

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Acton, MA, Employer**

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**Docket No. 11-2076
Issued: August 29, 2012**

Appearances:

*Kathleen O'Donnell, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 27, 2011 appellant, through his attorney, filed a timely appeal from a June 22, 2011 decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 OWCP properly found a \$29,077.33 overpayment of compensation for the period January 28, 2008 to March 12, 2011 as appellant concurrently received FECA and Social Security Act (SSA) benefits without an appropriate retirement benefit offset; (2) whether OWCP properly denied waiver of the overpayment although appellant was not at fault; and (3) whether OWCP properly directed recovery of the overpayment in full.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant does not contest the fact or amount of the overpayment. He asserts that repaying the overpaid compensation would cause appellant an unfair financial hardship because he would have to use savings to pay living expenses.

FACTUAL HISTORY

OWCP accepted that on December 13, 2007 appellant, then a 65-year-old rural letter carrier, sustained multiple cervical disc herniations, traumatic cervical spinal stenosis and incomplete quadriplegia when he slipped and fell in an employing establishment parking lot. He did not return to work following the injury. Appellant received compensation for total disability on January 28, 2008 and continuing. OWCP placed his case on the periodic rolls effective February 17, 2008.

In an affidavit of earnings and employment (Form CA-1032) signed on February 3, 2009, appellant noted that he had been assigned a CSA number and received both “regular” and “disability” retirement payments. He provided similar responses on CA-1032 forms completed on January 29, 2010 and January 25, 2011.

In March 10, 2011 worksheets, the Social Security Administration advised OWCP that appellant received \$29,077.33 in SSA age-related retirement benefits under the Federal Employees’ Retirement System (FERS) during the period January 28, 2008 to March 12, 2011, as follows: \$7,855.98 from January 28 to November 30, 2008; \$9,309.85 from December 1, 2008 to November 30, 2009; \$11,911.50 from December 1, 2009 to March 12, 2011.² OWCP determined that it failed to deduct the FERS offset from appellant’s compensation benefits from January 28, 2008 to March 12, 2011.

By notice dated March 31, 2011, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$29,077.33 from January 28, 2008 to March 12, 2011 because he received compensation benefits under FECA that were not reduced by the FERS portion of her SSA retirement benefits. Appellant was without fault in creation of the overpayment. OWCP afforded him 30 days to request a telephone conference, precoupment hearing or a final decision based on the record. OWCP also requested financial information and any additional arguments supporting waiver of the overpayment.

In an April 27, 2011 letter and accompanying overpayment recovery questionnaire (Form OWCP-20), appellant explained that he lived in the same household as his wife and minor child. He listed \$9,628.82 in monthly household income, \$7,845.72 in monthly ordinary and necessary

² Effective November 1, 2007, appellant’s Social Security Administration rate with FERS was \$1,719.50 and \$1,009.20 without FERS, a difference of \$710.30. Effective December 1, 2007, the Social Security Administration rate with FERS was \$1,759.00 and \$1,032.40 without FERS, a difference of \$726.60. As of January 1, 2008, the Social Security Administration rate with FERS was \$1,763.70 and \$1,032.40 without FERS, a difference of \$731.30. On December 1, 2008 the Social Security Administration rate with FERS increased to \$1,865.90, or \$1,092.20 without FERS, a difference of \$773.70. These rates remained constant through March 11, 2011. Multiplying by 12 and dividing by 13 to convert the monthly difference to a 28-day difference (OWCP pays compensation every 28 days), OWCP determined that it should have offset appellant’s compensation benefits by \$29,077.33.

living expenses, and \$187,039.83 in bank accounts and investment funds.³ Appellant requested waiver of the overpayment.

By decision dated and finalized June 22, 2011, an OWCP hearing representative finalized the fact and amount of the preliminary overpayment finding. The hearing representative found that appellant was not at fault in creation of the overpayment. Although appellant was found to be without fault in the creation of the overpayment, OWCP found that he had not justified waiver of recovery of the overpayment as his assets exceeded the \$8,960.00 asset base for an individual with a spouse and one additional dependent. The hearing representative directed recovery of the overpaid compensation by a lump-sum payment of \$29,077.33.

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 his duty.⁴ Section 8129(a) of FECA 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.”⁵

Section 8116(d) of FECA 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 received SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁶

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply. In disability cases, FECA benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee’s federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefit, OWCP will obtain information from the Social Security Administration on the amount of the claimant’s SSA benefits beginning with the date of eligibility to FECA benefits. The Social Security Administration will provide the actual amount of SSA benefits received by the claimant/beneficiary. It will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are

³ Appellant listed the following expenses: \$1,940.46 mortgage; \$750.00 food; \$300.00 clothing; \$1,335.63 utilities; \$842.45 miscellaneous including school lunches and payments to a church. He submitted extensive documentation of his assets, income and expenses.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

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

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

attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁸

ANALYSIS -- ISSUE 1

The record establishes that appellant received compensation under FECA beginning on January 28, 2008. OWCP placed him on the periodic rolls on February 17, 2008. He received FECA benefits for the period January 28, 2008 to March 12, 2011 and continuing. OWCP began to offset appellant's FECA benefits by the amount of his SSA benefits attributable to his federal employment under FERS on March 13, 2011.⁹ The Social Security Administration records provided the offset calculations for this period that OWCP used to determine an overpayment of compensation in the amount of \$29,077.33.¹⁰ The Board finds that these calculations are mathematically correct. The Board notes that on appeal, counsel does not contest the fact or amount of the overpayment.

As appellant is not entitled to receive both FECA benefits and that portion of his SSA benefits attributable to his federal employment, OWCP properly determined that an overpayment in the amount of \$29,077.33 was created.¹¹

LEGAL PRECEDENT – ISSUE 2

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. 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 FECA or would be against equity and good conscience.¹²

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits and FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of the claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁹ 5 U.S.C. § 8116(d).

¹⁰ See SSA and OWCP calculations *supra* note 2.

¹¹ *Janet K. George (Angelos George)*, *supra* note 6. See also *G.B.*, Docket No. 11-1568 (issued February 15, 2012).

¹² 5 U.S.C. § 8129.

excess of the allowable amount, a reasonable repayment schedule can be established or a reasonable, specified period of time. It is the individuals' burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.¹³ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁵ Recovery of an overpayment is also considered to be against equity and good conscience when any 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.¹⁶

Section 10.438 of FECA's implementing 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁷

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. Because he is without fault, OWCP may recover the overpayment only if recovery would not defeat the purpose of FECA or be against equity and good conscience.

Appellant requested waiver of the overpayment and provided information in an overpayment recovery questionnaire and associated correspondence. He indicated that his monthly household income was \$9,628.82. Appellant listed \$7,845.72 in monthly ordinary and necessary living expenses, and \$187,039.83 in various bank accounts and funds. The record establishes that his monthly household income exceeds his expenses by more than \$50.00. Additionally, appellant's assets of \$187,039.83 exceeded the resource base of \$ 8,960.00 for an individual with a spouse and one additional dependent. The Board therefore finds that OWCP properly determined that he was not entitled to waiver.¹⁸

¹³ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.600.6(a) (June 2009). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

¹⁴ *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹⁵ 20 C.F.R. § 10.437(a).

¹⁶ *Id.* at § 10.437(b).

¹⁷ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

¹⁸ 20 C.F.R. § 10.436; *G.B.*, *supra* note 11.

Further, there is no evidence and appellant did not allege that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from January 28, 2008 to March 12, 2011. Pursuant to its regulations, OWCP properly found that recovery of the overpayment would not be against equity and good conscience.

As the evidence does not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment of \$29,077.33.

On appeal, counsel does not contest the fact or amount of the overpayment. She asserts that recovery of the overpayment would cause undue financial hardship as appellant would have to deplete his savings to pay current living expenses. As set forth above, the financial information appellant submitted established that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience. Therefore, OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP 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, OWCP 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 facts, so as to minimize any hardship.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that the case is not in posture for a decision regarding repayment of the overpayment in full to recover the \$29,077.33 overpayment. In this case, appellant is receiving compensation based on his accepted cervical spine injury for which he was placed on the periodic rolls effective February 17, 2008. In the June 22, 2011 final overpayment decision, OWCP requested that appellant repay the overpaid amount of compensation in full based on his assets. However, it failed to provide him with the additional appropriate recovery method of deduction of installment payments from periodic compensation in accordance with its procedures. As appellant is receiving compensation benefits and has not refunded the amount owed to OWCP, recovery of the overpayment must be made by decreasing subsequent payments of compensation. Neither FECA, nor its implementing regulations make any provision for a mandatory lump-sum repayment by a claimant who is receiving continuing compensation benefits and is not entitled to any accrued compensation benefits.²⁰ On remand, therefore, OWCP should apply the criteria of section 10.441(a) of the regulations to arrive at a proper repayment schedule.²¹

¹⁹ 20 C.F.R. § 10.441(a). *See also G.B., supra* note 11.

²⁰ *G.B., supra* note 11. *See Jesse T. Adams*, 44 ECAB 256 (1992).

²¹ *Supra* note 19.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$ 29,077.77 from January 28, 2008 to March 12, 2011. The Board further finds that the OWCP properly denied waiver of the recovery of the overpayment. The Board further finds that OWCP improperly directed recovery of the overpayment in full as appellant continues to receive compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed as to the findings of fact, amount and denial of waiver of the overpayment. The June 22, 2011 decision is set aside regarding the method of recovery and the case remanded to OWCP for further development on this issue consistent with this decision.

Issued: August 29, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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