

FACTUAL HISTORY

On March 12, 2004 OWCP accepted that appellant, then a 59-year-old custodian, sustained aggravation of spinal stenosis of the lumbar region due to the repetitive duties of her job. It authorized decompressive laminectomy, medial facetectomy and foraminotomy at L3-4, L4-5 and L5-S1, which she underwent on April 28, 2004. OWCP placed appellant on the periodic rolls on July 11, 2004 and paid her appropriate compensation for total disability.²

On June 3, 2010 appellant advised OWCP that she would be turning 66 years old in July 2010 and she would receive her full retirement benefits from the SSA under the Federal Employee Retirement System (FERS). It responded that an offset may occur for the percentage of her retirement earned during her federal employment.

On October 5, 2010 OWCP was notified by Antonio Johnson that appellant received SSA retirement benefits effective July 1, 2010. Mr. Johnson provided SSA rates with a FERS offset and without a FERS offset for the applicable period. OWCP, however, failed to offset the portion of appellant's social security benefit under FERS that was based upon her federal civilian service.

In an October 12, 2010 letter, OWCP informed appellant that, because she had been receiving FERS and SSA benefits and was not entitled to receive both FERS benefits and FECA benefits, her FECA benefits would be adjusted to reflect the FERS portion of her SSA benefits.

By notice dated November 1, 2010, OWCP advised appellant of its preliminary determination that she received an overpayment in the amount of \$2,095.18 from July 1 through September 25, 2010 because she received compensation benefits under FECA that were not reduced by the FERS portion of her SSA retirement benefits.³ An OWCP worksheet indicated that the 28-day FERS offset for the stated period totaled \$2,095.18.⁴ Appellant was without fault in creating the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified appellant that,

² In an October 12, 2007 decision, OWCP reduced appellant's compensation effective October 28, 2007 based on her capacity to earn wages in the constructed position of medical office assistant. In a May 28, 2008 decision, it found that she received an overpayment of \$1,042.00 for the period October 28 through November 24, 2007 because she continued to receive total disability compensation when her compensation should have been reduced effective October 28, 2007 to reflect her wage-earning capacity. Appellant was found to be without fault in the creation of the overpayment. On March 3, 2008 OWCP granted her a schedule award for nine percent impairment of each lower extremity.

³ On October 13, 2010 OWCP reduced appellant's compensation for the period September 26 through October 23, 2010 to reflect the FERS offset and her health insurance premium.

⁴ Effective July 1, 2010 appellant's SSA rate was \$1,307.00 a month with FERS and \$576.50 without. The monthly difference was \$730.50. 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 \$674.31 every 28 days beginning July 1, 2010. As there were 87 days from July 1 through September 25, 2010, the dual benefit amounted to \$2,095.18 for that period. OWCP concluded that appellant received a total overpayment of \$2,095.18 from July 1 through September 25, 2010.

within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On November 19, 2010 appellant requested a precoupment hearing and contended that her retirement benefits did not start until the second Wednesday in October 2010 and not in July, August or September 2010. She submitted an overpayment recovery questionnaire stating that she received a letter from SSA indicating that her payments would increase from \$927.00 to \$1,209.00 on the second Wednesday in October 2010. Appellant reported monthly income of \$606.00 in compensation benefits and \$1,209.00 from social security, totaling \$1,815.00. She had \$40.00 cash on hand, a checking account balance of \$10,130.00, totaling \$10,170.00. Appellant listed monthly expenses which included \$730.00 for rent or mortgage; \$450.00 for food; \$70.00 for clothing; \$495.00 for utilities; \$500.00 for other expenses; \$290.00 for Citibank and U.S. bank loans; \$90.00 for a Discover credit card; and \$200.00 for a loan for valuable property or real estate worth \$70,000.00, totaling \$2,825.00. She also submitted bank statements indicating that she only received \$927.00 each month from July through September 2010.

At the March 14, 2011 hearing, appellant contended that no overpayment was created because the SSA benefits she received from July to September 2010 contained a FERS offset. She testified that she had no dependents. Appellant also testified that she owned a mobile home with a current market value of \$70,000.00 and had a 401(k) balance of approximately \$69,000.00.

In a partial decision dated May 18, 2011, an OWCP hearing representative found that appellant received an overpayment of \$2,095.18 for the period July 1 to September 25, 2010.

On May 27, 2011 the hearing representative reissued the May 18, 2011 decision due to missing pages. He found that appellant received an overpayment of \$2,095.18 for the period July 1 to September 25, 2010 because she received both SSA retirement benefits under FERS and FECA benefits at the same time. Appellant was found to be without fault in the creation of the overpayment. The hearing representative denied waiver of the recovery of the overpayment noting that she had assets that exceeded the resource base of \$3,000.00 from which to repay the \$2,095.18 overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

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 receives 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.⁵

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.⁶ The

⁵ 5 U.S.C. § 8116(d); see *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.100.11(a) (b) (February 1995).

offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA 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 attributable to federal service and that amount will be deducted from FECA benefit to obtain the amount of compensation payable.⁷

ANALYSIS -- ISSUE 1

The record establishes that appellant was placed on the periodic rolls on July 11, 2004 and received compensation benefits under FECA for the period July 1 through September 25, 2010. The SSA provided information establishing that she received SSA benefits beginning on July 1, 2010, her full retirement age and continuing through September 25, 2010 when OWCP began to offset her FECA benefits by the amount of her SSA benefits attributable to her federal employment under FERS.⁸ SSA records provided the offset calculations for this period that yielded an overpayment of compensation in the amount of \$2,095.18.⁹ As appellant is not entitled to receive both FECA benefits and that portion of her SSA benefits attributable to her federal employment, OWCP properly determined that an overpayment in compensation in the amount of \$2,095.18 was created.¹⁰

Appellant contended that the overpayment amount was incorrect based upon her bank statements which showed that she received SSA benefits in the amount of \$927.00 each month from July to September 2010. However, she did not submit any evidence providing the details of these payments. The Board finds, therefore, that the information provided by the SSA constituted a sufficient basis for calculating the overpayment amount in this case.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of

⁷ FECA Bulletin 97-09 (issued February 3, 1997).

⁸ *Supra* note 5.

⁹ *Supra* note 4.

¹⁰ *Janet K. George (Angelos George)*, *supra* note 5.

¹¹ 20 C.F.R. § 10.433(a).

FECA; or (2) adjustment or recovery of the overpayment 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 under 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 claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's 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 her position for the worse.¹⁶

Section 10.438 of the 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

¹² 20 C.F.R. § 10.434. *See* 5 U.S.C. § 8129(b).

¹³ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6(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, 473 (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).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. Because she is without fault, it 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 on an overpayment recovery questionnaire. She indicated that her monthly income was \$1,815.00 and her monthly expenses were \$2,825.00. The questionnaire revealed that appellant had monthly expenses which included rent or mortgage of \$730.00, food of \$450.00, clothing of \$70.00, utilities of \$495.00, other expenses of \$500.00, bank loans of \$290.00, a Discover credit card of \$90.00 and loan of \$200.00 for a trailer home worth \$70,000.00. Assets included cash on hand of \$40.00 and a checking account balance of \$10,130.00 for a total of \$10,170.00. Appellant also reported a 401(k) balance of approximately \$69,000.00. The record establishes that, although her monthly income does not exceed her monthly expenditures by more than \$50.00, her assets, including her bank accounts, mobile home and 401(k) far exceed the resource base of \$4,800.00 for an individual. The Board finds, therefore, that OWCP properly determined that appellant is not entitled to a waiver.¹⁸

Further, 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 from July 1 through September 25, 2010. Pursuant to its regulations, OWCP properly found that recovery of the overpayment would not be against equity or good conscience.

As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying a waiver of recovery of the overpayment of \$2,095.18.

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 decision regarding repayment of the overpayment in full to recover the \$2,095.18 overpayment. In this case, appellant is receiving compensation based on her accepted employment-related aggravation of spinal stenosis of the

¹⁸ See *E.M.*, Docket No. 07-785 (issued August 17, 2007); 20 C.F.R. § 10.436.

¹⁹ 20 C.F.R. § 10.441(a).

lumbar region for which she was placed on the periodic rolls effective July 11, 2004. In the May 27, 2011 final overpayment decision, OWCP requested that appellant repay the overpaid amount of compensation in full based on her assets. However, it failed to provide her with the additional appropriate recovery method of deduction of the 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

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$2,095.18 from July 1 through September 25, 2010. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment. The Board finds, however, that OWCP improperly directed recovery of the overpayment in full as appellant continues to receive compensation benefits.

²⁰ See *Barbara Hughes*, 48 ECAB 398, 403 (1997).

²¹ *Supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part, regarding the fact and amount of the overpayment and waiver of recovery of the overpayment, but is set aside and remanded for further development on the issue of rate of recovery consistent with this decision.

Issued: February 15, 2012
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