

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

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C.S., Appellant )

and )

DEPARTMENT OF THE AIR FORCE, )  
HANSCOM AIR FORCE BASE, MA, Employer )

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**Docket No. 12-63  
Issued: July 5, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Judge

**JURISDICTION**

On October 5, 2011 appellant filed a timely appeal of a September 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly found that appellant received an overpayment in the amount of \$12,483.98 from November 1, 2008 through January 15, 2011, because she concurrently received FECA and Social Security Administration (SSA) benefits without an appropriate retirement benefit offset; (2) whether OWCP properly denied waiver of the recovery of the overpayment; and (3) whether OWCP properly determined that appellant should repay the debt at the rate of \$300.00 per month.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant alleged that both OWCP and SSA overpaid her during the same period, the debt should be waived or she should be allowed to repay at the rate of \$50.00 a month.

### **FACTUAL HISTORY**

On May 17, 1995 appellant, then a 48-year-old management analyst filed a traumatic injury claim alleging that she fell on May 10, 1995 dislocating and fracturing her shoulder. OWCP accepted her claim for right shoulder dislocation, left thigh strain and right shoulder acromioplasty. It entered appellant on the periodic rolls. OWCP also accepted her claim for herniated disc at L5-S1 with surgery, foot bursitis, spurs and exostectomy of both feet. Appellant returned to work. On July 3, 2002 she filed a claim for recurrence of disability. OWCP accepted this claim on July 17, 2002. It entered appellant on the periodic rolls on September 24, 2002. By decision dated June 8, 2004, OWCP reduced her compensation benefits to zero for the failure to cooperate with vocational rehabilitation efforts. An OWCP hearing representative reversed this decision on January 26, 2005 and benefits were reinstated.

On October 10, 2008 OWCP requested that appellant supply financial information. A Form EN1032 completed on October 22, 2008 directed appellant to "Report any benefits received from [SSA], which you receive as part of an annuity under the Federal Employees' Retirement System (FERS). DO NOT report any benefits received from [SSA] on account of employment in the private sector." Appellant responded that she did not receive any benefits from SSA under FERS. She completed similar forms on October 20, 2009 and October 11, 2010.

SSA completed a FERS SSA Benefits Calculation on January 3, 2011. Effective November 2008 appellant received SSA benefits with FERS of \$1,345.80 and without FERS was entitled to a rate of \$901.00. On and after December 2008, these rates increased respectively to \$1,423.90 and \$953.10. The document stated, "[Appellant] received [d]isability benefits until the effective date above, (November 2008) when her benefit became a reduced retirement benefit."

In a letter dated January 10, 2011, OWCP informed appellant that she had been receiving dual benefits from SSA and OWCP. The letter noted, "The portion of ... SSA benefits earned as a [f]ederal employee is part of the FERS retirement package and the receipt of FECA benefits and [f]ederal retirement benefits concurrently is a prohibited dual benefit." OWCP informed appellant that her regular payments of compensation would be \$4,762.10 every 28 days. The record reveals that her compensation benefits from OWCP were \$5,028.08 in 2010.

In a letter dated February 1, 2011, OWCP made a preliminary determination that appellant had received an overpayment in the amount of \$12,483.98 as she had received dual benefits from SSA and OWCP from November 1, 2008 through January 15, 2011. It found that she was at fault in the creation of the overpayment as she failed to provide information which she knew or should have known to be material to the receipt of compensation. OWCP calculated the amount of the overpayment from December 1, 2008 to January 15, 2011 by noting that the 76 days were paid with an excess of \$434.58 from November 1 to 30, 2008, 30 days were paid at an excess amount of \$410.58. The sum total of the overpayment was \$12,483.98.

Appellant requested an oral hearing before an OWCP hearing representative on February 18, 2011 and alleged that she was not at fault in the creation of the overpayment. She assumed that her SSA benefits were the result of her 24-year history of work in the private sector. Appellant signed an Election of Benefits Form on June 10, 2007 electing FECA benefits in preference to FERS benefits. On an overpayment recovery questionnaire, she listed her monthly income as \$8,720.00 based on her OWCP benefits and SSA benefits with dependents. Appellant indicated that her housing expense was \$500.00, that she spent \$1,800.00 on food and \$400.00 on clothing. Other expenses included \$951.00 in utilities and \$2,560.00 in miscellaneous expenses, including insurance, medical and dental insurance and charity. Appellant owed \$67,200.00 in an Equity Line of credit and paid \$1,000.00 a month and had credit card debt of \$5,000.00 paying \$1,261.00 for monthly expenses of \$8,472.00. She listed her assets as \$200.00, cash, \$2,400.00 checking account balance, \$20,000.00 savings account balance, stocks and bonds of \$8,100.00 and other funds of \$5,000.00 for total assets of \$35,700.00. Appellant submitted an attachment listing total monthly expenses for the period November 2008 to April 2009 as between \$6,450.00 and \$9,681.00 and total monthly income between \$7,781.00 and \$9,413.00. She alleged average expenses of \$300.00 more than her income.

Appellant testified at the June 10, 2011 oral hearing. She alleged that she was not at fault in the creation of the overpayment and did not understand how she could have received an overpayment when she elected OWCP benefits rather than FERS benefits. Appellant testified that repaying the overpayment would be a financial hardship. She stated that her home was paid for and that she owed \$500.00 in taxes. Appellant also received notification from SSA that she had been overpaid. She indicated that she would provide the supporting documentation requested by the hearing representative.

On June 29, 2011 appellant alleged that over a six-month period on average she spent more than her monthly income. She stated that SSA informed her that she had been overpaid \$37,671.00. Appellant corrected her testimony to report stock with a value of \$7,000.00. She provided a second analysis of her expenses and income for the six-month period from August 2010 to January 2011. This analysis listed monthly income between \$9,413.00 and \$16,360.00 for a six-month average of \$11,606.00. Appellant listed monthly expenses ranging between \$8,467.00 and \$12,519.00 or average expenses of \$10,618.00.

By decision dated September 7, 2011, the hearing representative found that appellant received an overpayment in the amount of \$12,483.98 from November 1, 2008 through January 15, 2011, due to the failure of OWCP to offset SSA benefits. She found that appellant was without fault in the creation of the overpayment. The hearing representative found that appellant had average monthly expenses of \$10,618.00 and average income of \$11,606.00. She noted that appellant had an overpayment with SSA of \$37,671.00 with a pending hearing. The hearing representative found that appellant paid far more than the minimum on her credit card debt and included food expenses of \$1,900.00 and clothing expenses of \$577.00 per month. She determined that these expenses were unreasonable for a family of three. The hearing representative found that appellant had assets of \$35,700.00. She determined that appellant had not established financial hardship and that waiver could not be considered as appellant had \$1,000.00 in discretionary income. The hearing representative determined that the overpayment

could be recovered through payments of \$300.00 deducted every 28 days from appellant's continuing compensation benefits.

### **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.<sup>2</sup>

OWCP's 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 SSA benefits paid on the basis of age and attributable to the employee's federal service.<sup>3</sup> The 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 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.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that appellant was placed on the periodic rolls on September 24, 2002 and receives compensation benefits under FECA. SSA provided information establishing that she received SSA benefits beginning November 1, 2008 through January 3, 2011, when OWCP began to offset her FECA benefits by the amount of her SSA benefits attributable to her federal employment under FERS. SSA provided the offset calculations from this period that yielded an overpayment of compensation in the amount of \$12,483.98. As appellant is not entitled to receive both FECA benefits with that portion of her SSA benefits attributable to her federal employment, OWCP properly determined that an overpayment of compensation was created in the amount of \$12,483.98. The Board finds that the evidence from SSA establishes an overpayment in this case. The case will be affirmed as to fact and amount of overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later

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<sup>2</sup> 5 U.S.C. § 8116(d); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see *Janet K. George (Angelos George)* 54 ECAB 201 (2002).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.111(a)(b) (February 1995); see also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

<sup>4</sup> FECA Bulletin 97-09 (issued February 3, 1997); see *R.C.*, *id.*

payment to which the individual is entitled.<sup>5</sup> The only exception to this requirement that an overpayment must be recovered is set forth 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.”

A finding that the claimant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of [FECA] or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations<sup>6</sup> provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA. 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8129(a).

<sup>6</sup> 20 C.F.R. § 10.436.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(6)(a) (June 2009). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436 and 10.437.

<sup>8</sup> *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>9</sup> 20 C.F.R. § 10.437.

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as 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.<sup>10</sup> This information would also be used to determine the repayment schedule, if necessary.

### **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 recovery of the overpayment and provided an overpayment recovery questionnaire and a summary of her monthly income and expenses from August 2010 through January 2011. Based on her reports of expenses and income, her income exceeds her expenses by an average of \$988.00 per month. Appellant also reported assets of \$35,700.00. As her income exceeds her expenses by more than \$50.00 and her assets exceed the resource base of \$8,960.00 (\$8,000.00 plus \$960.00), the Board finds that she is not entitled to waiver.<sup>11</sup>

There is no evidence and appellant did not allege that she relinquished a valuable right or changed her position detrimentally due to the excess compensation she received from November 2008 through January 2011. 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 \$12,483.98.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of the regulations provide:

“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

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<sup>10</sup> 20 C.F.R. § 10.438(a).

<sup>11</sup> See *E.M.*, Docket No. 07-785 (issued August 17, 2007); 20 C.F.R. § 10.436.

financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”<sup>12</sup>

### **ANALYSIS -- ISSUE 3**

Appellant submitted financial evidence of her income and expenses June 2010 through January 2011. She indicated that her monthly income was \$16,360.00 and \$9,413.00 for a six month average of \$11,606.00. Appellant listed monthly expenses ranging between \$12,519.00 and \$8,467.00 for average expenses of \$10,618.00. The hearing representative found that her income exceeded her expenses by approximately \$1,000.00 per month and that she could repay the overpayment at a rate of \$300.00 every 28 days. Based on the evidence of record, OWCP gave due regard to the relevant factors noted above and did not abuse its discretion in setting the rate of recovery.<sup>13</sup> The Board finds that it properly determined that the overpayment could be recovered by deducting \$300.00 from appellant’s continuing compensation payments.

On appeal, appellant alleged that recovery should be waived or that she should be allowed to repay the overpayment at the rate of \$50.00 every 28 days. The Board has addressed these issues and found that OWCP properly denied waiver and properly determined the rate of repayment.

### **CONCLUSION**

Appellant received an overpayment of \$12,483.98 during the period November 1, 2008 through January 15, 2011, because she concurrently received FECA and SSA benefits without an appropriate retirement benefit offset. Although she is without fault in the creation of the overpayment, she is not entitled to waiver of recovery. The Board further finds that OWCP reasonably imposed a repayment schedule of \$300.00 every 28 days to be withheld from appellant’s continuing compensation benefits.

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<sup>12</sup> 20 C.F.R. § 10.441.

<sup>13</sup> See *Howard R. Nahikian*, 53 ECAB 406 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Judge  
Employees' Compensation Appeals Board