

(3) whether it properly required repayment of the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation.

OWCP accepted that on appeal appellant's representative asserts that since appellant was not at fault, to require repayment would be against equity and good conscience because appellant has financial hardship.

FACTUAL HISTORY

OWCP accepted that on February 24, 1996 appellant, then a 53-year-old mail processing clerk, sustained contusions to the face, scalp, and neck, as well as lumbar and cervical injuries when she was struck by a heavy door at work. She returned to modified duty. Appellant stopped work on January 11, 2002, and on June 7, 2002 filed a recurrence claim (Form CA-2a), stating that she could not continue to work due to symptoms of pain and stiffness. The recurrence claim was accepted, and she was placed on the periodic compensation rolls. Appellant has never returned to work.³

In July 2013 OWCP began development of whether appellant was receiving dual benefits from FECA and SSA. On September 10, 2013 SSA provided information regarding appellant's SSA rate with and without Federal Employees' Retirement System (FERS) benefits, effective April 1, 2008. On September 12, 2013 OWCP informed appellant that her FECA benefits were being reduced to reflect the contribution to her SSA benefits, effective September 22, 2013. Appellant's net compensation each 28 days was \$2,009.00.

On September 12, 2013 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$36,474.46 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits, that she received from April 1, 2008 through September 21, 2013, was based on credits earned while working in the Federal Government, and that this portion of her SSA benefits was a prohibited dual benefit. OWCP found her without fault. The preliminary determination provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire. She was informed of the procedures she could take and was allotted 30 days to respond. An overpayment worksheet indicated that the FERS offset for the period April 1, 2008 through September 21, 2013 totaled \$36,474.46.

Appellant requested a telephone conference and submitted an overpayment questionnaire, signed on September 20, 2013. She reported monthly income of \$4,270.88, based on SSA and FECA benefits, and benefits from the Department of Veterans Affairs (VA), and expenses totaling \$4,104.00, with cash, checking, and savings totaling \$25,289.00. In correspondence dated October 11, 2013, OWCP informed appellant that additional financial information was needed prior to holding a telephone conference.⁴ Appellant submitted additional financial

³ On May 9, 2008 and July 8, 2009 OWCP suspended appellant's monetary compensation because she failed to provide OWCP EN1032 forms. Appellant complied, and her compensation resumed.

⁴ In form reports submitted to OWCP on October 5, 2013, Dr. Silvester Lango, an attending Board-certified orthopedic surgeon, diagnosed contusion of face, cervical neuropathy, and low back pain, and advised that appellant was totally disabled.

information. This included bank, credit card, department store, telephone, insurance, and dental statements. On November 27, 2013 OWCP asked that appellant also provide household income tax returns and specific documentation regarding insurance and utilities. On December 19, 2013 appellant's representative informed OWCP that appellant did not file tax returns as her only source of income was FECA and SSA benefits. He attached additional financial information.

On July 18, 2014 appellant submitted an OWCP Form EN1032 in which she indicated that, in addition to FECA compensation, she also received SSA compensation of \$1,293.00 monthly, and VA disability compensation which she did not quantify. She submitted updated financial information regarding bank accounts, credit cards, utilities, cellular telephone, automobile, and rental insurance, medical expenses, cable television, and internet service. Bank information showed a savings account total of \$8,173.65 on December 26, 2014 in one account, and a combined balance of checking and savings of \$9,828.75 on February 9, 2015 in a second account.

A telephone conference was held on March 16, 2015. A memorandum of conference dated March 18, 2015 indicated that an OWCP communication specialist and appellant's representative participated. The representative described appellant's monthly expenses as follows: rent \$1,230.38, utilities \$251.00, insurance \$320.00, miscellaneous personal care \$27.00, and \$3,217.00 in repayment of loans and credit card payments, for total monthly expenses of \$5,045.38. He indicated that her monthly SSA benefit was \$1,316.00 and maintained that she should be entitled to waiver because she was not at fault in the creation of the overpayment. OWCP compromised the amount of the overpayment from \$36,474.46 to \$15,600.00, based on appellant's age. The representative indicated that, after her review of the financial information, repayment at a rate of \$100.00 to \$200.00 each compensation period was recommended. On March 28, 2015 he maintained that appellant did not have the financial resources to repay the overpayment.

By decision dated April 8, 2015, OWCP finalized the preliminary overpayment determination as compromised, finding that appellant received an overpayment of compensation in the amount of \$15,600.00 and, while she was not at fault, she was not entitled to waiver of recovery of the overpayment because the financial information submitted did not establish a basis for granting waiver. Repayment in the amount of \$150.00 was to be deducted every 28 days from her continuing compensation.

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.⁵ Section 8116 limits the right of an employee to receive compensation: while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁶ Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a).

concurrently with separation pay.⁷ FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸ When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.⁹

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation beginning in 2002 and that she received SSA retirement benefits beginning on April 1, 2008. The portion of the SSA benefits appellant earned as a federal employee was part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.¹⁰ Appellant's FECA compensation was not offset until September 22, 2013. The SSA notified OWCP of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit appellant received from April 1, 2008 through September 21, 2013. This yielded an overpayment of compensation in the amount of \$36,474.46. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period April 1, 2008 through September 21, 2013 and finds that appellant received dual benefits totaling \$36,474.46. OWCP, however, permissibly compromised the overpayment down to \$15,600.00, based on appellant's age.¹¹ Thus, an overpayment of compensation in a different amount was created.

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

⁷ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-9 (issued February 3, 1997).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

¹⁰ *Supra* note 8.

¹¹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.6 (May 2004).

¹² 5 U.S.C. § 8129.

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

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. A higher amount is specified for a beneficiary with one or more dependents.¹⁴ 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.¹⁵ 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.¹⁶

OWCP procedures provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery would defeat the purpose of FECA if both the individual from whom recovery is sought needed substantially all of his or her current income (including FECA periodic benefits) to meet current ordinary and necessary living expense, and if the individual's assets did not exceed the resource base 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. An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00). If an individual has disposable 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.¹⁷

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

¹⁴ 20 C.F.R. § 10.436(b).

¹⁵ *Id.* at § 10.437(a).

¹⁶ *Id.* at § 10.437(b).

¹⁷ *Supra* note 11 at Chapter 6.200.6.a(1) (June 2009).

¹⁸ *Supra* note 12.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because her asset base exceeds the resource base of \$4,800.00, as provided in OWCP procedures.¹⁹ On the overpayment questionnaire, she submitted in 2013, she noted having cash, checking, and savings totaling \$25,289.00. Bank statements submitted in February 2015 showed checking and savings account totals of \$8,173.65 and \$9,828.75 in separate accounts. These amounts exceed the \$4,800.00 asset base for an individual such as appellant who has no dependents.²⁰ 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 to consider the first prong of the test, *i.e.*, whether her monthly income exceeded her monthly ordinary and necessary expenses by more than \$50.00.²¹

Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience. As described above, the record does not support this contention.

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.²² OWCP procedures provide that 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.²³ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁴ 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.²⁵

¹⁹ See *supra* note 17.

²⁰ *Id.*

²¹ *Id.* The Board also notes that in reporting monthly expenses at the telephone hearing, appellant described credit card and loan payments of \$3,217.00 but did not sufficiently explain whether these were to cover ordinary and necessary expenses. Appellant also did not report her entire monthly income since her VA benefit payment was not included. OWCP procedures provide that ordinary and necessary living expenses include fixed expenses such as food, clothing, furniture, household and personal hygiene supplies, rent, mortgage payments, utilities, maintenance, burial plot or prepaid burial contract; accident, health, life and vehicle insurance; taxes; vehicle expenses and commuting expenses not included under vehicle expenses; medical expenses, church and charitable contributions made on a regular basis; and miscellaneous expenses not to exceed \$50.00 per month. The procedures add that consumer debt should not be calculated if the expenses are included in the fixed expenses. Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 6.200.6.a(3) (June 2009).

²² 20 C.F.R. § 10.437; see *W.P.*, 59 ECAB 514 (2008).

²³ *Supra* note 9 at Chapter 2.600.b(3) (June 2009).

²⁴ *Id.* at § 10.437(b)(1) (2011); see *J.A.*, Docket No. 09-1678 (issued June 9, 2010).

²⁵ *Id.* at § 10.437(b)(2) (2011); see *Wayne G. Rogers*, 54 ECAB 482 (2003).

Appellant submitted no evidence to show that she gave up a valuable right or changed her position for the worse in reliance on anticipated compensation payments. Thus, 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. OWCP properly found that appellant was not entitled to waiver on the grounds that recovery would be against equity and good conscience.

As appellant failed to 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.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.²⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$15,600.00 overpayment by deducting \$150.00 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(a) of its regulations and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, it properly required repayment of the overpayment by deducting \$150.00 from appellant's compensation payments every four weeks.²⁷

²⁶ *Id.* at § 10.441(a).

²⁷ *Id.*; *see C.P.*, Docket No. 13-1341 (issued January 6, 2014).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,600.00 and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$150.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board