



## **FACTUAL HISTORY**

On November 8, 1995 the employee, then a 59-year-old rural route letter carrier, filed an occupational disease claim alleging that he suffered from coccidioidomycosis (valley fever). He contended that he contracted the disease due to exposure to excessive dust produced while traveling dirt roads and on the shoulders of roads. On March 27, 1996 OWCP accepted the employee's claim for valley fever (pulmonary coccidioidomycosis). It later accepted appellant's claim for amyloidosis secondary to coccidioidomycosis. The employee died on March 7, 2002. OWCP paid appellant survivor's benefits.

On March 14, 2011 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$17,405.76. It noted that the overpayment occurred due to a tardy identification of a Federal Employees' Retirement System (FERS)-Social Security Administration (SSA) offset in the receipt of benefits. OWCP noted that the employee's surviving spouse, appellant, had been receiving benefits since October 2002. Appellant turned 60 years old on November 16, 2005. Due to improper offset of FERS-SSA benefits, OWCP found that she received an overpayment of compensation in the amount of \$17,405.76 from November 1, 2005 through March 12, 2011, at which point OWCP corrected the error.<sup>2</sup> It sent appellant financial forms to complete and instructions for contesting the overpayment finding and instructions for requesting waiver of recovery of the overpayment.

On March 24, 2011 appellant requested a prerecoupment hearing before an OWCP hearing representative. She contended that the overpayment occurred through no fault of her own and requested waiver.

By letter dated April 5, 2011, appellant's attorney asked for a further explanation as to how the overpayment was calculated. He noted that appellant kept meticulous records and was not at fault in creating the overpayment. Counsel argued that she had little discretionary income after paying simple living expenses and that denying waiver would cause her to seek welfare or become homeless and would defeat the purpose of FECA. Appellant also submitted financial documents.

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<sup>2</sup> OWCP calculated the difference between what appellant was paid for SSA with FERS and SSA without FERS for each year. It determined that compensation was overpaid commencing November 1, 2005. OWCP indicated that for the check appellant received using the pay rate effective December 1, 2005, appellant received SSA with FERS in the amount of \$1,001.00 but should have received \$758.00. It calculated this difference as \$243.00 and noted that, when this amount was converted to the 28-day period covered by appellant's compensation check, the overpayment was in the amount of \$240.33. Starting with the checks based on the rate commencing December 1, 2006, appellant received \$1,042.00 per month SSA with FERS, but should have received \$789.10 per month without FERS. After converting these figures as previously noted, OWCP determined that appellant received an overpayment in the amount of \$3,043.14. Utilizing the pay rate effective December 1, 2007, it determined that appellant was paid \$1,101.10 for SSA with FERS, but should have been paid \$833.80 per month without FERS. After calculating the difference, converting it to 28-day payments and multiplying by the appropriate number of pay periods, OWCP determined that appellant was overpaid in the amount of \$3,143.01. For payments with the effective date December 1, 2008, it determined that appellant was paid at the rate of \$1,164.80 per month, but that she should have received compensation in the amount of \$882.10 per month. After calculating the difference and converting the overpayment to 28-day periods, OWCP determined that appellant received an overpayment in the amount of \$10,979.28. The total of these overpayment figures equals \$17,405.76, the amount that OWCP found for the overpayment. ( $\$240.33 + \$3,043.14 + \$3,143.01 + \$10,979.28$ ).

At the hearing held on August 12, 2011, appellant listed her liquid assets as \$307.69. She noted that she owns a recreational vehicle that does not run for which she owes about \$3,000.00. Appellant also leased a 2010 Ford Explorer. She reiterated that she was not at fault in the creation of the overpayment.

Appellant submitted documentation with regard to her assets and liabilities. She listed her monthly income as \$2,941.54 representing \$1,068.00 from SSA and \$1,873.54 in workers' compensation benefits. Appellant listed total monthly expenses of \$3,727.38: \$584.59 for rent; \$471.03 for utilities; \$119.87 for telephone; \$500.00 for food, groceries and incidentals; \$686.67 for transportation; \$259.07 for house maintenance; \$50.00 for entertainment; \$2.79 for dues, memberships and fees; \$17.00 for health/exercise shoes; \$25.00 for clothing; \$151.25 for pet care; \$199.78 for health care; \$25.00 for hair and cosmetics; \$7.49 for books; \$50.00 for charity and \$42.70 for miscellaneous. She also listed minimum charge card payments of \$535.14.

By decision dated February 2, 2012, OWCP's hearing representative found that appellant received an overpayment in the amount of \$17,405.76. Appellant was found to be without fault in the creation of the overpayment; that waiver of recovery of the overpayment was not warranted; and that appellant was to repay the overpayment by deduction of \$100.00 from each of her continuing compensation payments until payment was made in full.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(d)(2) of FECA 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 subchapter III of chapter 84 of this title or benefits under title II of the Social Security Act shall be entitled to all such benefits, except that--”

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“(2) in the case of benefits received on account of age or death under title II of the Social Security Act, compensation payable under this subchapter based on the federal 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 chapter 84 of this title.”<sup>3</sup>

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<sup>3</sup> 5 U.S.C. § 8116(d)(2); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 2.1000.11(a)-(b) (January 1997); FECA Bulletin No. 97-9 (issued February 3, 1997) (FECA benefits have to be adjusted for the FERS portion of the SSA benefits, the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit).

### ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$17,405.76. Appellant received FERS benefits from November 1, 2005 through March 12, 2011 without offset for the portion of SSA benefits from the employee's retirement compensation. Due to her receipt of a portion of the SSA benefits the employee earned as a federal employee as part of his FERS retirement concurrent with the receipt of benefits under FECA, she received a prohibited dual benefit.<sup>4</sup> An OWCP overpayment calculation worksheet found that the FERS offset in this amount was not made against the compensation appellant received under FECA. The Board finds that this created an overpayment of compensation. The Board finds that appellant received an overpayment of compensation in the amount of \$17,405.76 for the period November 1, 2005 through March 12, 2011.

### LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA<sup>5</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 FECA 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.<sup>6</sup> OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would 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 his or 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 OWCP from data provided by the Bureau of Labor Statistics.<sup>7</sup> For waiver under the defeat the purposes of FECA standard, appellant must show that she needs substantially all of her current income to meet current ordinary and necessary living expense, and there assets do not exceed the resource base.<sup>8</sup>

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual whose received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in

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<sup>4</sup> *Id.*, see also *C.H.*, Docket No. 08-2426 (issued August 14, 2009).

<sup>5</sup> 5 U.S.C. § 8129(a)-(b).

<sup>6</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

<sup>7</sup> OWCP procedures provide that the 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>8</sup> See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

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>9</sup>

### ANALYSIS -- ISSUE 2

OWCP's hearing representative found that appellant was not at fault in the creation of the overpayment. However, the fact that appellant is without fault in creating the overpayment does not preclude OWCP from collecting the overpayment. She is still required to repay the debt unless: (1) recovery of the overpayment would defeat the purpose of FECA; or (2) recovery of the overpayment would be against equity and good conscience as set forth in 20 C.F.R. §§ 10.434 and 10.437.

There is no evidence in this case, and appellant did not allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period in question. Pursuant to its regulations, OWCP therefore properly found that recovery of the overpayment would not be against equity or good conscience.<sup>10</sup>

With regard to whether recovery of the overpayment would defeat the purpose of FECA, the Board finds that the case is not in posture for decision and will be remanded. OWCP can waive recovery of an overpayment if a beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses.<sup>11</sup> In determining that appellant was not entitled to waiver of recovery of the overpayment, OWCP's hearing representative briefly reviewed appellant's income and expenses as set forth by her financial records. Appellant had a monthly income of \$2,941.54 and she listed expenses of \$3,727.38 per month. The expenses included \$686.67 for transportation, \$151.25 for pet care and minimal charge card payments of \$535.14. The hearing representative found that these expenses were inflated, and that appellant should be able to make some adjustment to her monthly expenditures and still have money to pay \$100.00 per month towards the overpayment. Accordingly, she denied waiver. On appeal, appellant contends that her expenses for pet care, transportation and minimal charge card payments were not inflated. The Board is unable to fully review the denial of waiver as specific factual findings as to how much was reasonable for pet care, credit card payments and transportation were not made. The hearing representative did not make a specific finding with regard to appellant's monthly expenditures.

It is well established that OWCP, as part of its adjudicatory function, must make findings of fact and provide a statement of reasons for the decision reached.<sup>12</sup> Accordingly, the Board will remand this case for OWCP's hearing representative to thoroughly discuss appellant's financial expenditures and determine how much appellant needs for ordinary and necessary

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<sup>9</sup> 20 C.F.R. § 10.437.

<sup>10</sup> See *W.J.*, Docket No. 12-672 (issued August 24, 2012).

<sup>11</sup> *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

<sup>12</sup> See *Robert N. Johnson*, 51 ECAB 480 (2000); see also 20 C.F.R. § 10.126.

living expenses. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.<sup>13</sup>

**CONCLUSION**

The Board finds that an overpayment of compensation in the amount of \$17,405.76 was created, for which appellant was without fault. This case is not in posture for decision regarding waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 2, 2012 is affirmed with regard to fact and amount of the overpayment. The decision is set aside regarding waiver of recovery of the overpayment and the case remanded for further proceedings consistent with this decision.

Issued: December 13, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> In light of the disposition of this issue, the issue as to recovery of the overpayment is moot.