

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

C.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Providence RI, Employer**

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**Docket No. 13-1341
Issued: January 6, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013 appellant filed a timely appeal from an April 26, 2013 decision of the Office of Workers' Compensation Programs (OWCP) regarding 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 case.

ISSUES

The issues are: (1) whether OWCP properly found a \$19,225.52 overpayment of compensation for the period December 9, 2010 to October 20, 2012, as appellant received simultaneous wage-loss compensation and Social Security Act benefits without an appropriate offset; (2) whether it properly denied waiver of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

On appeal, appellant contends that OWCP misstated his income and expenses. He asserts that he receives Social Security benefits of \$1,773.83 a month, not \$3,770.00 as found by

¹ 5 U.S.C. § 8101 *et seq.*

OWCP. Appellant claimed net rental income of \$625.00 a month, whereas OWCP listed \$900.00. He also contends that OWCP did not include life insurance premiums of \$1,151.00 and \$101.29 in Medicare payments in his monthly expenses of \$3,415.00. Appellant asserted that his actual monthly expenses were \$4,667.29 a month. He acknowledged that OWCP did not allow all his claimed expenses and that repaying the overpayment presented severe financial hardship. Appellant requested that OWCP reduce the monthly repayment amount.

FACTUAL HISTORY

OWCP accepted that on September 15, 2010 appellant, then a 67-year-old laborer/custodian, sustained a right elbow contusion and abrasion when he collided with a locker. Under File No. xxxxxx883, it previously accepted a concussion and left shoulder strain sustained on September 11, 2001 when he tripped and fell on a palette strap.² Appellant received Social Security Administration (SSA) retirement benefits as of January 1, 2008 as a FERS (Federal Employee Retirement System) employee who had reached 65 years of age. He stopped work on September 15, 2010 and did not return. Appellant also received continuation of pay from September 15 to December 9, 2010 and was placed on the daily rolls in receipt of wage loss as of December 10, 2010. OWCP placed him on the periodic compensation rolls effective January 16, 2011.³

In an October 18, 2012 memorandum, SSA advised OWCP that appellant received monthly benefits beginning in January 2008 at the following rates: \$888.00 from January to November 2008; \$939.00 from December 2008 to November 2011; and \$973.00 commencing in December 2011. OWCP determined that he was overpaid \$19,225.52 as follows: \$633.13 from December 9 to 31, 2010; \$9,260.24 from January 1 to November 30, 2011; and \$9,332.14 from December 1, 2011 to October 20, 2012.

In an October 24, 2012 memorandum, OWCP calculated the offset of appellant's SSA benefits based on his current receipt of \$1,942.51 in FECA compensation benefits each 28-day payment cycle. Effective October 26, 2012, it adjusted his wage-loss compensation under FECA to reflect the appropriate offset of his SSA benefits.

By notice dated November 15 2012, OWCP advised appellant of its preliminary determination that a \$19,225.52 overpayment of compensation was created as he was paid dual compensation under FECA and the Social Security Act for the period December 9, 2010 to October 20, 2012 without an appropriate offset.

On December 10, 2012 appellant completed an Overpayment Recovery Questionnaire (Form OWCP-20). He listed monthly household income of \$6,727.00: \$3,770.00 in SSA benefits, \$1,602.00 in disability benefits through the Department of Veterans Affairs and

² On October 13, 2011 OWCP doubled appellant's claims under File No. xxxxxx140, File No. xxxxxx883 and File No. xxxxxx897 under master File No. xxxxxx140.

³ Under File No. xxxxxx883, OWCP issued appellant schedule awards for 22 percent impairment of the right upper extremity. Under File No. xxxxxx140, by decision dated September 27, 2011, it denied his claim for a schedule award for additional right arm impairment. The schedule award issue is not before the Board on the present appeal.

\$900.00 in rental income from a condominium in Florida. Appellant listed \$199,899.00 in assets: \$180,000.00 in annuity value, \$12,112.00 in a savings account; and \$7,687.00 in a checking account, \$100.00 cash on hand. He noted that he owned a condominium worth \$67,760.00 and had a mortgage balance of \$118,500.00 on his primary residence. Appellant submitted supporting financial documentation for his income, assets and expenses.

Appellant requested a prerecoupment hearing, held on March 5, 2013. He explained that, after being turned down for life insurance due to his history of renal cancer, he purchased a condominium in Florida to provide rental income to his wife in the event of his death. Appellant also received disability benefits from the Department of Veterans Affairs in the amount of \$1,600.00 a month. Following the hearing, he submitted additional financial documentation regarding taxes, maintenance fees, insurance and utilities for the Florida condominium and his primary residence in Rhode Island. Appellant also submitted bills showing the following monthly expenses: \$165.00 for cable television; \$5.50 life insurance premium; \$170.00 for automobile insurance; and \$72.00 for dental insurance.

By decision dated April 26, 2013, an OWCP hearing representative finalized the fact and amount of the overpayment. He found that appellant was without fault in creation of the overpayment, but that waiver could not be granted as there were sufficient assets and income to repay the overpaid compensation without incurring financial hardship. Therefore, recovery of the overpayment would not defeat the purpose of FECA. The hearing representative found that appellant's monthly household income was \$8,736.00, including \$3,770.00 in SSA benefits; \$1,602.00 in disability benefits from the Department of Veterans Affairs; \$2,104.00 in FECA compensation; and \$900.00 in rental income from the Florida condominium. He allowed \$3,415.00 in monthly ordinary and necessary living expenses, including \$1,790.00 for mortgage, taxes, utilities and insurance on appellant's primary residence, \$1,000.00 for food, \$133.00 for clothing, \$248.00 in life and automobile insurance premiums and \$244.00 in monthly minimum credit card payments. The hearing representative disallowed expenses related to the Florida condominium as it was not appellant's primary residence and cable television fees as such costs were not ordinary or necessary. He found that appellant had \$4,961.00 in discretionary income per month, the difference between his \$8,376.00 monthly income and allowed expenses of \$3,415.00. The hearing representative found that recovery of the overpayment would not be against equity and good conscience as appellant did not change his position for the worse in reliance on the overpaid compensation, as he used the funds to invest in real estate. He directed recovery of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days, finding that this amount would not impose a financial hardship.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his duty.⁴ Section 8129(a) of FECA provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter because of an error of fact or

⁴ 5 U.S.C. § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁵

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 received 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.⁶

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 the 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 had received SSA benefit, OWCP will obtain information from SSA on the amount of the claimant’s SSA 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

The record establishes that appellant received compensation under FECA beginning on December 10, 2010. OWCP placed him on the periodic rolls in receipt of wage loss on January 16, 2011. Appellant received FECA benefits for the period commencing January 16, 2011. OWCP began to offset appellant’s FECA benefits by the amount of his SSA benefits attributable to his federal employment under FERS on October 26, 2012.⁹ SSA records provided the offset calculations for this period that yielded an overpayment of compensation in the amount of \$19,225.52. The Board finds that the calculations are correct. The Board notes that, on appeal, appellant does not contest the fact or amount of the overpayment as determined by OWCP.

As appellant is not entitled to receive both FECA benefits and that portion of his SSA benefits attributable to his federal employment, OWCP properly determined that an overpayment in the amount of \$19,225.52 was created for the period December 9, 2010 to October 20, 2012.¹⁰

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d); *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁹ 5 U.S.C. § 8116(d).

¹⁰ *Janet K. George (Angelos George)*, *supra* note 6. *See also G.B.*, Docket No. 11-1568 (issued February 15, 2012).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹¹ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹²

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹³ 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 sections 10.434-37 of the implementing federal regulations.¹⁴ 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.¹⁵ A higher amount is specified for a beneficiary with one or more dependents.¹⁶ 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.¹⁷ 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.¹⁸

Section 10.438 of the FECA’s implementing 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

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁴ 20 C.F.R. §§ 10.434-37 (1999).

¹⁵ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

¹⁶ 20 C.F.R. § 10.436.

¹⁷ *Id.* at § 10.437(a).

¹⁸ *Id.* at § 10.437(b).

of an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.²⁰

ANALYSIS -- ISSUE 2

Appellant was found to be without fault in creation of the overpayment. Accompanying the November 15, 2012 preliminary notice of overpayment, OWCP provided appellant an overpayment recovery questionnaire to obtain information about his income, assets and expenses. Appellant provided information with supporting documentation regarding his income, assets and expenses.

In the April 26, 2013 decision, an OWCP hearing representative found that, although appellant was without fault in creation of the overpayment, waiver could not be granted as he had sufficient assets and income to repay the overpaid compensation without incurring financial hardship. The hearing representative determined that appellant did not need substantially all of his income to cover ordinary and necessary living expenses as his discretionary income exceeded the \$50.00 a month. Appellant's monthly household income was \$8,736.00, with \$3,415.00 in allowable monthly ordinary and necessary living expenses, leaving \$4,961.00 in discretionary income per month, well above the \$50.00 amount used to determine this criterion. Also, he had \$20,799.00 in bank accounts and cash, well above the \$8,000.00 asset base for an individual with a spouse or one dependent.²¹ Therefore, recovery of the overpayment would not defeat the purpose of FECA. The hearing representative further found that recovery would not be against equity and good conscience as appellant had not changed his position for the worse as a result of the overpaid funds. He directed recovery of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days, finding that this amount would not impose a financial hardship.

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.²²

On appeal, appellant contends that repayment of the overpayment would cause financial hardship and that OWCP overstated his income and did not allow all of his expenses. As noted, the financial information he submitted establishes that he was not entitled to waiver based on financial hardship.

¹⁹ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

²⁰ *Daniel J. Perea*, 42 ECAB 214 (1990).

²¹ Federal (FECA) Procedure Manual, *supra* at note 15 Chapter 6.200.6a(1)(b).

²² *M.C.*, Docket No. 13-1147 (issued July 18, 2013).

LEGAL PRECEDENT -- ISSUE 3

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 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 any hardship.²³

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$19,225.52 overpayment by deducting \$600.00 from appellant's compensation payments every four weeks, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP properly required repayment of the overpayment by deducting \$600.00 from appellant's compensation payments every four weeks.

CONCLUSION

The Board finds that OWCP properly found a \$19,225.52 overpayment of compensation for the period December 9, 2010 to October 20, 2012 as he received a prohibited dual benefit. The Board further finds that OWCP properly denied waiver as appellant's financial information demonstrated that recovery would not defeat the purpose of FECA or be against equity and good conscience. The Board further finds that OWCP did not abuse its discretion by requiring recovery of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation payments.

²³ 20 C.F.R. § 10.441(a) (2003).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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