments.

In July 2007 appellant inquired about entitlement to a schedule award and submitted an August 24, 2007 impairment evaluation from his attending physician Dr. Upendra Patel, a Board-certified orthopedic surgeon.

On January 5, 2008 appellant informed OWCP that when he began employment with the employing establishment on November 4, 2002 he received an offset waiver as a condition of employment. He noted that he previously worked for the Department of Justice for 28 years as a United States marshal. Appellant indicated that he was hired by the employing establishment for a five-year appointment, and stated that an offset was provided such that there would be no offset of his retirement annuity through civil service. He noted that his five-year contract ended on November 2, 2007.

By letter dated September 16, 2008, OWCP advised appellant that since he was receiving FECA benefits and was also receiving an OPM annuity, this would be considered a dual benefit. It informed him that he would have to elect to receive either FECA or OPM benefits and provided an election form. Appellant provided a November 1, 2002 letter regarding the hiring of federal air marshals. The letter stated that the appointment was not to exceed five years from the date of appointment and referenced an offset waiver process found in 5 C.F.R. § 553.203.³ A notification of personnel action, effective November 3, 2002, noted that appellant was hired as a reemployed annuitant in an excepted position.

² The record does not contain an explanation of the circumstances of the injury or development as to whether the injury was sustained in the performance of duty.

³ The letter does not appear to be addressed to appellant as it references a special agent in charge.

On April 9, 2009 OWCP informed appellant that section 553.203 did not apply to payments under FECA, noting that there was no offset waiver provision under FECA allowing payment of dual benefits for wage-loss compensation and an OPM retirement annuity. Appellant was again sent an election form.⁴

On November 19, 2009 appellant was granted a schedule award for a seven percent loss of use of the right upper extremity, for 21.84 weeks, to run from March 1 to June 8, 2007.⁵ On December 3, 2009 OWCP issued a preliminary finding that an \$18,315.33 overpayment of compensation had been created for the period April 10, 2006 through January 6, 2007. It explained that the overpayment occurred because appellant received FECA benefits and OPM retirement benefits during this period. Appellant was found not at fault and was provided an overpayment action request and overpayment questionnaire. The record contains computer printouts showing that for the period April 10, 2006 through January 6, 2007, he received gross FECA wage-loss compensation totaling \$18,315.33.

On January 2, 2010 appellant requested a hearing that was scheduled for 1:45 p.m. on March 29, 2010. He did not appear at the scheduled hearing. On March 29, 2010 OWCP's hearing representative notified counsel that he would proceed with a review of the written record and asked that counsel submit any additional information on the issues of fact, amount and waiver of the overpayment. OWCP's hearing representative advised that an overpayment questionnaire was required to determine waiver.

By decision dated June 16, 2010, OWCP's hearing representative finalized the preliminary overpayment decision, finding that appellant received an overpayment in compensation in the amount of \$18,315.33 and, while he was not at fault, he was not entitled to waiver of the overpayment because he failed to supply the requested overpayment questionnaire. Appellant was ordered to repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁶ Section 8116(a) states that while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans

⁴ Appellant submitted an election form, dated September 21, 2009, in which he elected FECA benefits. He did not provide an election date, and by letter dated October 19, 2009, OWCP asked that he clarify if he was choosing FECA benefits for the period April 10, 2006 to January 6, 2007 and informed him that he should provide an effective date. Appellant provided a second election form stating that he elected civil service retirement benefits for the period April 10, 2006 to January 6, 2007.

⁵ By decision dated January 20, 2010, OWCP's hearing representative denied appellant's hearing request of the schedule award decision as untimely. On January 7, 2011 appellant requested reconsideration of the schedule award decision.

⁶ 5 U.S.C. § 8102(a).

Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁷ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹

ANALYSIS -- ISSUE 1

The record supports that appellant received both wage-loss compensation under FECA and OPM retirement benefits for the period April 10, 2006 through January 6, 2007. As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,¹⁰ an overpayment in compensation was created.¹¹ At the time appellant was hired by the employing establishment, he was already a federal annuitant, and his salary as a federal air marshal was not offset by his retirement annuity under an exception provided by section 555.203 of federal regulations.¹² This, however, does not constitute offset under FECA. The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹³

As appellant received \$18,315.33 in FECA benefits while concurrently receiving OPM retirement benefits, an overpayment of compensation in that amount was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."¹⁴ Section 10.438 of OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹² 5 C.F.R. § 553.203(a), reemployed civilian annuitants, provides: Annuitants reemployed with full salary and annuity under an exception granted in accordance with this part are not considered employees for purposes of subchapter 3 of chapter 83 or chapter 84 of title 5, United States Code. They may not elect to have retirement contributions withheld from their pay; they may not use any employment for which an exception is granted as a basis for a supplemental or recomputed annuity; and they may not participate in the Thrift Savings Plan.

¹³ 5 U.S.C. § 8116(a); *supra* note 8.

¹⁴ *Id.* at § 8129.

conscience.¹⁵ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁶

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁷ Appellant, however, had the responsibility to provide financial information to OWCP¹⁸ and did not do so.

In its preliminary determination dated December 3, 2009, OWCP clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Moreover, on March 29, 2010, OWCP's hearing representative informed counsel of the importance of submitted the overpayment questionnaire for determining waiver. Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting his income and expenses at any time prior to the June 6, 2010 decision over which the Board has jurisdiction.¹⁹ Thus, contrary to his argument on appeal, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience as it would cause a financial burden. Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in the amount of \$18,315.33.²⁰

¹⁵ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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. *Id.* at § 10.437.

¹⁶ 20 C.F.R. § 10.438.

¹⁷ *Supra* note 15.

¹⁸ *Supra* note 16.

¹⁹ The Board's jurisdiction to consider and decide appeals from final decisions of OWCP extends only to those final decisions issued within 180 days prior to the filing of the appeal. 20 C.F.R. § 501.3(e).

²⁰ *Supra* note 16.

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²¹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$18,315.33 and that OWCP properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ *Cheryl Thomas*, 55 ECAB 610 (2004).

²² *Id.* The Board notes that appellant submitted financial information with his appeal to the Board. The Board cannot consider this, however, as its review of the case is limited to the evidence of record that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008).