

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

S.Y., Appellant)

and)

**DEPARTMENT OF THE ARMY, U.S. ARMY
EUROPE, 5th Signal Command, Germany,
Employer**)

**Docket No. 11-964
Issued: March 21, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 7, 2011 appellant timely appealed the December 29, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for a hearing. She also timely appealed OWCP's September 9, 2010 merit decision that found 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 overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$19,776.11 for the period August 1, 2008 through July 31, 2010; (2) whether OWCP properly denied waiver of recovery of the overpayment and ordered the withholding of \$500.00 every 28 days from appellant's continuing compensation; and (3) whether the Branch of Hearings and Review properly denied her September 28, 2010 request for a hearing.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 69-year-old former auditor, has an accepted occupational disease claim for right carpal tunnel syndrome and aggravation of bilateral hand/thumb osteoarthritis, which arose on or about June 17, 1997. OWCP has paid her wage-loss compensation for temporary total disability dating back to October 1997. In August 2008, appellant was eligible to receive a federal retirement (age-related) annuity. She received her first monthly retirement check from the Social Security Administration (SSA) on or about September 24, 2008. This payment covered the period beginning August 1, 2008. In addition to her federal retirement annuity, appellant received wage-loss compensation from OWCP. In November 2008, she advised OWCP that she was receiving SSA retirement benefits.

In April 2010, OWCP asked SSA to provide information regarding the dual benefits appellant received. It forwarded a form entitled "FERS [Federal Employees' Retirement System] SSA [Dual Benefits Calculations]." Appellant's name, date of birth and social security number were noted on the form. OWCP also provided information regarding the date she was first eligible to receive benefits under FECA. The form asked SSA to provide information regarding the effective date of appellant's social security benefits. It also asked for separate calculations of the SSA rate with FERS and without FERS. OWCP asked SSA to calculate appellant's social security benefits based on her private sector employment contributions only and then provide a separate calculation that included both private sector and FERS employment contributions. The April 15, 2010 request went unanswered so it submitted a second request on June 18, 2010.

An SSA representative responded on July 30, 2010. Effective August 1, 2008, appellant's SSA rate with FERS was \$1,160.20 a month. Excluding her FERS contributions, she would have received only \$377.40 in SSA benefits a month. Beginning December 1, 2008, the amounts increased to \$1,227.40 (with FERS) and \$399.20 (without FERS).² Effective August 1, 2010, OWCP reduced appellant's 28-day compensation rate by \$764.49 based on the recent information provided by SSA.

On August 2, 2010 OWCP issued a preliminary overpayment decision finding that appellant received an overpayment of \$19,776.11 for the period August 1, 2008 through July 31, 2010. It explained that part of her SSA retirement benefits were subject to offset. OWCP further explained that it would be reducing her wage-loss compensation prospectively because of the dual benefits. It noted that it had not reduced her compensation effective August 1, 2008, therefore, an overpayment existed. Appellant was not considered at fault in creating the overpayment. OWCP advised her of her right to respond to the preliminary determination should she disagree. Appellant was afforded 30 days to respond in writing to the preliminary determination but did not respond.

OWCP issued a final overpayment decision on September 9, 2010. Although appellant was not at fault in creating the \$19,776.11 overpayment, it denied waiver of recovery. OWCP advised appellant that it would withhold \$500.00 from her continuing compensation.

² Appellant received a cost of living increase (COLA) effective December 1, 2008.

In a letter dated September 30, 2010, appellant expressed her surprise that OWCP had already issued a final decision regarding the overpayment. She had reportedly contacted her OWCP adviser, "Marilyn," in late-August 2010 and received a 30-day extension to respond to the preliminary determination. The September 30, 2010 letter also requested a waiver of recovery and appellant challenged the amount of the overpayment. Appellant indicated that her SSA entitlement began on August 2, 2008, but she did not receive her first check until September 24, 2008. Based on her own calculations, she believed the overpayment was only \$18,325.26. Appellant also submitted an overpayment recovery questionnaire OWCP-20 and a request for a prerecoumment hearing, both dated September 28, 2010. She did not provide any supporting documentation, but reported a monthly household income of \$10,593.00, monthly expenses of \$8,007.00 and assets totaling \$445,200.00.³

By decision dated December 29, 2010, the Branch of Hearings and Review found that appellant's September 28, 2010 request for a prerecoumment was untimely. OWCP's hearing representative further found that she was not entitled to a hearing with respect to OWCP's September 9, 2010 final overpayment decision.⁴

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ Wage-loss benefits are reduced by the amount of social security benefits attributable to the employee's federal service.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant received federal retirement benefits beginning August 1, 2008. Appellant also received FECA wage-loss compensation for overlapping periods. Part of her SSA retirement benefits were based on credits she earned as a federal employee. Appellant is not entitled to wage-loss compensation and federal retirement benefits concurrently. As such, her FECA benefits must be offset by the amount of any SSA benefits attributable to her federal service.⁷ Based on information provided by SSA, OWCP calculated an offset of \$19,776.11 for the period August 1, 2008 through July 31, 2010, which it properly declared an overpayment.

Appellant does not challenge the fact of overpayment, but the amount. She calculated the overpayment based on when she received her SSA retirement benefits check. Appellant noted that while she was eligible for SSA retirement benefits in early-August 2008, she did not receive

³ The reported assets included \$135,000.00 in checking and savings accounts.

⁴ OWCP provided similar advice to appellant on November 23, 2010, but nonetheless forwarded her hearing request so the Branch of Hearings and Review could issue a formal decision.

⁵ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ *Id.* at § 8116(d)(2).

⁷ 20 C.F.R. § 10.421(d).

the first check until the latter part of September 2008. Based on when she actually received the SSA benefit, she believed the overpayment was \$18,325.26 rather than \$19,776.11.

OWCP properly calculated the dual benefit/overpayment based on overlapping coverage periods and not when those payments were actually received. There was a two-year period (730 days) where appellant received FERS based on SSA retirement benefits as well as FECA benefits. The August 1, 2008 to July 31, 2010 period covered parts of 27 OWCP periodic payments. SSA benefits were paid on a monthly basis, whereas FECA benefits were paid every 28 days. OWCP converted the monthly differential to a 28-day FERS offset for the corresponding periods of August 1 to November 30, 2008 and December 1, 2008 to July 31, 2010.⁸ For the 122-day period beginning August 1, 2008, the 28-day FERS offset was \$722.58 or \$25.81 a day⁹ and for the 608-day period beginning December 1, 2008, OWCP calculated a 28-day FERS offset of \$764.49 or \$28.89 a day.¹⁰ For the first 122-day period, appellant was overpaid \$3,148.82 (122 x \$25.81) and for the latter period ending on July 31, 2010, she received an overpayment of \$16,598.40 (608 x \$27.30). The combined periods total \$19,747.22. However, OWCP found an overpayment of \$19,776.11; a difference of \$28.89. The decision shall be modified to reflect an overpayment of \$19,747.22. Accordingly, the Board affirms OWCP's finding with respect to the fact and amount of overpayment, as modified. Additionally, the Board affirms its finding that appellant was not at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹¹ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² Additionally, 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 or when any individual, in reliance on such payment or

⁸ The 28-day FERS offset was derived by taking the reported monthly differential for the corresponding periods and multiplying it by 12 (months) and then dividing that annual figure by 52 (weeks). The weekly amount was then multiplied by 4 (weeks) to arrive at the 28-day FERS offset figure.

⁹ For the corresponding period, SSA reported a monthly differential of \$782.80.

¹⁰ For this latter period which included a COLA, SSA reported a monthly differential of \$828.20.

¹¹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹² *Id.* at § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.¹³

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁴ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.¹⁵ The information is also used to determine an appropriate repayment schedule, if necessary.¹⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

When an overpayment has been made to an individual who is entitled to further payments and 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 2

While OWCP found appellant was not at fault in creating the overpayment, this alone does not entitle her to waiver of recovery of the overpayment. The August 2, 2010 preliminary determination advised her of the various options available to her, including the submission of an overpayment recovery questionnaire Form OWCP-20. Appellant was expected to respond in writing within 30 days of the date of the preliminary determination. She claimed she contacted OWCP by telephone in late-August 2010 and reportedly received an extension of time to respond to the August 2, 2010 preliminary overpayment determination. The Board notes that there are no contemporaneous records Form CA-110 notes documenting a late-August 2010 telephone conversation between appellant and OWCP.

Prior to issuing its September 9, 2010 final overpayment decision, OWCP had not received any evidence or argument from appellant that might otherwise justify a waiver of recovery of the overpayment. Particularly, it did not have access to any current financial information other than her monthly SSA benefits and her wage-loss compensation. Appellant is responsible for providing information about income, expenses and assets.¹⁹ This information is necessary for determining whether a waiver of recovery is warranted.²⁰ It is also used to determine an appropriate repayment schedule.²¹ The regulations specifically provide that failure

¹³ *Id.* at § 10.437(a), (b).

¹⁴ *Id.* at § 10.438(a).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 10.438(b).

¹⁸ *Id.* at § 10.441(a).

¹⁹ *Supra* note 14.

²⁰ *Id.*

²¹ *Id.*

to submit the requested financial information within 30 days of the request “shall result in denial of waiver....”²² Absent the requisite financial information, the Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board further finds that under the circumstances, OWCP reasonably imposed a repayment schedule of \$500.00 every 28 days.²³

LEGAL PRECEDENT -- ISSUE 3

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.²⁴

The only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision.²⁵

ANALYSIS -- ISSUE 3

Appellant reportedly contacted OWCP by telephone in late-August 2010 and received a 30-day extension to respond to the preliminary overpayment determination. As previously noted, there is no contemporaneous documentation of this conversation. Moreover, the “[overpayment action request]” form that accompanied the August 2, 2010 preliminary determination was specific as to the 30-day time limitation and the method of requesting a prerecoupment hearing, including the particular address where the signed, written request was to be mailed. Appellant’s written request for a prerecoupment hearing was dated September 28, 2010.

As appellant’s written hearing request was dated more than 30 days after the August 2, 2010 preliminary determination, it was untimely, and she effectively waived her right to a prerecoupment hearing.²⁶ Furthermore, the Branch of Hearings and Review properly advised appellant that because OWCP had already issued a final overpayment decision on September 9, 2010, that decision was not subject to the hearing provision under 5 U.S.C. § 8124(b).²⁷

²² *Supra* note 17.

²³ In addition to money previously withheld from her compensation, appellant remitted a lump sum of \$17,325.26 on October 30, 2010. The debt has since been repaid in full.

²⁴ 20 C.F.R. § 10.432.

²⁵ *Supra* note 16.

²⁶ *Supra* note 24.

²⁷ 20 C.F.R. § 10.440(b).

CONCLUSION

Appellant received an overpayment of \$19,747.22 for the period August 1, 2008 through July 31, 2010. Although she was without fault in creating the overpayment, she is not entitled to waiver of recovery. The Board further finds that OWCP reasonably imposed a repayment schedule of \$500.00 every 28 days to be withheld from appellant's continuing compensation payments. Lastly, as appellant did not timely request a prerecoupment hearing, OWCP properly denied her request for hearing.

ORDER

IT IS HEREBY ORDERED THAT the December 29 and September 9, 2010 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: March 21, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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