

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

C.H., Appellant)

and)

DEPARTMENT OF THE ARMY, JOINT)
MUNITIONS & LETHALITY COMMAND,)
Richmond, KY, Employer)

**Docket No. 15-0799
Issued: June 19, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2015 appellant filed a timely appeal from the November 25, 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 appellant received a \$5,199.75 overpayment of compensation; and (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

OWCP accepted that on February 25, 2010 appellant, then a 63-year-old explosives operator, sustained a right shoulder sprain with superior glenoid labrum lesion due to a fall at

¹ 5 U.S.C. §§ 8101-8193.

work. On August 24, 2010 appellant underwent OWCP-authorized right shoulder arthroscopy and rotator cuff repair. He received disability compensation on the daily rolls beginning August 24, 2010 and was later placed on the periodic rolls. Appellant began performing modified work for the employing establishment on November 15, 2010 and underwent additional OWCP-authorized right shoulder surgery on July 5, 2011.

On August 22, 2011 appellant began working as a modified office automation clerk for the employing establishment on a full-time basis. By decision dated September 11, 2012, OWCP reduced his compensation effective August 22, 2011 based on its determination that his actual wages as a modified office automation clerk fairly and reasonably represented his wage-earning capacity.

OWCP requested and received documentation from the Social Security Administration (SSA) showing that, for the period January 1, 2013 to September 20, 2014, appellant received dual benefit payments from OWCP and SSA without an offset of FECA benefits being made by SSA benefits attributable to employment under the Federal Employees' Retirement System (FERS). This documentation included information regarding appellant's applicable SSA rates and their effective dates. OWCP provided a computer worksheet showing the amounts of prohibited dual payments appellant received for the period January 1, 2013 to September 20, 2014.

In a September 26, 2014 notice, OWCP advised appellant of its preliminary determination that he received a \$5,199.75 overpayment of compensation for the period January 1, 2013 to September 20, 2014 because he received prohibited dual FECA and SSA benefits during this period. It also made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It requested that he complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

In a Form OWCP-20 completed on October 20, 2014, appellant indicated that he had \$3,977.41 in monthly income, \$1,350.00 in monthly expenses, and \$135,136.16 in assets, comprised of \$80,000.00 in land and \$55,136.16 in cash on hand and checking and saving account balances. He noted that he was married and did not have any dependents. In an attached statement, appellant argued that his FECA payments should not have been offset and he requested waiver of the recovery of the overpayment.

In a November 25, 2014 decision, OWCP determined that appellant received a \$5,199.75 overpayment of compensation. It found that he was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver because his monthly income exceeded his monthly ordinary and necessary living expenses by more than \$50.00 and because

his assets exceeded the allowable resource base. OWCP indicated that the overpayment would be recovered in a single payment of \$5,199.75.²

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 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.⁵

ANALYSIS -- ISSUE 1

Appellant received both wage-loss compensation under FECA and benefits under SSA for the period January 1, 2013 to September 20, 2014. The portion of the SSA benefits appellant received as a federal employee as part of his FERS retirement package concurrently with the benefits he 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 January 1,

² With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007). As appellant was not in receipt of continuing compensation at the time of OWCP's November 25, 2014 overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See* 20 C.F.R. § 10.441.

³ 5 U.S.C. § 8116(d). *See D.S.*, Docket No. 12-689 (issued October 10, 2012).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000(e)(2) (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 R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁵ FECA Bulletin No. 97-09 (issued February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

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

2013 to September 20, 2014 created an overpayment of compensation in the amount of \$5,199.75.⁷

The Board has reviewed OWCP's calculations of benefits appellant received for the period January 1, 2013 to September 20, 2014 and finds that OWCP properly determined that an overpayment in the amount of \$5,199.75 was created.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.⁸ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁹ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his 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.¹⁰ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.¹¹ 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.¹²

⁷ Appellant argued that his FECA payments should not have been offset, but he did not provide an explanation for this argument.

⁸ See *Robert Atchison*, 41 ECAB 83 (1989).

⁹ 5 U.S.C. § 8129(b).

¹⁰ 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. 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. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹¹ *Id.* at § 10.437(a), (b).

¹² *Id.* at § 10.437(b)(1).

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. As noted above, he reported assets of \$135,136.16 and the Board notes that these assets greatly exceed the allowable resource base of \$8,000.00 for a married claimant without dependents. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether his monthly income exceeds his monthly ordinary and necessary living expenses by more than \$50.00.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹³

On appeal, appellant argued that he was not at fault in the creation of the \$5,199.75 overpayment. However, OWCP found that he was not at fault in the creation of the overpayment and properly considered his financial circumstances in reaching its decision to deny his request for waiver of recovery of the overpayment. 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 establish that OWCP abused its discretion by refusing to waive the overpayment.

CONCLUSION

The Board finds that appellant received a \$5,199.75 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

¹³ See *William J. Murphy*, 41 ECAB 569 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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