

On appeal appellant's attorney asserts that the overpayment should be waived as she detrimentally relied on the funds received. Therefore, recovery would be against equity and good conscience and defeat the purpose of FECA.

FACTUAL HISTORY

On November 4, 1992 OWCP accepted that appellant, then a 63-year-old custodial worker, sustained a low back strain on September 2, 1992 while removing debris outside of the employing establishment. The claim was accepted for a mild bulging disc at L3-4. Appellant worked light duty until June 17, 1993. She retired on October 1, 1994.

By letter dated June 19, 1995, OWCP informed appellant that she must elect either civil service annuity benefits or FECA benefits. It advised her that, if she elected FECA benefits, these would be reduced by SSA benefits paid on the basis of age and attributable to her federal employment. Appellant elected FECA benefits, effective June 28, 1995. She was placed on the periodic compensation rolls.²

The record includes OWCP 1032 forms signed by appellant on October 29, 1994, November 24, 1997, December 27, 2005, January 11, 2007, January 8, 2008, January 7, 2009, and March 6, 2010. Appellant advised that she was not receiving SSA benefits or payments. On 1032 forms signed on November 18, 1996, December 20, 2004 and January 16, 2011, appellant stated that she was receiving benefits from SSA, as part of an annuity for federal service.³

In February 2011, OWCP developed the issue of whether appellant was receiving dual benefits from FECA and SSA. On February 24, 2011 SSA provided information regarding receipt of appellant's SSA benefits with and without federal retirement (FERS) benefits from January 1994 through December 2010. On March 11, 2011 OWCP reduced appellant's FECA benefits to reflect the contribution to her SSA benefits.

On March 15, 2011 OWCP issued a preliminary finding that a \$67,221.63 overpayment of compensation had been created. It found that the overpayment occurred because that portion of appellant's SSA benefits received from January 1, 1994 to March 12, 2011 based on credits earned by an employee covered under FERS was a prohibited dual benefit. OWCP found appellant without fault.

Appellant requested a precoupment hearing and provided an overpayment questionnaire. She had a monthly income of \$1,557.00 and monthly expenses of \$971.00. By decision dated August 29, 2011, an OWCP hearing representative vacated the preliminary overpayment finding and remanded the case to OWCP to review the 1032 forms, to be followed by a *de novo* overpayment determination.

² In December 2004, she moved to Georgia.

³ On the forms signed December 20, 2004, December 27, 2005, January 11, 2007, January 8, 2008, January 7, 2009, March 6, 2010 and January 16, 2011, appellant indicated that she was receiving disability retirement benefits from the Office of Personnel Management.

On September 6, 2011 OWCP issued a preliminary finding that a \$67,221.63 overpayment of compensation was created because a portion of appellant's SSA benefits was based on credits earned while an employee under FERS. This portion of her SSA benefit was a prohibited dual benefit. OWCP reviewed the 1032 forms submitted and found that appellant was at fault in the creation of the overpayment because she responded on 1032 forms that she did not receive SSA benefits. In the election letter sent to her in June 1995, she was told that FECA benefits would be reduced by SSA benefits paid on the basis of age and attributable to federal service. OWCP determined that appellant accepted payments that she knew or reasonably should have known to be incorrect.

Appellant's attorney requested a prerecoumment hearing. On December 3, 2011 she submitted an OWCP 1032 form indicating that she was receiving SSA benefits. Appellant did not attend the hearing held on January 9, 2012. Counsel asserted that recovery of the overpayment would punish appellant for OWCP's mistake in not offsetting her SSA benefits. He noted that she was over 80 years old and argued detrimental reliance on the funds received from OWCP. The hearing representative informed the attorney that a new overpayment questionnaire was needed and one was sent to appellant that day.

In correspondence dated March 1, 2012, appellant's attorney argued that appellant was not at fault, and that the overpayment should be reduced substantially or waived in its entirety. He asserted that, in accordance with section 6.300.9 of OWCP procedures, a regulatory limitation of 10 years existed for the initiation of any offset effort, and that it was OWCP's responsibility to review appellant's claim since she became 62 in 1991, and in 1996 reported on a 1032 form that she was receiving SSA benefits.⁴

By decision dated March 28, 2012, an OWCP hearing representative affirmed the overpayment of compensation in the amount of \$67,221.63 for the period January 1, 1994 through March 12, 2011. Appellant received prohibited dual benefits under FECA and SSA. She found appellant without fault and denied waiver. The hearing representative noted that appellant did not complete a current overpayment questionnaire, even though her attorney was advised at the hearing to submit updated financial information, and the overpayment questionnaire was forwarded to appellant and her attorney. The hearing representative relied on the information provided in the April 2011 questionnaire in which appellant reported monthly income of \$1,557.00 and expenses of \$971.00, leaving an excess of \$586.00. She found that this did not establish financial hardship. Under the applicable regulations, appellant had excess income that would not allow waiver of recovery. The hearing representative further noted that appellant submitted no evidence to show that, in reliance of her compensation benefits, she relinquished a valuable right or changed her position for the worse. She set recovery of the overpayment at a rate of \$300.00 each compensation period. All charges were waived as the period of indebtedness exceeded appellant's life expectancy.

⁴ The attorney also referenced OWCP procedures regarding fault.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁵

Section 8116(d) of FECA requires that compensation benefits to 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 to his or her federal service.⁶

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.⁷ 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 benefits to obtain the amount of compensation payable.⁸

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation beginning in 1993 and received SSA benefits from January 1, 1994 to March 12, 2011. The portion of the SSA benefits she earned as a federal employee as part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.⁹ The SSA notified OWCP of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP determined the prohibited dual benefit appellant received from January 1, 1994 to March 12, 2011, created an overpayment of compensation in the amount of \$67,221.63.

Appellant's attorney contended that section 6.300.9 of OWCP procedure manual provides a regulatory limitation of 10 years for collection of an overpayment. The Board notes that section 6.300.9 refers to dual benefits received under FECA and retirement benefits from OPM and is not relevant to the receipt of dual FECA and SSA benefits.

⁵ 5 U.S.C. § 8102(a).

⁶ 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).

⁷ 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).

⁸ FECA Bulletin No. 97-9 (issued February 3, 1997).

⁹ *Id.*

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period January 1, 1994 to March 12, 2011. OWCP properly determined that she received dual benefits totaling \$67,221.63 for this period, thus creating an overpayment in compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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."¹⁰ Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.¹¹

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.¹² 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.¹³ Recovery of an overpayment is also considered to be against equity and good conscience when any 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.¹⁴

The individual who received the overpayment 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

OWCP's hearing representative found appellant without fault in the creation of the overpayment. Waiver must be considered and repayment is still required unless adjustment or

¹⁰ 5 U.S.C. § 8129.

¹¹ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437(a).

¹⁴ *Id.* at § 10.437(b).

¹⁵ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹⁷ Following the January 9, 2012 hearing, OWCP forwarded an overpayment questionnaire to appellant for completion regarding her current income and expenses. Appellant did not return the questionnaire. The hearing representative therefore relied on the questionnaire submitted in April 2011. Appellant reported monthly income of \$1,557.00 and monthly expenses of \$971.00, yielding an excess of \$586.00.

OWCP properly found that appellant's documented monthly income exceeded her monthly ordinary and necessary expenses by \$586.00. As appellant's reported income exceeded her reported ordinary expenses by more than \$50.00, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses. She has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA.¹⁸ It was therefore not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base.

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.¹⁹ Counsel contends on appeal that recovery of the overpayment would create a financial hardship and be against equity and good conscience because she detrimentally relied on the additional funds. Recovery of an overpayment is also considered to be against equity and good conscience when any 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.²⁰ OWCP procedures provide that 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

¹⁶ *Supra* note 11.

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.a(1)(b) (June 2009).

¹⁸ *Supra* note 13.

¹⁹ 20 C.F.R. § 10.437(a).

²⁰ *Id.* at § 10.437; *see W.P.*, 59 ECAB 514 (2008).

payment.²¹ An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²²

Appellant does not qualify for waiver under the principle of detrimental reliance because she submitted no evidence to establish that she gave up a valuable right or changed her position for the worse in reliance on the prohibited payments. Appellant has not shown that if required to repay the overpayment, she would be in a worse position after repayment than if she had never received the overpayment at all. OWCP properly found that she was not entitled to waiver on the grounds that recovery would be against equity and good conscience.²³

As appellant failed to establish that recovery of the overpayment in compensation 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 waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual 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.²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$300.00 per compensation period. The record indicates that appellant's monthly income exceeds her reported monthly expenses by \$586.00 per month. In setting the rate of recovery, OWCP gave due consideration of her age and waived all interest on the overpayment amount and related charges. It did not abuse its discretion in finding that appellant should repay the overpayment at the rate of \$300.00 per compensation period.

²¹ Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.600.b(3) (June 2009).

²² *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

²³ Federal (FECA) Procedure Manual, *supra* note 17.

²⁴ 20 C.F.R. § 10.441(a).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$67,221.63. OWCP properly denied waiver and required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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