

recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$200.00 from appellant's continuing compensation.

On appeal, appellant disagreed with OWCP's finding that he had a surplus of money to pay back the overpayment. He noted that it is a hardship for him to pay all his bills. Appellant submitted financial documentation that was not provided to OWCP.

FACTUAL HISTORY

On October 26, 1988 appellant, then a 45-year-old carpenter, sustained an injury while working with a jackhammer. OWCP accepted his claim for acceleration/precipitation of bilateral carpal tunnel syndrome and permanent aggravation of osteoarthritis of the right thumb. It paid compensation benefits.

Appellant's compensation was suspended in August 2009 and reinstated beginning April 5, 2010. Deductions were made for a prior overpayment, which has since been paid in full, but no deductions were made for his Federal Employees Retirement System (FERS) offset.

On January 22, 2013 OWCP received a January 23, 2013 letter from the Department of the Treasury that informed appellant that he had a delinquent debt and that his SSA benefits would be reduced to pay the debt. By letter dated January 25, 2013, it notified appellant that it appeared that he had received SSA benefits and that he had not reported on his annual Form 1032. OWCP asked him to provide a completed Form 1032 and statement with regard to whether he received benefits from SSA. No response was received.

In a February 6, 2013 memorandum, OWCP outlined the FERS offset. Effective December 1, 2008, the FERS offset was \$84.18 for the portion of appellant's SSA benefits earned during his employment with the Federal Government. On December 1, 2009 there was a 5.8 percent increase of \$4.88, which equaled an offset for FERS of \$89.06. On December 1, 2011 an increase of 3.6 percent yielded an increase of \$3.21 or \$92.27. As of December 1, 2012, an increase of 1.7 percent equaled \$1.57 or \$93.84. OWCP calculated the FERS offset amount for the period April 5, 2010 through November 30, 2011 as follows: for the period April 5 to November 30, 2010 the figure \$89.06 was divided by 28 days to yield \$3.18 and multiplied by 605 days to equal \$1,923.90; for the FERS offset amount for the period December 1, 2011 through November 30, 2012, was divided by 28 to yield \$3.30 and multiplied by 366 days equal \$1,207.80; for the period December 1, 2012 through February 9, 2013 \$93.84 was divided by 28 to yield \$3.35 and multiplied by 71 days equal \$237.85. It added the FERS offset amount \$1,923.90 plus \$1,207.80 plus \$237.85 which total an overpayment of \$3,369.55.

By decision dated February 7, 2013, OWCP made a preliminary determination that appellant was overpaid in the amount of \$3,369.55 because no deductions were made for the FERS offset when his compensation was reinstated from April 5, 2010 to February 9, 2013. It found him without fault in the creation of the overpayment and informed him of the necessary actions to take to appeal the decision.

On February 18, 2013 appellant requested a prerecoupment hearing with an OWCP hearing representative. He stated that he did not receive any SSA from government employment, rather all came from the private sector. Appellant also noted that, if the overpayment occurred, it was through no fault of his own and he requested a waiver. In an overpayment financial

questionnaire, he indicated that he had \$20.00 cash on hand, \$6.00 checking account balance plus \$0.00 in savings, stocks and bonds or personal property, for total assets of \$26.00. For monthly income, appellant listed \$852.00 in social security benefits; \$1,282.00 in OWCP compensation; and \$1,008.00 in other benefits, for a total income of \$3,142.00. He listed his monthly expenses as \$850.00 for rent or mortgage; \$400.00 for food; \$150.00 for clothing; \$159.00 for utilities; \$200.00 for other expenses. Appellant listed monthly bills of \$600.00 to a credit union, \$100.00 to Capital One Bank; and \$100.00 to Merrick Bank. He listed his total monthly expenses as \$2,409.00.³

At the hearing held on June 13, 2013, appellant agreed that an overpayment occurred but reiterated that it was not his fault. He testified that he did not have much cash flow after paying his bills. The hearing representative reviewed appellant's financial form, but found that he had not submitted documentation to support his monthly expenses, such as receipts or cancelled checks. She kept the record open for 30 days for appellant to submit further documentation.

By decision dated September 11, 2013, the hearing representative found that an overpayment of compensation existed for the period April 5, 2010 to February 9, 2013 in the amount of \$3,369.55 because OWCP failed to make deductions for the FERS offset. She affirmed the finding that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative found that appellant did not establish that recovery would either defeat the purpose of FECA or be against equity and good conscience because he did not submit adequate documentation of his finances. She directed recovery of the overpayment by deducting \$200.00 from appellant's compensation payments until it was paid in full.

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.⁴

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.⁵ 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 in 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

³ The correct addition of these figures yields a total of \$2,559.00, the amount utilized by the hearing representative in discussing appellant's monthly expenses.

⁴ *Id.* at § 8116(d). See, *D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁵ See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010); Federal (FECA) Procedure Manual, Part 2 -- *Claims, Dual Benefits* Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service.

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.⁶

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation and SSA benefits from April 5, 2010 to February 9, 2013. As previously stated, the portion of the SSA benefits he earned as federal employee as part of his FERS retirement package and the receipt of benefits under FECA and FERS benefits concurrently is a prohibited dual benefit.⁷ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefits appellant received from April 5, 2010 to February 9, 2013, created an overpayment in the amount of \$3,369.55.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period April 5, 2010 to February 9, 2013 and finds that it properly determined that he received benefits totaling \$3,369.55 for this period, thus creating an overpayment in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of 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.⁸ Section 10.438 of OWCP regulations provide that 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.⁹

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

⁷ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁸ 5 U.S.C. § 8129.

⁹ 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 or 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. 20 C.F.R. § 10.436. 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. 20 C.F.R. § 10.437. OWCP's procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009); see *W.F.*, 57 ECAB 705 (2006).

Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁰

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹¹ Appellant, however, had the responsibility to provide financial information to OWCP¹² and did not do so.

In its preliminary determination dated February 7, 2013, OWCP clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. It gave additional notice to appellant of his responsibility to submit further financial documentation at the telephone conference held on February 18, 2013. Appellant did submit a completed overpayment questionnaire but did not submit financial information supporting his income and expenses. As a result OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Appellant did not submit the financial information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in compensation in the amount of \$3,369.55.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provide that, 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 the 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 hardship.¹³

ANALYSIS -- ISSUE 3

The hearing representative determined that \$200.00 would be withheld from appellant's continuing compensation payments until the overpayment was recovered. In making this determination she noted that he failed to submit supporting financial documentation. The hearing representative further noted that appellant had a surplus of \$583.00 after deducting his monthly expenses of \$2,559.00 from his monthly income of \$3,142.00. OWCP did not abuse its discretion in directing OWCP to recover the overpayment by withholding \$200.00 a month from

¹⁰ 20 C.F.R. § 10.438(b).

¹¹ *Id.*

¹² *Id.* at 10.438; *see also K.P.*, Docket No. 12-1450 (issued April 4, 2013).

¹³ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004); *see also J.M.*, Docket No. 10-1913 (issued July 11, 2011).

his continuing compensation benefits. The Board will affirm OWCP's September 11, 2013 decision on the rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,369.55 for the period April 5, 2010 to February 9, 2013 because he received full compensation benefits concurrent with SSA retirement benefits. The Board further finds that OWCP properly found that the overpayment was not subject to waiver and properly required repayment of the compensation by deducting \$200.00 each period from his continuing compensation payment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2013 is affirmed.

Issued: August 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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