

On appeal, appellant contends that as both OWCP and SSA overpaid her during the same period and she has numerous bills to pay, recovery would be against equity and good conscience and the debt should be waived.

FACTUAL HISTORY

OWCP accepted that appellant, then a 53-year-old food inspector, sustained tendinitis in both shoulders and right carpal tunnel syndrome due to factors of her federal employment. She stopped work on July 2, 1993 and did not return. OWCP paid appellant compensation for total disability.

On October 12, 2011 SSA informed OWCP that appellant began receiving benefits in July 2005. It provided her SSA rate with and without Federal Employees' Retirement System (FERS) benefits from July 2005 to December 2010.

By letter dated November 29, 2011, OWCP informed appellant that she had received dual benefits from SSA and OWCP. The letter noted that the portion of SSA benefits earned as a federal employee was part of the FERS retirement package and the receipt of FECA benefits and FERS retirement benefits concurrently was a prohibited dual benefit. OWCP offset appellant's SSA benefits from her compensation to total \$23,570.95 for the period July 1, 2005 to November 19, 2011.

On December 20, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation from July 1, 2005 through November 19, 2011 as she had received dual benefits from SSA and OWCP. It calculated the overpayment of \$23,570.95 by determining the amount that should have been offset every 28 days during the period July 1, 2005 through November 19, 2011 because it resulted from FERS contributions and then adding these amounts to find a total overpayment of \$23,570.95.² OWCP further advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment. It requested that she 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, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

Subsequently, appellant submitted SSA benefit statements dated 2000 and 2001 documenting a total of \$9,918.00 in net benefits and a Thrift Savings Plan (TSP) withdrawal election form, with a notation indicating that \$16,601.76 was transferred to appellant's checking account as of June 30, 2005 and another TSP withdrawal in the amount of \$20,525.00 as of March 31, 2011.

By decision dated January 23, 2012, OWCP found that appellant received an overpayment of \$23,570.95 because it failed to offset a portion of SSA retirement benefits. It

² The FERS offset deductions were as follows: July 1 to November 30, 2005 = \$1,392.14; December 1, 2005 to November 30, 2006 = \$3,465.54; December 1, 2006 to November 30, 2007 = \$3,573.74; December 1, 2007 to November 30, 2008 = \$3,668.10; December 1, 2008 to November 30, 2009 = \$3,862.61; December 1, 2009 to November 30, 2010 = \$3,862.61; and December 1, 2010 to November 19, 2011 = \$3,746.21.

further found that appellant was not at fault in creating the overpayment but denied waiver of recovery on the basis that she did not provide information to show that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP determined that the overpayment could be recovered through payments of \$700.00 deducted 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.³

OWCP 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.⁴ 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.⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received SSA benefits attributable to her federal employment under FERS from July 1, 2005 to November 19, 2011.⁶ Appellant also received FECA disability compensation for overlapping periods. SSA records provided the offset calculations for this period that totaled an overpayment of compensation in the amount of \$23,570.95.⁷ As appellant is not entitled to receive both FECA benefits and that portion of her

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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.1.11(b) (February 1995); see also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁵ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁶ 5 U.S.C. § 8116(d); see *Janet K. George (Angelos George)*, *supra* note 3.

⁷ Effective July 1, 2005, appellant's SSA rate varied between \$778.00 to \$905.00 a month with FERS and \$502.00 to \$584.00 without. OWCP calculated the amount of FERS contributions that should have been offset per 28 days (OWCP pays compensation every 28 days) for each period and concluded that appellant received a total overpayment of \$23,570.95 from July 1, 2005 to November 19, 2011.

SSA benefits attributable to her federal employment, OWCP properly determined that an overpayment in compensation in the amount of \$23,570.95 was created.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs because of an error of fact of law, adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁹ 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 regulations¹⁰ 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.¹¹ 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 \$50.00.¹²

⁸ See *Janet K. George (Angelos George)*, *supra* note 3.

⁹ 5 U.S.C. § 8129(a).

¹⁰ 20 C.F.R. § 10.436.

¹¹ 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.

¹² See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

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.¹³

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.¹⁴ This information would also be used to determine the repayment schedule, if necessary.

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.¹⁵ 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.¹⁶ 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 on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.¹⁷

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁸ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted. The information is also used to determine an appropriate repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁹

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

¹³ 20 C.F.R. § 10.437.

¹⁴ *Id.* at § 10.438(a).

¹⁵ 5 U.S.C. § 8129(b); *id.* at §§ 10.433, 10.434, 10.436, 10.437.

¹⁶ *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).

¹⁷ *Id.* at § 10.437(a), (b).

¹⁸ *Id.* at § 10.438(a).

¹⁹ *Id.* at § 10.438(b).

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.²⁰

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. On appeal, appellant contends that as both OWCP and SSA overpaid her during the same period and she has numerous bills to pay, recovery would be against equity and good conscience and the debt should be waived.

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 December 20, 2011 preliminary determination advised her to submit 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 reported \$9,918.00 in net SSA benefits and withdrawals in the sum of \$37,126.76 from her TSP, but did not submit a completed overpayment recovery questionnaire or a summary of her monthly income and expenses.

Prior to issuing its January 23, 2012 final overpayment decision, OWCP did not receive any evidence or argument from appellant that might otherwise support waiver of recovery of the overpayment. Particularly, she did not provide any current financial information other than her monthly SSA benefits, TSP withdrawals and FECA compensation. Appellant is responsible for providing information about her income, expenses and assets.²¹ This information is necessary for determining whether a waiver of recovery is warranted.²² It is also used to determine an appropriate repayment schedule.²³ The regulations specifically provide that failure to submit the requested financial information within 30 days of the request shall result in denial of waiver.²⁴ 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 \$700.00 from appellant's continuing compensation benefits.

Further, there is no evidence in this case and appellant did not allege that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received from July 1, 2005 through November 19, 2011.²⁵ Pursuant to its regulations, OWCP

²⁰ *Id.* at § 10.441(a).

²¹ *Id.* at § 10.438(a).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at § 10.438(b).

²⁵ *See C.S.*, Docket No. 12-63 (issued July 5, 2012).

properly found that recovery of the overpayment would not be against equity or good conscience.

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 \$23,570.95.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$23,570.95 for the period July 1, 2005 through November 19, 2011 because she received workers' compensation benefits that were not offset to reflect her receipt of SSA benefits. The Board further finds that although appellant was without fault in creating the overpayment, OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 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