

repetitive motion required by her job duties. She stated that she first became aware of the condition in 1992, but did not realize that it was employment related until March 1998.² OWCP accepted the claim for aggravation of right knee osteoarthritis and a consequential injury of aggravation left knee degenerative joint disease. It authorized total right knee replacement surgery, which occurred on July 20, 2005; total left knee replacement surgery, which occurred on September 22, 2008; and revision total right knee replacement surgery, which occurred on July 7, 2010. Appellant received compensation for temporary total disability on the periodic rolls.³

On April 30, 2013 OWCP was informed that appellant opted for the voluntary early retirement incentive from the employing establishment. It advised that she was no longer an employee as of January 31, 2013 and that she would be receiving \$15,000.00 early retirement incentive from the employing establishment.

In a letter dated July 10, 2013, OWCP informed appellant of her rate of compensation and the necessity to elect between FECA and Office of Personal Management benefits. It stated separation incentive payments and benefits for wage loss paid by OWCP are not payable for the same period of time. OWCP noted that the employing establishment related that appellant would receive voluntary retirement incentive payments \$10,000.00 on May 24, 2013 and payment of \$5,000.00 on May 23, 2014.

In a July 10, 2013 letter, OWCP advised appellant that it had made a preliminary determination that she received a \$732.18 overpayment because she received a retirement incentive payment in this amount from the employing establishment during the period May 24 to June 1, 2013 for which she was also receiving compensation for total disability. It made a preliminary determination that she was without fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact or amount and request waiver of the recovery of the overpayment. It requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days.

On July 22, 2013 appellant requested waiver of recovery of the overpayment, but did not provide a completed Form OWCP-20 or financial information.

In a February 12, 2014 decision, OWCP finalized its preliminary determination. It further denied waiver of recovery of the overpayment. OWCP explained that appellant did not submit the requested financial information and, thus, has not shown that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It requested that she remit the full amount within 30 days.

² Under File No. xxxxxx418 OWCP accepted appellant's claim for a left ankle sprain and other joint derangement due to an August 25, 1989 employment injury. It denied her claim for depression under File No. xxxxxx290.

³ OWCP noted that appellant's loss of wage-earning capacity decision had been issued on July 7, 1999 and that she worked 20 hours per week for the National Park Service. Appellant stopped work on July 10, 2005 and has not returned.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁶ Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay (which is also known as retirement incentive pay).⁷ OWCP discovers concurrent receipt benefits it must declare an overpayment in compensation and give the usual due process rights.⁸

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.⁹ Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$732.18 overpayment of compensation that arose when she concurrently received compensation for temporary disability and separation pay. While receiving compensation for disability resulting from her employment injury, appellant entered into a retirement incentive agreement with the employing establishment that resulted in her receiving an initial payment of \$10,000.00 on May 23, 2013 in exchange for her voluntary resignation. Her FECA benefits continued until June 1, 2013 in the amount of \$732.18. Although compensation under FECA is paid for the incapacity to earn the wages an employee was receiving at the time of the work injury and although appellant was no less disabled for having accepted the separation pay, the law is clear in providing that she may not concurrently

⁴ 5 U.S.C. § 8101-8193, 8102.

⁵ *Id.*

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.421(c).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (June 2009).

⁹ *See L.J.*, Docket No. 10-510 (issued October 1, 2010).

¹⁰ Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of weeks' worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. *See supra* note 8 at Chapter 2.1000.17(d) (June 2009); *see R.H.*, Docket No. 08-2025 (issued July 20, 2009).

receive compensation for total disability and separation pay.¹¹ Because appellant's separation pay created an overpayment of compensation, the Board must affirm OWCP's February 12, 2014 decision on the issue of fact and amount of overpayment.¹²

LEGAL PRECEDENT -- ISSUE 2

According to section 10.436,¹³ recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁴ For waiver under this standard, appellant must meet the two-pronged test and show that she both needs substantially all of her current income to meet current ordinary and necessary living expenses¹⁵ and that her assets do not exceed the resource base.¹⁶

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.¹⁷ OWCP's regulations provide:

“(a) 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....

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹⁸

¹¹ See *supra* note 8. See *L.D.*, 59 ECAB 673 (2008).

¹² OWCP gave appellant the appropriate due process rights by sending her a preliminary overpayment determination and providing her an opportunity to respond.

¹³ 20 C.F.R. § 10.436.

¹⁴ OWCP's procedures provide that 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) (October 2004).

¹⁵ 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. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

¹⁶ *W.F.*, 57 ECAB 705, 708 (2006).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.438. See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

ANALYSIS -- ISSUE 2

In this case, appellant was found to be without fault in creation of the overpayment. Accompanying the July 10, 2013 preliminary notice of overpayment, OWCP provided her an overpayment recovery questionnaire to obtain information about her monthly income, assets and expenses. Appellant requested waiver in a July 22, 2013 letter, but did not return the questionnaire or otherwise provide any financial information. Under the implementing regulations, OWCP could not determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹ As appellant failed to submit the requested information, as required by section 10.438 of its regulations, she is not entitled to waiver.²⁰ The Board finds that OWCP properly denied waiver of recovery of the \$732.18 overpayment of compensation.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$732.18 for which she was not at fault. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment as appellant did not submit any financial information.

¹⁹ *C.B.*, Docket No. 12-1849 (issued January 13, 2014).

²⁰ 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information). *See also Linda Hilton*, 52 ECAB 476 (2001).

²¹ With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). Therefore, the Board does not have jurisdiction over the method of recovery issued in this case. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2014 is affirmed.

Issued: August 18, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board