

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

C.H., Appellant)

and)

DEPARTMENT OF THE ARMY, TANK)
AUTOMOTIVE & ARMAMENTS COMMAND,)
Anniston, AL, Employer)

**Docket No. 15-1402
Issued: September 17, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 12, 2015 appellant filed a timely appeal from a May 19, 2015 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 \$7,688.57 overpayment of compensation; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on June 19, 1985 appellant, then a 37-year-old mechanic, sustained injury due to picking up a starter from the bottom of a container. Appellant's claim was accepted for low back strain, aggravation of degenerative disc disease, bulging disc at L5-S1, subdural empyema (resulting from an epidural injection), meningitis, and chronic headaches. She stopped work following the injury and returned to work intermittently. Appellant stopped work again on December 20, 1993 and received ongoing total disability compensation benefits.

In a July 17, 2013 letter to OWCP, Jeffrey Karl, an injury compensation official for the employing establishment stated:

“This is in regard to the injury compensation claim shown above, and the potential for a FERS [Federal Employees Retirement System] offset in this case. The above-referenced claimant is now 66 years of age. Any Social Security Benefits that she may now be receiving is [sic] considered as being retirement benefits by the Social Security Administration (SSA).

“If that is the case, since this claimant is a FERS employee, her compensation payments must be now be offset by any part of her SSA benefit that was calculated by using her [f]ederal employment earnings, if SSA considers her to be ‘retired,’ rather than ‘disabled,’ under the SSA program.

“Please send off a SSA FERS Questionnaire to SSA to inquire as to the claimant's status, and if the claimant is considered to be ‘retired,’ what the offset should be.”

In a July 15, 2014 letter to OWCP, Mr. Karl noted that appellant was now 67 years of age and that any SSA benefits that she is now receiving were considered as being retirement benefits by the SSA. He stated:

“Since this claimant is a FERS employee, her compensation payments must be now be offset by any part of her SSA benefit that was calculated by using her [f]ederal employment earnings.

“Please send off a SSA FERS Questionnaire to SSA to inquire as to what the Offset should be.”

In August 2014 OWCP received information from the SSA advising of the offset amounts for FERS dual benefits beginning in June 2013. Effective August 24, 2014, it reduced appellant's ongoing disability compensation benefits based on the amount of her social security benefits which were attributable to her federal service.

In an August 27, 2014 letter, OWCP advised appellant of its preliminary determination that she received a \$7,688.57 overpayment of compensation for the period June 1, 2013 to August 23, 2014 because she received prohibited dual benefits in the form wage-loss

compensation under FECA and benefits under SSA without an appropriate offset being made.² It also made a preliminary determination that appellant 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 overpayment. It informed appellant that she could submit additional evidence in writing or at pre-recoupment hearing, but that a pre-recoupment 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 financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant submitted a completed Form OWCP-20 on September 13, 2014 in which she indicated that her monthly income was \$2,502.99 (comprised of FECA and SSA benefits), that her monthly expenses were \$2,780.00,³ and that her assets were \$4,234.64 (comprised of checking and saving account balances). She argued that she was not at fault in the creation of the overpayment and requested waiver of recovery of the overpayment.

Appellant requested a telephonic pre-recoupment hearing with an OWCP hearing representative on the issues of fact, amount, fault, and possible waiver of the overpayment. During the hearing held on April 8, 2015, the hearing representative explained to appellant that she would have to submit financial documentation on monthly income and monthly ordinary and necessary expenses to support waiver of recovery of the overpayment. Appellant testified that she spent more than she made and that she took in her grandchildren in October 2013, a circumstance which increased her food and utility expenses.

After the hearing, appellant submitted a letter dated April 20, 2015 referencing attached documents which included a bank statement, three credit card statements, and a handwritten statement of her reported expenses. She also stated that her daughter and two grandchildren had lived with her temporarily but that now only her two grandchildren resided with her for an indefinite period of time. The bank statement reflected various payments including cash withdrawals and payment of various expenses, such as multiple Super Walmart purchases. The bank statement also had deductions for a cable bill, food purchases, and several utilities. The minimum monthly payments required on the three credit card statements totaled \$488.00. Appellant also provided a list of expenses for utilities (\$711.02), insurance (\$465.56), food (\$267.04), car gas (\$99.25), overdraft safety (\$32.00), unspecified household items (\$105.00), car repair (\$252.17), home equity loan (\$125.00), recreation (\$94.13), and church (\$40.00).

By decision dated May 19, 2015, an OWCP hearing representative determined that appellant received a \$7,688.57 overpayment of compensation. The hearing representative found that appellant was not at fault in the creation of the overpayment, but determined that the overpayment was not subject to waiver of recovery because appellant had not submitted sufficient financial documentation to support such waiver. It was noted that appellant asserted

² OWCP provided calculations based on SSA documentation that revealed that \$7,688.57 had not been offset for the period June 1, 2013 to August 23, 2014.

³ Appellant listed claimed monthly expenses of \$330.00 for rent/mortgage, \$250.00 for food, \$75.00 for clothing, \$608.00 for food, \$917.00 for miscellaneous expenses, and \$600.00 for credit card debt.

that she had various monthly expenses which exceeded her monthly income, but that the bank statement and credit card bills submitted did not support her claimed monthly expenses. The hearing representative required repayment of the overpayment by deducting \$75.00 from appellant's continuing compensation payments 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.⁴

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.⁵ 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 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$7,688.57 overpayment of compensation because she received prohibited dual benefits in that amount for the period June 1, 2013 to August 23, 2014. Appellant received both wage-loss compensation under FECA and benefits under SSA for the period June 1, 2013 to August 23, 2014. As previously stated, the portion of the SSA benefits appellant received as a federal employee as part of her FERS retirement package concurrently with the benefits he or she received under FECA 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 benefits appellant received from June 1, 2013 to August 23, 2014 created an overpayment of compensation in the amount of \$7,688.57. The Board has reviewed OWCP's calculations of

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a), (e) (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).

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

⁷ *See P.G.*, Docket No. 13-589 (issued July 9, 2013).

benefits appellant received for the period June 1, 2013 to August 23, 2014 and finds that OWCP properly determined that an overpayment in the amount of \$7,688.57 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 or her 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 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

Section 10.438 of OWCP regulations provide:

"(a) 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 the FECA or be against equity and good conscience.

⁸ See *Robert Atchison*, 41 ECAB 83, 87 (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) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹¹ 20 C.F.R. § 10.437(a), (b).

¹² *Id.* at § 10.437(b)(1).

This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”¹³

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant did not establish entitlement to waiver of recovery of the \$7,688.57 overpayment under the relevant standards. Appellant did not provide sufficient financial information within the appropriate time period to show that she was entitled to waiver of recovery of the overpayment.

As noted by OWCP hearing representative, appellant asserted that she had various monthly expenses which exceeded her monthly income.¹⁴ The Board finds that OWCP properly determined that appellant did not provide proof for all of her reported monthly expenses and/or that they constituted ordinary and necessary living expenses. Appellant submitted a bank statement which reflected various payments including cash withdraws and payment of various expenses, such as multiple Super Walmart purchases. The bank statement also had deductions for a cable bill, utilities, and food purchases. However, as noted by OWCP, this bank statement by itself would not establish that specific expenses were required or indicate what the minimum amount charged monthly would be for such expenses. Appellant provided credit card statements indicating that she had monthly minimum credit card payments of \$488.00. The Board notes, however, the submission of these credit card statements, without supporting explanation and documentation, does not establish that the credit card payments were for ordinary and necessary monthly expenses. In an April 2015 statement, appellant claimed monthly expenses for utilities (\$711.02), insurance (\$465.56), food (\$267.04), car gas (\$99.25), overdraft safety (\$32.00), unspecified household items (\$105.00), car repair (\$252.17), and home equity loan (\$125.00), but she did not provide supporting documentation to clearly establish such expenses.¹⁵ She also listed monthly expenses for recreation (\$94.13) and church (\$40.00), but she did not submit evidence showing that these were ordinary and necessary monthly expenses.

For these reasons, appellant did not submit sufficient financial information to establish that recovery of the overpayment would defeat the purpose of FECA. She has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As appellant has not

¹³ *Id.* at § 10.438.

¹⁴ Appellant had indicated that her monthly income was \$2,502.99, comprised of FECA and SSA benefits.

¹⁵ On appeal appellant argues that the bank statement she submitted documented monthly expenses such as those for utilities. However, as noted by OWCP, the bank statement would not, in and of itself, show that the deductions were for expenses coming due on a monthly basis. In her Form OWCP-20, completed in September 2014, appellant also claimed other monthly expenses, including \$330.00 for rent/mortgage, \$75.00 for clothing, and \$917.00 for unidentified miscellaneous expenses. She also failed to provide evidence documenting these claimed monthly expenses.

shown that her current ordinary and necessary living expenses exceed her monthly income by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁶ Because she has not met the first 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 second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁷

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 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.”¹⁸

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$75.00 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. Therefore, OWCP properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

¹⁶ See *supra* note 10.

¹⁷ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁸ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

CONCLUSION

The Board finds that appellant received a \$7,688.57 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment and that it properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2015
Washington, DC

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

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

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