

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 11-1841
Issued: July 11, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2011 appellant filed a timely appeal from a March 2, 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 \$120,352.29 overpayment of compensation, compromised to \$67,000.00, for the period September 2, 2007 to November 20, 2010 as he received Office of Personnel Management (OPM) retirement benefits and compensation concurrently; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$250.00 a month from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that OWCP inflated the amount of the overpayment by improperly deducting health and life insurance premiums and because part of his retirement annuity was awarded to his ex-wife. He asserts that he is unable to repay the overpayment at the rate of \$250.00 a month due to financial hardship.

FACTUAL HISTORY

OWCP accepted that on or before May 1, 1991 appellant, then a 39-year-old automotive mechanic, sustained a permanent aggravation of right knee arthritis.² He received compensation for intermittent absences through August 1998. On September 14, 1998 appellant was assigned a modified clerk position, which he performed successfully through September 2005.³ On October 31, 2005 OWCP expanded the claim to accept an aggravation of degenerative arthritis of the left knee. Appellant underwent a total left knee arthroplasty on October 25, 2005. He did not return to work. OWCP placed appellant's case on the periodic rolls effective November 25, 2005.

In April 2007, the employing establishment transferred appellant's health benefits enrollment to OWCP retroactive to October 25, 2005, the day he stopped work. Appellant's Federal Employee Group Life Insurance (FEGLI) benefits were terminated on November 11, 2006 as appellant had been in leave without pay status for the preceding 12 months.

Appellant retired from the employing establishment effective September 1, 2007. He received retirement benefits through OPM beginning on September 2, 2007.

In an affidavit of earnings and employment (Form EN1032) signed on October 12, 2008, appellant noted earning \$2,750.00 from November 1 to December 24, 2007 as a seasonal worker, posing for photographs dressed as Santa Claus. Under Part D -- Other Federal Benefits or Payments, appellant answered "yes" to question 1.a., indicating that he received OPM retirement benefits during the preceding 15 months. He provided his Civil Service Annuity (CSA) number. In a Form EN1032 signed on August 24, 2010, appellant stated that he had not worked during the prior 15 months. He again stated that he received OPM retirement benefits and had been assigned a CSA number.

Appellant continued to receive FECA compensation for total disability concurrently with OPM retirement benefits through November 2, 2010. On December 29, 2010 he elected to receive FECA benefits in lieu of OPM retirement benefits effective January 1, 2011.

In a January 19, 2001 worksheet, OWCP noted that appellant began receiving an OPM retirement annuity on September 2, 2007. Its compensation payment records demonstrate that, for the period September 2, 2007 to March 15, 2008, appellant received seven compensation payments of \$2,922.00, totaling \$20,454.00. From March 16, 2008 through March 13, 2010

² On October 4, 1994 OWCP granted appellant a schedule award for a 40 percent permanent impairment of the right leg.

³ By decision dated February 9, 1999, OWCP determined that appellant's actual earnings as a modified clerk properly represented his wage-earning capacity. It also terminated appellant's wage-loss compensation on the grounds that his actual earnings met or exceeded those of his date-of-injury position.

OWCP issued 26 payments of \$3,048.00 totaling \$79,248.00 and nine payments of \$3,152.00 covering the period March 14 to November 20, 2010 totaling \$28,368.00. This total was \$128,070.00. From these gross payments OWCP deducted the health and life insurance that had been deducted from the compensation payments to find appellant had received \$120,352.29 in net wage-loss compensation.⁴

By notice dated January 20, 2011, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$120,352.29 for the period September 2, 2007 to November 20, 2010 as he received a prohibited dual benefit from OPM while receiving compensation under FECA. OWCP calculated that appellant received \$120,352.29 in compensation from September 2, 2007 to November 20, 2010 and that the entire amount was overpaid as he also received OPM retirement benefits for that same period. OWCP found that appellant was without fault in creation of the overpayment, noting that he had reported his receipt of OPM retirement benefits on CA-1032 forms. Appellant was afforded 30 days to request a telephone conference, prerecoupment hearing or a final decision based on the record. OWCP also requested financial information and any arguments supporting waiver of the overpayment.

In an overpayment recovery questionnaire dated February 8, 2011, appellant provided information regarding his income, assets and expenses. He noted that he was unmarried and had no dependents. Appellant listed \$2,723.00 in monthly household income, and \$2,730.00 in current ordinary and necessary living expenses including mortgage, utilities, student loan repayments and legal bills. He listed assets of \$50.00 cash, \$7,500.00 in bank accounts and \$75,000.00 in a retirement account. Appellant asserted that he was not at fault in creation of the overpayment as employing establishment officials told him he could receive dual benefits and repeatedly processed both his FECA and OPM forms. He requested a decision based on the written record.

By decision dated March 2, 2011, OWCP finalized the fact and amount of the preliminary overpayment determination. By additional decision of the same date, it compromised the \$120,352.29 overpayment to \$67,000.00 and waived interest. 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 of \$82,550.00 exceeded the \$4,800.00 asset base for an individual with no dependents. Also, his monthly income including FECA benefits on and after January 1, 2011 would be \$4,388.67, more than \$50.00 in excess of his \$2,730.00 in ordinary and necessary expenses.⁵ OWCP directed recovery of the overpayment by deducting \$250.00 a month from appellant's continuing compensation payments.

⁴ As appropriate, the overpayment was not based on the gross amount of compensation when health and life insurance premiums had been deducted from appellant's compensation payments. *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁵ OWCP noted that appellant did not submit supporting financial documentation, but accepted his listing of assets, income and expenses as factual.

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.⁶ 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.”⁷

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee’s monthly pay. Where the employee has one or more dependents as defined in FECA, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent or a total of 75 percent of monthly pay.⁸

Section 8116(d)(2) of FECA⁹ provides for limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.¹⁰ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹¹ The beneficiary must elect the benefit that he or she wishes to receive.¹²

ANALYSIS -- ISSUE 1

The record reflects that, from September 2, 2007 to November 20, 2010, appellant received \$120,352.29 in wage-loss compensation benefits under FECA at the same time that he received OPM retirement benefits. The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP’s implementing regulations prohibit the receipt of FECA wage-loss benefits and a federal annuity. There is no dispute that appellant received such prohibited dual benefits. Thus, the Board finds that this created an overpayment of compensation.¹³ Because there can be no OWCP benefits while receiving retirement pay; all compensation under FECA is considered an overpayment.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8110(b).

⁹ *Id.* at § 8116(d)(2).

¹⁰ *Id.* at § 8116(a).

¹¹ 20 C.F.R. § 10.421(a).

¹² *Id.*

¹³ *Id.*

On appeal, appellant contends that OWCP miscalculated the amount of the overpayment as it improperly deducted health insurance premiums although he did not receive health insurance benefits, deducted premiums for a life insurance policy he viewed as redundant and because part of his annuity was paid to his ex-wife. These calculations are not relevant, however, as all compensation payments, whatever the amount or deductions, were improper and thus, the entire amount paid by OWCP is the overpayment.

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.¹⁴

OWCP regulations, at 20 C.F.R. § 10.438(a), state that the overpaid individual “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. This information will also be used to determine the repayment schedule, if necessary.”¹⁵

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$120,352.29 overpayment, compromised to \$67,000.00, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP accepted all the financial disclosures appellant made and correctly noted that his monthly income exceeded monthly expenses by \$1,618.67. This means that appellant does not need substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses.¹⁶ OWCP properly concluded that recovery of the overpayment would not cause hardship to appellant or defeat the purpose of FECA.

Further, as it appears that appellant would not experience severe financial hardship in attempting to repay the debt and he made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation. Recovery of the overpayment is not considered to be against equity and good conscience. The Board finds that

¹⁴ 5 U.S.C. § 8129.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1), .6(a)(4) (September 1994).

OWCP properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.¹⁷

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 factors, so as to minimize any hardship.¹⁸

ANALYSIS -- ISSUE 3

OWCP noted that appellant's monthly income exceeded monthly expenses by \$1,816.67. It therefore determined that he could repay the debt at \$250.00 per month without great hardship. The Board finds that OWCP gave due regard to the relevant factors noted above and did not abuse its discretion in setting a rate of recovery that left appellant with \$1,816.67 in discretionary income each month. The Board will affirm OWCP's March 2, 2011 decision on the issue of the rate of recovery.

On appeal, appellant asserts that he is unable to repay the overpaid compensation at the rate of \$250.00 a month due to financial hardship. As stated, OWCP properly found, based on the evidence of record, that recovery of the overpaid compensation would not cause appellant financial hardship.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$120,352.29, compromised to \$67,000.00, for the period September 2, 2007 to November 20, 2010. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by deducting \$250.00 a month from appellant's continuing compensation payments.

¹⁷ *See id.*

¹⁸ 20 C.F.R. § 10.441(a) (2003).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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