

On appeal appellant agreed that she did get double pay but contended that she was not at fault because every year she completed the SSA-581 and someone did not do their job in allowing the overpayment.

FACTUAL HISTORY

OWCP accepted appellant's claim for a cervical strain and herniated cervical disc due to an employment-related injury on October 6, 1999. Appellant worked limited duty since September 13, 2000, and stopped working on June 12, 2006. She was placed on the periodic rolls.

On November 20, 2008 appellant completed an OWCP Form EN-1032. She advised that, for the preceding 15 months, although she was receiving SSA benefits, she was not receiving any benefits from SSA as part of an annuity for her federal service. On December 14, 2008 appellant completed another Form EN-1032 indicating that she had not received any retirement check and reiterated that she did not receive SSA benefits for her federal service. On December 18, 2009 appellant completed another Form EN-1032. She noted that she had not received a regular retirement check. Appellant did receive benefits from SSA during the preceding 15 months as part of an annuity for federal service, but made a notation that she did not understand the question. In the Form EN-1032 completed on November 13, 2010, she advised that she had not received SSA benefits for her federal service for the prior 15 months. In the form signed on November 25, 2011, appellant listed that she did receive SSA benefits for her federal service.

In response to a query from OWCP, on January 12, 2012 SSA noted that commencing March 2008, appellant's SSA rate with Federal Employees' Retirement System (FERS) was \$1,262.40 and without FERS was \$442.00. For the period commencing December 2008, the rate with FERS was \$1,335.40 and without FERS was \$467.60. Effective December 2009, the rate was \$1,335.50 with FERS and \$467.60 without FERS. For the period commencing December 2010, the rate with FERS was \$1,335.50 and without FERS was \$467.60; for December 2011, the rate with FERS was \$1,382.90 and without FERS was \$484.40.

On February 10, 2012 OWCP made a preliminary determination that appellant was overpaid in the amount of \$40,099.72 as her compensation payments for the period March 1, 2008 through January 14, 2012 were not reduced based on the SSA offset amount. It made a preliminary determination that she was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. OWCP gave appellant the opportunity to respond to the determination and to complete financial paperwork. In a

supporting memorandum, OWCP explained how it determined that she was overpaid \$40,099.72.²

Appellant responded on February 19, 2012 and contended that the overpayment occurred through no fault of her own and requested a waiver. Appellant noted that she did nothing wrong and if she had known better she would never have accepted the money. She noted that she filled out the yearly paperwork. Appellant requested a precoupment hearing. She also submitted completed financial forms. In a letter dated February 19, 2012, appellant stated that she did not know that she could not draw SSA and OWCP benefits. She noted that she could not afford to repay the overpayment and that the money was used to repair her home that was damaged by Hurricane Katrina.

At the telephonic hearing held on November 19, 2012, appellant noted that she started receiving SSA benefits in March 2008. She did not know that she did anything wrong when completing the form. With regard to her finances, appellant testified that she receives about \$1,800.00 for OWCP compensation and about \$1,300.00 a month from SSA. Appellant noted that her husband received about \$1,300.00 to \$1,400.00 in SSA disability payments and \$131.00 for retirement from International Paper Company. For expenses, she paid \$292.00 to the Small Business Administration, \$400.00 for food, \$700.00 a month for utilities, \$252.00 for insurance, \$200.00 for a truck payment, \$200.00 for gas and medical and \$150.00 for drugs. Appellant had about \$500.00 to \$600.00 in bills at Wells Fargo. After the hearing, she submitted a document from the Internal Revenue Service (IRS) indicating that she owed \$12,132.85 in back taxes and penalties and made monthly payments in the amount of \$170.00.

By decision dated January 29, 2013, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$40,099.72. She determined that appellant was at fault in the creation of the overpayment for the periods March 1, 2008 to December 17, 2009 and November 13, 2010 to November 24, 2011. The hearing representative determined that appellant was not at fault for the periods December 18, 2009 through November 12, 2010 or November 25, 2011 to January 14, 2012; but appellant was not entitled to waiver of recovery of the overpayment. The hearing representative determined that appellant should repay the overpayment by having \$923.08 deducted from her continuing compensation.

² OWCP noted as follows: the FERS offset for March 1 through November 30, 2008 was \$757.29 for every 28 days, there were 275 days in this period, which resulted in an overpayment of \$7,437.67. For the period December 1, 2008 through February 28, 2009 was \$801.05 for every 28 days, there were 90 days in this period, which resulted in an overpayment of \$2,574.80. For the period March 1 through November 30, 2009, the FERS offset was \$801.05 for every 28 days, there were 275 days in this period, so the overpayment would be \$7,867.46. For the period December 1, 2009 through February 28, 2010, the FERS offset was \$801.14 every 28 days, there were 90 days in this period, so the total offset was \$2,575.09. For the period March 1 through November 30, 2010, the FERS offset was \$801.14 every 28 days for a period of 275 days, so the overpayment would be \$7,868.34. For the period December 1, 2010 through February 28, 2011, the offset was \$801.14 every 28 days for a period of 90 days, so the overpayment would be \$2,575.09. For the period March 1 through November 30, 2011, a period of 275 days, the offset was \$801.14 for every 28 days or \$7,868.34. Finally, for the period December 1, 2011 through January 14, 2012, a period of 45 days, the offset was \$829.38 every 28 days, of \$1,332.93. The sum of the total of these overpayments is \$40,099.72, the amount OWCP found was overpaid to appellant.

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 duty.³

Section 8116(d)(2) 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 benefit 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 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 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 March 1, 2008 to January 14, 2012. As noted, 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 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 benefit appellant received from March 1, 2008 to January 14, 2012 created an overpayment of compensation in the amount of \$40,099.72.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period March 1, 2008 to January 14, 2012 and finds that it properly determined that appellant

³ 5 U.S.C. § 8102(a).

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

⁵ 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).

⁶ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); FECA Bulletin No. 97-9 (issued February 3, 1997).

⁷ *Id.*

received dual benefits totaling \$40,099.72, creating an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁸ provides that an overpayment must be recovered 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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.⁹

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which the recipient knew or should have known to be incorrect.”¹⁰

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide in relevant part:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”¹¹

ANALYSIS -- ISSUE 2

OWCP's hearing representative determined that appellant was at fault in the creation of the overpayment for the period March 1, 2008 to December 17, 2009 and from November 13, 2010 to November 24, 2011. With regard to the period December 18, 2009 to November 12,

⁸ 5 U.S.C. § 8129(a)-(b).

⁹ *Bonnye Mathews*, 45 ECAB 657 (1994).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

2010 and after November 25, 2012, appellant was not at fault in the creation of the overpayment because she had not misrepresented the fact of receiving SSA benefits for that period. The EN-1032 forms cover the period commencing 15 months prior to the signing of the form. But as she was in receipt of such benefits commencing March 1, 2008, OWCP properly determined that appellant was at fault in the creation of the overpayment for the periods March 1, 2008 to December 17, 2009 and November 13, 2010 to November 24, 2011. Accordingly, the Board finds that she was at fault in the creation of the overpayment and not entitled to waiver of recovery of the overpayment for these time periods.¹²

OWCP determined that appellant was not at fault in the creation of the overpayment for the period December 18, 2009 through November 12, 2010 and November 25, 2011 to January 14, 2012. The hearing representative properly considered her entitlement to waiver of recovery of the overpayment for these periods.

LEGAL PRECEDENT -- ISSUE 3

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹³

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.¹⁴ 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 \$50.00.¹⁵

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

¹² *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

¹³ 20 C.F.R. § 10.434. See 5 U.S.C. § 8129(b).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

¹⁵ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

in attempting to repay the debt.¹⁶ 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 her position for the worse.¹⁷

ANALYSIS -- ISSUE 3

The fact that appellant is without fault in creating a portion of the overpayment does not mean that OWCP cannot collect the overpayment. Appellant is still required to repay the debt unless: (1) recovery of the overpayment would defeat the purpose of FECA; or (2) recovery of the overpayment would be against equity and good conscience.

In determining that appellant was not entitled to a waiver of the recovery of the overpayment, OWCP reviewed appellant's income, expenses and assets. Based on the financial documentation supplied by appellant and reviewed at the hearing, OWCP found that appellant had a household income of \$4,731.00 and her listed expenses were \$2,364.00. As the household income exceeded her listed expenses by \$2,367.00, the hearing representative properly determined that recovery of the overpayment was not against equity and good conscience. Further, there is no evidence in this case that appellant relinquished a valuable right or changed position for the worse in reliance on the excess compensation she received. The Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 8129 of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹⁸

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 any hardship.¹⁹

ANALYSIS -- ISSUE 4

The Board finds that OWCP gave due regard to the financial information appellant submitted to OWCP. As appellant's monthly household income was \$4,731.00 and her monthly household expenses were \$2,364.00, OWCP's hearing representative did not abuse her discretion

¹⁶ 20 C.F.R. § 10.437(a).

¹⁷ *Id.* at § 10.437(b).

¹⁸ *Id.* at § 10.436.

¹⁹ *Id.* at § 10.441(a).

in setting the rate of recovery as \$923.08 from each of appellant's continuing compensation payments. The Board will affirm OWCP's decision with regard to rate of recovery.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$40,099.72 for the period March 1, 2008 to January 14, 2012 because she concurrently received FECA and SSA benefits without an appropriate retirement benefit offset. The Board further finds that appellant was not without fault in the creation of the overpayment for the periods March 1, 2008 to December 17, 2009 and from November 13, 2010 to November 24, 2011. As she was without fault for the remaining period, waiver was properly considered, but, the Board finds that OWCP properly denied waiver of recovery of the overpayment. Finally, the Board finds that OWCP properly found that the overpayment should be recovered by deducting \$923.08 monthly from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2013 is affirmed.

Issued: June 2, 2014
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