

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

V.E., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
New York, NY, Employer)

**Docket No. 15-340
Issued: April 1, 2015**

Appearances:

*Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 3, 2014 appellant, through counsel, filed a timely appeal from an October 27, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 determined that appellant received an overpayment of compensation in the amount of \$54,892.63; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required collection of the overpayment by deducting \$735.30 from appellant's continuing compensation every 28 days.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on September 10, 1998 appellant, then a 58-year-old registered nurse, sustained a right ankle sprain, bilateral shoulder tendinitis, exacerbated cervical spine sprain, and lumbosacral spine sprain due to a fall at work. She received disability compensation on the periodic rolls beginning June 16, 2002.

Appellant completed EN1032 forms each year, covering the period between 2005 and 2014, in which she stated that she received no benefits from the Social Security Administration (SSA) as part of an annuity for federal service. Each of these forms covered the 15-month period prior to the date that it was signed and contained a strongly worded certification clause warning that the form must be filled out in an accurate manner.

By letter dated August 11, 2014, OWCP informed appellant that SSA had confirmed receipt of SSA benefits attributed to her federal service, and that the difference between appellant's SSA income with benefits with federal service and without federal service was \$565.70, and that this difference must be offset against her compensation benefits. It noted that when the \$565.70 monthly difference was adjusted to the 28-day cycle for OWCP benefits, appellant's compensation should be adjusted in the amount of \$522.18, and that this would commence with her first payment on August 23, 2014.

In an August 22, 2014 preliminary determination, OWCP indicated that appellant was overpaid benefits in the amount of \$54,892.63 for the period November 1, 2005 to July 26, 2014 because she received retirement benefits from SSA that were attributable to her federal service at the same time that she received full compensation benefits from OWCP.² It also made a preliminary determination that appellant was at fault in the creation of the overpayment. Appellant was given instructions as to how to contest the overpayment and fault determination and was provided financial forms to complete with regard to the collection of the overpayment. OWCP informed her that failure to submit the requested information within 30 days would result in the denial of waiver. Appellant was also advised that the completed financial form would assist OWCP in determining a fair repayment amount.

Appellant submitted a financial form, signed on September 8, 2014, in which she listed monthly income of \$10,214.00 comprised of her SSA payments and FECA benefits and her husband's SSA and pension payments. She listed monthly expenses of \$5,981.00 and assets of \$365,000.00 from a second home, checking and savings accounts, and stocks and bonds. Appellant indicated that she was contesting the fact, amount, and fault findings of the overpayment. She argued that she was not at fault in creating the overpayment because she

² In an attached calculations sheet, OWCP noted that for the period November 1 to 30, 2005, the offset amount was \$449.01; for the period December 1, 2005 to November 30, 2006, the offset amount was \$5,683.17; for the period December 1, 2006 to November 30, 2007, the offset amount was \$5,880.51; for the period December 1, 2007 to November 30, 2008, the offset amount was \$6,031.76; for the period December 1, 2008 to November 30, 2011, the offset amount was \$19,092.71; for the period December 1, 2011 to November 30, 2012, the offset amount was \$6,610.93; for the period December 1, 2012 to November 30, 2013, the offset amount was \$6,705.97; and for the period December 1, 2013 to July 26, 2014, the offset amount was \$4,438.57. The total of these figures is \$54,892.63, which represents the total of the offsets that were not deducted from appellant's compensation between November 1, 2005 and July 26, 2014 and, therefore, the total of the overpayment of compensation.

thought that the word “annuity” on the EN1032 forms referred to an income stream from an investment instrument and not SSA benefits. Appellant indicated that she misunderstood the questions on the EN1032 forms because English is her second language. She claimed that she would experience severe financial hardship in attempting to repay the overpayment.

By decision dated October 27, 2014, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$54,892.63. It determined that she knew or should have known that the payments she received were incorrect and was therefore at fault in the creation of the overpayment and not entitled to waiver of recovery of the overpayment. OWCP considered the financial information submitted by appellant and determined that it would collect the overpayment by deducting \$735.30 from her continuing compensation every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits 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.³

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.⁴ The offset of FECA benefits by SSA benefits attributable to employment under the Federal Employees’ Retirement System (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 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.⁵

ANALYSIS -- ISSUE 1

Appellant received both wage-loss compensation under FECA and benefits under SSA for the period November 1, 2005 through July 26, 2014. As previously stated, the portion of the SSA benefits appellant received as a federal employee as part of her FERS retirement package

³ 5 U.S.C. § 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).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); and 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. *See also R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁵ *Supra* note 4.

concurrently with the benefits she received under FECA is a prohibited dual benefit.⁶ 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 November 1, 2005 through July 26, 2014 created an overpayment of compensation in the amount of \$54,892.63.

The Board has reviewed OWCP's calculations of benefits appellant received for the period November 1, 2005 through July 26, 2014 and finds that OWCP properly determined that an overpayment of compensation was created in the amount of \$54,892.63.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁷ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁸ In determining whether an individual is with fault, section 10.433(a) of OWCP regulations provide that an individual is with fault in the creation of an overpayment who: (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 he or she knew or should have known to be incorrect.⁹

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because she made an incorrect statement as to a material fact that she knew or should have known to be incorrect. In her EN1032 forms covering the relevant periods between 2005 and 2014, appellant consistently reported that she was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as appellant was clearly receiving SSA benefits based on periods of her federal employment.

The Board finds that appellant was aware that she received SSA and FECA benefits simultaneously. Appellant inaccurately reported that she was not receiving SSA benefits on the EN1032 forms she completed. Based on the clear language of the forms which appellant knowingly signed, appellant made an incorrect statement as to a material fact. The Board finds

⁶ See *P.G.*, Docket No. 13-589 (issued July 9, 2013).

⁷ 5 U.S.C. § 8129(b).

⁸ See *Robert W. O'Brien*, 36 ECAB 541 (1985).

⁹ 20 C.F.R. § 10.433(a).

that appellant was at fault in the creation of the overpayment and is therefore precluded from receiving a waiver.¹⁰

Before OWCP and on appeal, appellant argued that she was not at fault in the creation of the overpayment because she thought that the word “annuity” on the EN1032 forms referred to an income stream from an investment instrument and not SSA benefits. However, the EN1032 forms clearly indicate that the word “annuity” refers to an annuity from SSA. She asserted that she misunderstood the questions on the EN1032 forms because English is her second language. The Board has reviewed appellant’s communications of record and notes that her command of English appears to be more than adequate to understand the questions posed on the EN1032 forms.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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.”¹¹

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$735.30 from appellant’s compensation payments every 28 days, 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.¹² Therefore, OWCP properly required repayment of the overpayment by deducting from her compensation payments every 28 days.

¹⁰ See *R.L.*, Docket No. 13-713 (issued August 15, 2013).

¹¹ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988). The Board has jurisdiction to review the issue of recovery of an overpayment in those cases, such as the present case, 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).

¹² Before the Board and on appeal, appellant claimed that she would experience severe financial hardship in attempting to repay the overpayment. However, OWCP took her ability to repay the overpayment into account when it considered the financial information she submitted. Appellant submitted a financial form in which she listed monthly income of \$10,214.00, monthly expenses of \$5,981.00, and assets of \$365,000.00.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,892.63, properly denied waiver of recovery of the overpayment, and properly required collection of the overpayment by deducting \$735.30 from appellant's continuing compensation every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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