

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

P.I., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 11-1555
Issued: January 26, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 21, 2011 appellant, through his attorney, filed a timely appeal from an April 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he received an overpayment of compensation and denying waiver. 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 the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$19,311.47 for the period July 1, 2002 through July 31, 2010 because he concurrently received compensation FECA benefits and benefits from the Social Security Administration (SSA) without appropriate retirement offset; and (2) whether OWCP properly denied waiver of the recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 25, 1993 appellant, then a 55-year-old tractor trailer operator, sustained a dorsal lumbar strain and a herniated cervical disc at C2-3 in the performance of duty. Appellant stopped work on January 26, 1993 and did not return. OWCP paid him compensation for total disability.

In a form dated July 30, 2010, SSA informed OWCP that appellant began receiving benefits in July 2002.² It provided his SSA rate with and without federal employees' retirement services (FERS) benefits from July 2002 to December 2009.

On August 10, 2010 OWCP offset appellant's SSA benefits from his compensation beginning August 1, 2010.³ By letter dated August 12, 2010, it advised him that it should have offset the SSA benefits he received based on his federal service beginning July 2002 from his compensation for total disability.

By letter dated November 3, 2010, OWCP notified appellant of its preliminary determination that he received an overpayment of compensation of \$19,311.47 from July 1, 2002 through July 31, 2010 because it failed to offset the portion of his SSA benefits attributable to his federal service. It calculated the overpayment by determining the amount that should have been offset for each period because it resulted from federal service and then adding these amounts to find a total overpayment of \$19,311.47. OWCP further advised appellant of its preliminary determination that he was not at fault in the creation of the overpayment. It requested that he complete an 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 November 20, 2010 appellant requested waiver of the overpayment and contended that repayment would result in financial hardship. In an accompanying overpayment recovery questionnaire, he related that he had \$34,000.00 in a savings account that he intended to use for a new roof on his home. On November 30, 2010 appellant, through counsel, requested a telephone hearing.

At the March 9, 2011 hearing, counsel noted that appellant was not at fault in creating the overpayment. Appellant would suffer hardship in repaying the debt and gave up a valuable right when OWCP failed to advise him of the offset provisions. Counsel asserted that OWCP was at fault for paying him an inaccurate amount. Appellant related that he intended to put a new roof on his house with the money in savings.

² In CA-1032 forms beginning June 2, 2002, appellant related that he received benefits from SSA.

³ On August 13, 2010 SSA informed OWCP that appellant did not receive SSA benefits. On September 10, 2010 OWCP noted that it had received conflicting responses from SSA and requested clarification. By letter dated September 10, 2010, SSA confirmed that appellant received SSA retirement benefits beginning July 2002.

By decision dated April 28, 2011, the hearing representative found that appellant received an overpayment of \$19,311.47 because OWCP failed to offset that portion of SSA retirement benefits due to federal service. She further found that he was not at fault in creating the overpayment but denied waiver based on his savings account. The hearing representative instructed appellant to repay the 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 compensation benefits shall be reduced by the amount of SSA benefits attributable to his federal service.⁴

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, FECA benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received compensation benefits under FECA for the period July 1, 2002 through July 31, 2010. On July 30, 2010 SSA advised that he earned regular retirement benefits beginning July 1, 2002 and that a portion of the benefits were based on his federal service. Consequently, appellant received an overpayment as he received compensation benefits under FECA at the same time that he received SSA benefits attributable to his federal employment.⁶

SSA provided OWCP with information regarding appellant's benefit rate with and without federal service from July 2002 to December 2009. Based on this information, OWCP calculated that he received an overpayment of \$19,311.47 for the period July 1, 2002 through July 31, 2010. Appellant does not challenge fact or amount of the overpayment and the record supports OWCP's determination that he received an overpayment of \$19,311.47 from July 1, 2002 through July 31, 2010.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁷ 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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997).

⁶ *See supra* note 4.

⁷ 5 U.S.C. § 8129.

recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁸

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 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.⁹ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹⁰ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.¹¹

Section 10.437 provides that 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.¹² To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹³

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or be against equity and good conscience. In order to defeat the purpose of FECA it must be established that a claimant needs substantially all current income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit (currently \$8,000.00 for a claimant with a spouse and \$960.00 for each additional dependent). If nonexempt assets exceed the established limit, then recovery of the overpayment would not defeat the purpose of FECA.

⁸ See *L.S.*, 59 ECAB 350 (2008); *Wade Baker*, 54 ECAB 198 (2002).

⁹ 20 C.F.R. § 10.436. OWCP procedures provide 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).

¹⁰ *Id.*

¹¹ *Id.*

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437(b)(1).

Appellant indicated on his overpayment recovery questionnaire that he had assets totaling \$34,000.00 in savings. He has nonexempt assets that exceed the established limit. Therefore, recovery of the overpayment would not defeat the purpose of FECA.¹⁴

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. The availability of assets indicates that appellant would not experience financial hardship attempting to repay the debt. The factors considered regarding financial hardship are substantially the same as those factors to determine whether repayment would defeat the purpose of FECA and, as noted above, appellant has sufficient available assets.¹⁵ Moreover, he has not presented evidence that he gave up a valuable right or changed his position for the worse in reliance on the overpayment. Appellant argued that he intended to use the money for a new roof on his house and that he relinquished a valuable right by spending the extra money when OWCP did not advise him of the offset provision. He has not submitted any evidence to support his allegations.¹⁶ The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse.

As the evidence fails to support that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, OWCP did not abuse its discretion by denying waiver of recovery.

CONCLUSION

The Board finds that appellant received an overpayment of \$19,311.47 for the period July 1, 2002 through July 31, 2010 because he received workers' compensation benefits that were not offset to reflect his receipt of SSA benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁴ As appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test, *i.e.*, whether he needs substantially all his income to meet current ordinary and necessary expenses.

¹⁵ See *Jan K. Fitzgerald*, 51 ECAB 659 (2000); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(1) (June 2009).

¹⁶ See *Wayne G. Rogers*, 54 ECAB 482 (2003).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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