

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$167,721.39 for the period August 31, 2008 through March 9, 2013; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$2,269.89 from appellant's continuing compensation payments every four weeks.

On appeal, appellant contends that recovery of the overpayment should be waived as it would create a financial hardship and be against equity and good conscience because she detrimentally relied on the additional funds. She further indicated that her financial circumstances had changed and had affected her ability to repay the overpayment.

FACTUAL HISTORY

The record reveals that appellant's husband, the employee, died on August 30, 2008 as a result of being assaulted in the performance of duty as a federal agent on August 28, 2008.⁴ At the time of his death, the employee was covered by the Federal Employees Retirement Systems (FERS).

On October 26, 2008 appellant filed a claim for death benefits (Form CA-5). OWCP awarded her and her four minor sons death benefits in the amount of \$4,817.10 every 28 days. It paid compensation to appellant and her sons effective August 31, 2008.

On April 1, 2014 OWCP was notified that appellant began to receive Social Security Administration (SSA) retirement benefits effective August 31, 2008 which were subject to a FERS offset. The record contains documents showing that OWCP failed to offset these amounts for the period August 31, 2008 through March 9, 2013 in the total amount of \$167,721.39.

In an April 4, 2013 letter, OWCP advised appellant of its preliminary determination that she received a \$167,721.39 overpayment of compensation for the period August 31, 2008 through March 9, 2013 due to OWCP's failure to conduct a proper FERS offset for SSA benefits she received. It also made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the recovery of the overpayment. It informed her that she could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On April 27, 2013 appellant requested a telephonic precoupment hearing and waiver of recovery of the overpayment contending that she was not at fault in its creation. She also contended that she made many life decisions based on her compensation from OWCP, including a major move from a lower cost of living to a higher cost of living. Appellant also made choices to seek treatment for several medical conditions, which included flights, hotel rooms and rental

⁴ OWCP File No. xxxxxx955.

cars for her and her four sons. She indicated that she spent and committed funds in ways she otherwise would not have done, if not for her compensation from OWCP.

In a completed overpayment recovery questionnaire (Form OWCP-20) received on May 29, 2013, appellant reported monthly income of \$4,420.00 in SSA benefits. She also reported approximately \$5,100.00 in monthly household expenses and \$1,497.70 in monthly debts. Appellant reported the following assets: \$60.00 cash on hand, \$128,056.31 in a checking account, \$252,263.54 in a second checking account, \$144,566.20 in a third checking account, \$533,485.90 in a fourth checking account, \$33,316.46 in a savings account, \$154,606.41 in a second savings account, a total of \$435,343.90 in two certificates of deposit and \$188,552.90 in an Individual Retirement Account (IRA), totaling \$1,870,251.62. She submitted a number of financial documents supporting these figures.

A telephonic prerecoupment hearing was held on May 30, 2013. Appellant stated that she had rheumatoid arthritis, diagnosed in 2005, and obtained infusions every six weeks for treatment. She also had lung problems, weight loss and a mass in her cervix. Appellant's children had asthma. She noted that this was why her medical bills were approximately \$2,225.00 per month. Appellant indicated that she made medical care decisions with the funds she thought she had available from OWCP, which led her to seek treatment from Johns Hopkins Hospital where she underwent surgery in 2012. She had to hire help with the kids and fly them and her sister to the hospital for a period of time. Appellant moved to Tampa in 2010 to be closer to her family (her father and his wife) so that she could have a support system. She had problems with home rentals there because the children had asthma and could not live in places they rented. Appellant lost a total of \$8,000.00 because the landlords did not want to refund her money when she had to move from one residence to another. She moved to Naples, Florida in January 2012. They continued to lease in Naples and kept furniture and household goods in a storage facility which cost \$1,000.00 per month. Appellant argued that had she known that she was not entitled to the overpaid amount she may not have obtained out-of-state treatment or moved to Florida. OWCP explained to her that the maximum resource base was \$10,880.00.⁵ Appellant and her four children received \$4,424.00 every month from SSA benefits (based on 5 individual payments of \$884.80) and \$2,269.89 (net) in death benefits from OWCP every 28 days, which equated \$2,459.05 per month,⁶ giving her a monthly income of \$6,883.05. OWCP found that her monthly expenses and liabilities totaled \$10,620.96, exceeding her income by \$3,737.91. However, it noted that appellant's assets far exceeded her \$10,880.00 resource base.

In a June 13, 2013 narrative statement, appellant reiterated her argument that the overpayment of compensation should be waived due to her detrimental reliance in her decisions to stop working and move to Florida, as well as her financial hardship due to future college expenses for her children, which she estimated at one million dollars. She submitted additional financial documentation in support of her claim.

By decision dated June 25, 2013, OWCP finalized the overpayment and appellant was found without fault in the creation of the overpayment. It found that appellant had monthly

⁵ \$8,000 (appellant and one son) + \$960 multiplied by 3 (her other sons) = \$10,880.00. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

⁶ \$2,269.89 x 13 payments/12 months = \$2,459.05.

income of \$6,883.05 and expenses of \$10,620.96 which established that her monthly expenses exceeded her monthly income. However, OWCP denied waiver of recovery of the overpayment on the basis that appellant had over \$1,000,000.00 in assets, which exceeded her \$10,880.00 resource base. It directed recovery of the overpayment by deducting \$2,269.89 from appellant's continuing compensation payments every four weeks. OWCP considered appellant's financial circumstances in reaching this determination.

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.⁷

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.⁸

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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation effective August 31, 2008 and received SSA benefits for the period August 31, 2008 through March 9, 2013. The portion of the SSA benefits her husband earned as a federal employee as part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.¹¹ The SSA notified OWCP of the applicable SSA rates for appellant and

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116(d). See *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); see *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

¹⁰ FECA Bulletin No. 97-9 (issued February 3, 1997).

¹¹ See *supra* notes 7 to 9. See also *L.B.*, Docket No. 12-1202 (issued February 6, 2013); *D.P.*, Docket No. 09-64 (issued August 10, 2009).

their effective dates. Based on these rates, OWCP determined the prohibited dual benefit appellant received from August 31, 2008 to March 9, 2013 created an overpayment of compensation in the amount of \$167,721.39.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period August 31, 2008 through March 9, 2013 and concludes that it properly determined that she received dual benefits totaling \$167,721.39 for this period. Thus, an overpayment of compensation was created 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.¹² Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹³

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.¹⁴ A higher amount is specified for a beneficiary with one or more dependents.¹⁵ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposit.¹⁶ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies, vehicles, jewelry and artwork.¹⁷

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 5 U.S.C. § 8129.

¹³ See *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁴ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. See *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP 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, *supra* note 5 at Chapter 6.200.6.a (June 2009).

¹⁵ *Id.*

¹⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.6.a(4)(a) (June 2009). See *S.S.*, Docket No. 12-1302 (issued February 22, 2013).

¹⁷ *Id.* at Chapter 6.200.6.a(4)(b) (June 2009). Assets do not include the value of household furnishings (primary residence), wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income-producing property, if the income from such property has been included in comparing income and expense. See *id.*

in attempting to repay the debt.¹⁸ 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.¹⁹ 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 payment.²⁰ 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.²¹

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.²²

ANALYSIS -- ISSUE 2

Appellant was not at fault in creating the overpayment of compensation. OWCP found that she was not and could not have been aware that the payments she received were incorrect. This does not mean, however, that appellant may keep money that does not belong to her. 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.

In determining that appellant was not entitled to waiver of recovery of the overpayment, OWCP reviewed appellant's income, expenses and assets as listed in her overpayment recovery questionnaire (Form OWCP-20) received on May 29, 2013. Appellant had monthly income of \$6,883.05 and monthly expenses of \$10,620.96. She reported over \$1,000,000.000 in assets, including four checking accounts, two savings accounts, two certificates of deposit and an IRA. Although appellant's monthly expenses exceed her monthly income by \$3,737.91, the Board finds that she is not entitled to waiver as her assets far exceed her \$10,880.00 resource base.

On appeal, appellant contends that recovery of the overpayment should be waived as it would create a financial hardship and be against equity and good conscience because she detrimentally relied on the additional funds. She argued that she made decisions to stop working, obtain out-of-state medical treatment and move to Florida based on her income during the period she was overpaid. That would support her reliance on the receipt of compensation benefits in general, but it does not support her reliance on the overpaid amount, which is the relevant inquiry.

¹⁸ 20 C.F.R. § 10.437(a).

¹⁹ *Id.* at § 10.437(b).

²⁰ *Id.*

²¹ *Id.* at § 10.437(b)(2); see *Wayne G. Rogers*, 54 ECAB 482 (2003); *L.B.*, *supra* note 11.

²² *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

In *O.G.*,²³ the claimant received an overpayment of compensation and argued detrimental reliance indicating that once OWCP informed him how much compensation he would receive weekly, he immediately decided that he could let his two daughters continue to attend their colleges. His assets exceeded \$200,000.00, including a second, nonincome-producing property and a boat. The Board found that, although the employee showed that the amount he was overpaid caused him to make a decision to his own detriment, he failed to show that he would not have made that decision if OWCP had informed him of the compensation to which he was correctly entitled. In other words, he did not establish that the \$83.06 error in his weekly pay rate made all the difference and that if he had instead received compensation benefits at the correct and slightly reduced pay rate it would not have been possible for his daughters to remain at their respective universities.

In contrast, OWCP procedures provide that if a widow entered her daughter in college because the difference in monthly benefits between her entitlement to a Civil Service death annuity and her entitlement to a FECA death annuity made this possible and it was subsequently discovered that all FECA benefits were paid in error, she would have had no other funds from which to pay her daughter's tuition. The widow would qualify for waiver of recovery of the overpayment of compensation under the principle of detrimental reliance as she was in a worse position financially than if she and her daughter had never been entitled to FECA benefits because she entered her daughter in college and incurred a financial obligation in spending the benefits.²⁴

To establish detrimental reliance, she must show that the amount she was overpaid caused her to make a decision, to her detriment, that she would not have otherwise made. The record establishes that appellant has over \$1,000,000.00 in liquid assets. She did not show that OWCP's failure to conduct a proper FERS offset for SSA benefits she received for the period August 31, 2008 through March 9, 2013 made all the difference and that, if she had instead received compensation benefits at the correct rate, it would not have been possible for her to stop working, obtain out-of-state medical treatment or move to Florida. In her June 13, 2013 narrative statement, appellant argued that she would suffer financial hardship due to future college expenses for her children. The Board has held that there is no provision for conjecture concerning future income.²⁵

Appellant does not qualify for waiver of recovery of the overpayment 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. She 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.²⁶ As appellant failed to

²³ Docket No. 11-1112 (issued January 20, 2012).

²⁴ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.b(3) (June 2009), Example 3.

²⁵ See *D.L.*, Docket No. 07-2016 (issued April 21, 2008).

²⁶ On appeal, appellant further indicated that her financial circumstances had changed and had affected her ability to repay the overpayment. The Board, however, is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See *supra* note 3.

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.²⁷

LEGAL PRECEDENT -- ISSUE 3

The amount of adjustment of continuing compensation to recover an overpayment lies within OWCP's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.²⁸ With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) 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.²⁹ 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.³⁰

ANALYSIS -- ISSUE 3

OWCP found that appellant could repay the overpayment by deducting \$2,269.89 from her continuing compensation payments every four weeks. It took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.441(a), and found that this method of recovery would minimize any resulting hardship on appellant. OWCP considered the amount of appellant's assets and determined that her more than \$1,000,000.00 in assets far exceeded her \$10,880.00 resource base. Therefore, the Board finds that OWCP properly required repayment of the overpayment by deducting \$2,269.89 from appellant's continuing compensation payments every four weeks.

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$167,721.39 for the period August 31, 2008 through March 9, 2013. The Board further finds that it properly denied waiver of recovery of the overpayment. The Board also finds that OWCP properly directed recovery of the overpayment by deducting \$2,269.89 from appellant's continuing compensation payments every four weeks.

²⁷ Federal (FECA) Procedure Manual, *supra* note 24 at Chapter 6.200.6.b (June 2009); *L.B.*, *supra* note 11.

²⁸ See *Howard R. Nahikian*, 53 ECAB 406 (2002).

²⁹ 20 C.F.R. § 10.441(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

³⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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