

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

D.F., Appellant

and

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

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**Docket No. 11-1595
Issued: February 1, 2012**

Appearances:
Appellant, pro se
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 June 28, 2011 appellant filed a timely appeal from a May 20, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation, denying waiver of recovery of the overpayment and directing repayment. 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 that appellant received an overpayment in the amount of \$14,127.27 from June 1, 1997 through August 28, 2010 because he concurrently received FECA and Social Security Administration (SSA) benefits without appropriate retirement benefit offset; (2) whether it properly found that he was at fault in creating the overpayment, thereby precluding waiver of recovery; and (3) whether it properly directed recovery of the overpayment in full.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that he should not be required to repay the overpayment, as he was not at fault in its creation and was never informed of the effect of retirement on his FECA benefits.

FACTUAL HISTORY

On July 5, 1985 appellant sustained an acute back strain while lifting flats of mail. OWCP accepted his claim for lumbar sprain and lumbar disc displacement. Appellant received ongoing wage-loss compensation payments based on temporary total disability *via* OWCP's periodic rolls beginning May 8, 1990. The record reflects that, while on compensation, he received retirement benefits from the SSA. OWCP, however, failed to offset the portion of appellant's social security benefits that was based upon his federal civilian service.

OWCP periodically required appellant to provide information regarding his income for the previous 15-month period. On 11 separate occasions between May 21, 1998 and May 8, 2010, he completed the required form, indicating in each instance that he was not in receipt of social security benefits as part of an annuity for federal service for the prior 15-month period.²

In a June 1, 2010 memorandum from the SSA, Lisa Anderson advised that appellant received SSA benefits from June 1997 through August 2010. Ms. Anderson provided SSA rates with a Federal Employees' Retirement System (FERS) offset and without a FERS offset for the applicable period.

The record contains a FERS and social security dual benefits calculation worksheet specifying the social security benefits appellant would have received every 28 days without FERS offset versus the amounts he should have received with FERS offset for the period June 1, 1997 through August 28, 2010. The worksheet reflects that OWCP's failure to deduct the FERS offset for the applicable period resulted in an overpayment of \$14,127.27.

By notice dated September 15, 2010, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$14,127.27 because he was in receipt of social security benefits attributable to his federal employment at the same time that he was receiving compensation benefits under FECA for the period June 1, 1997 through August 28, 2010. Appellant was found at fault in creating the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On January 11, 2011 appellant submitted an overpayment recovery questionnaire and request for a prerecoupment hearing. He reported monthly income of \$4,685.87, which included social security benefits of \$1,134.00 and compensation benefits of \$1,448.00. Appellant noted that he had a checking account with a balance of \$26,000.00, a savings account with a balance of \$178,432.87, stocks and bonds worth \$204,891.12 and other assets in the amount of \$58,292.47,

² Appellant signed the above-referenced forms on May 21, 1998, June 8, 2001, May 16, 2002, May 10, 2003, July 6, 2004, July 1, 2005, May 18, 2006, June 22, 2007, May 23, 2008, May 15, 2009 and May 8, 2010.

for total assets in the amount of \$467,616.46. He stated that his monthly expenses totaled \$2,519.35. Appellant did not submit evidence supporting his claimed expenses. He acknowledged that he had failed to report his social security benefits to OWCP, indicating that he “had no knowledge that there must be an offset.”

At the February 23, 2011 hearing, appellant testified that he never received notice that his compensation should have been reduced by the amount of any social security benefits that were attributable to federal service. He acknowledged that he had, indeed, received social security benefits between June 1, 1997 and August 28, 2010. Appellant testified, however, that he did not understand why he repeatedly answered “no” in response to the question as to whether he had received social security benefits during that period. He further testified that his monthly expenses exceeded his monthly income.

By decision dated May 20, 2011, an OWCP hearing representative found that the preliminary determination that appellant received an overpayment of \$14,127.27 for the period June 1, 1997 to August 28, 2010, because his SSA retirement benefits based on federal service were not deducted from his compensation during that period was correct. Finding that appellant was at fault in the creation of the overpayment, the hearing representative denied waiver of the overpayment. Noting that appellant failed to provide financial documentation supporting his request for waiver, the hearing representative found that the evidence was insufficient to reach a monthly repayment agreement. He, therefore, directed appellant to repay the overpayment amount in full, noting that he had sufficient liquid assets to do so.

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 duty.³ Section 8129(a) 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.⁴

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 [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 --”

* * *

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

“(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 payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received compensation benefits under FECA beginning May 8, 1990. On June 1, 2010 SSA provided information that appellant earned regular retirement benefits from June 1, 1997 through August 28, 2010, and that a portion of his benefits were based on federal service. The Board finds that appellant received an overpayment, as he received compensation benefits under FECA at the same time that he received social security benefits attributable to his federal employment.⁶

SSA provided OWCP with information regarding appellant’s benefit rate with, and hypothetically without, federal service from June 1, 1997 through August 10, 2010. Based on this information, OWCP correctly totaled the monthly offset that should have been made and calculated that he received an overpayment of \$14,127.27 for the period June 1, 1997 through August 28, 2010. Appellant does not challenge fact or amount of the overpayment, and the record supports OWCP’s determination that he received an overpayment of \$14,127.27 for the period June 1, 1997 through August 28, 2010.

The Board notes that the hearing representative incorrectly referred to the period of the overpayment as June 1, 1997 to August 10, 2010. The hearing representative, however, found that the preliminary overpayment determination, which identified the overpayment period as June 1, 1997 to August 28, 2010, was correct. He also referenced the financial documentation submitted by SSA and OWCP, which identified the period of the overpayment as June 1, 1997 to August 28, 2010. The Board finds that the evidence establishes that the period of the overpayment was June 1, 1997 to August 28, 2010, and that the hearing representative’s reference to the overpayment period as ending on August 10, 2010 was harmless error.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made because of an error of factor law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁷ OWCP may consider waiving an overpayment

⁵ *Id.* at § 8116(d)(2); *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).

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

⁷ 5 U.S.C. § 8129(a).

only if the individual to whom it was made was not at fault in accepting or creating an overpayment.⁸

FECA's implementing regulations provide that an individual is with fault, in the creation of an overpayment who made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; failed to provide information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.⁹ 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 circumstances and the individual's capacity to realize that he is being overpaid.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is necessary to determine whether an overpayment should be waived. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver.

As noted, an individual is with fault in the creation of an overpayment who made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; failed to provide information which he knew or should have known to be material; or accepted a payment which he knew or should have known to be incorrect.¹² In this case, the evidence establishes that appellant was aware that he was receiving social security and FECA benefits simultaneously. However, he failed to inform OWCP that he was receiving social security benefits on the forms he submitted but also repeatedly denied that he was receiving such benefits.

Appellant contends that he was not at fault in the creation of the overpayment because no one told him of a required offset due to his receipt of dual benefits and, therefore, presumably was not aware that the information was material. His ignorance of the effect of the receipt of dual benefits does not explain his misrepresentations on 11 separate occasions between May 21, 1998 and May 8, 2010 that he was not in receipt of social security benefits when, in fact, he was.

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(a).

¹⁰ *Id.* at § 10.433(c).

¹¹ *Id.* at § 10.438.

¹² *Id.* at § 10.433(a).

The Board finds that appellant made incorrect statements as to a material fact which he knew or should have known to be incorrect. The Board finds, therefore, that he was at fault in the creation of the overpayment and is precluded from receiving a waiver.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹³

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. As noted, appellant failed to timely submit supporting documentation or properly represent his income on the overpayment questionnaire form. In cases where the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441 is not submitted, OWCP is unable to consider financial circumstances. The Board finds that OWCP did not abuse its discretion in following its regulations and finding that the overpayment was due in full.¹⁴ Appellant represented that he had liquid assets of \$204,432.87 and his assets exceed the resource base of \$4,800.00. Therefore, recovery of the overpayment would not defeat the purpose of FECA.¹⁵

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment in the amount of \$14,127.27 for the period June 1, 1997 through August 28, 2010 and that he was at fault in creating the overpayment, thereby precluding waiver of recovery. The Board further finds that OWCP did not abuse its discretion in determining that appellant should repay the overpayment amount in full, as he failed to submit the necessary financial information from which OWCP could determine an appropriate repayment schedule.

¹³ 20 C.F.R. § 10.441(a); *see Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁴ *C.H.*, Docket No. 09-26 (issued November 17, 2009).

¹⁵ According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if it would cause hardship because the beneficiary needs substantially all of his 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. OWCP procedures 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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 20, 2011 is affirmed as modified.

Issued: February 1, 2012
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