

On appeal appellant asserts that he was entitled to receive both retirement and FECA benefits because when he was rehired by the Federal Government after retirement, he received a waiver that allowed him to receive both federal pay and his OPM retirement, and that any recovery of the overpayment would be against equity and good conscience.

FACTUAL HISTORY

On June 8, 2011 appellant, then a 59-year-old criminal investigator filed a traumatic injury claim (Form CA-1), alleging that he injured his right ankle while climbing into the back of a truck. OWCP accepted right ankle sprain, traumatic arthropathy of the right ankle, and reflex sympathetic dystrophy of the right ankle. On November 13, 2012 appellant underwent right ankle surgery. He received appropriate compensation, and returned to modified telework on November 4, 2013.

In correspondence dated October 3, 2014, the employing establishment requested that OWCP make an overpayment determination because appellant had received FECA compensation concurrently with a retirement annuity. It submitted a notification of personnel action (Form SF-50) indicating that effective April 30, 2006 appellant voluntarily retired as a criminal investigator with the Transportation Security Administration. A second Form SF-50, effective October 10, 2010, indicated that appellant was rehired as a criminal investigator with the employing establishment. It noted that he was a reemployed annuitant.

On October 17, 2014 appellant informed OWCP that when he began employment with the employing establishment, he received an offset waiver as a condition of employment. He noted that he was a rehired annuitant, and maintained that any overpayment should be waived.

By letter dated November 5, 2014, OWCP advised appellant that since he had received FECA benefits during a period when he also received an OPM annuity, this would be considered a dual benefit. It informed him that he would have to elect to receive either FECA or OPM benefits and provided him an election form. On December 1, 2014 appellant elected OPM retirement benefits, effective May 22, 2011. He again requested waiver of any overpayment.

On January 13, 2015 OWCP issued a preliminary determination that a \$32,957.67 overpayment of compensation had been created for the period November 18, 2012 through November 2, 2013. It explained that the overpayment occurred because appellant received FECA benefits and OPM retirement benefits concurrently during this period. Appellant was found at fault and was provided an overpayment action request and overpayment recovery questionnaire. The record contains an overpayment worksheet and computer printouts showing that for the period November 18, 2012 through November 2, 2013 appellant received net FECA wage-loss compensation totaling \$32,957.67.

On January 21, 2015 appellant requested a precoupment hearing. He submitted an overpayment action request in which he requested a hearing, and an overpayment recovery questionnaire (Form OWCP-20). On the overpayment recovery questionnaire, appellant listed income of \$14,661.00 per month, including rental income. He listed approximate monthly expenses of \$11,505.00, including rental property mortgage, and noted that he supported his wife

and 35-year-old son. Appellant listed assets totaling \$16,705.00.² He additionally submitted documentation including the October 10, 2010 notice of personnel action, a notice of annuity adjustment dated January 3, 2012, and an employing establishment memorandum dated September 17, 2010 noting that appellant, an annuitant, was to be rehired as a criminal investigator.

On February 20, 2015 appellant was granted a schedule award for 20 percent permanent impairment of the right lower extremity, for 57.6 weeks, to run from October 21, 2014 to November 28, 2015. An initial payment of \$19,794.21 covered the period October 21, 2014 to January 10, 2015, and continuing payments of \$6,759.00 every four weeks were to continue to November 28, 2015.

At the hearing, held on July 15, 2015, appellant challenged the fault finding. He testified that he would be stopping work in October, that he had a rental condominium and a small boat, and that his son who lived with him had undiagnosed Asperger's syndrome. Appellant indicated that he had \$40,000.00 in savings to pay off debts, and that his thrift savings had been used to pay for two weddings. The hearing representative asked him to submit two cycles of billing statements, including utilities and mortgage statements.

In correspondence dated July 21, 2015, appellant asserted that as a rehired annuitant with a waiver, he should be entitled to receive FECA compensation concurrently with his annuity. He attached two leave and earnings statements showing net biweekly income of \$3,357.35, two annuity statements showing net monthly payments of \$6,006.89, mortgage statements for his residence of \$2,698.21 for a first mortgage and \$995.24 for a second mortgage, and student loan balances of \$165,057.00, \$7,838.67, and \$17,581.79. Appellant included an estimate of present income of \$14,469.00 monthly, dropping to \$7,269.00 monthly after October 4, 2015, with monthly expenses totaling \$10,245.00, such that, after October 4, 2015, he would have negative income.

By decision dated September 2, 2015, an OWCP hearing representative finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$32,957.67 and, while he was not at fault, he was not entitled to waiver of recovery of the overpayment. He noted that appellant failed to submit complete documentation of his expenses, and that he testified he had accumulated \$40,000.00 in anticipation of repayment of the overpayment and thus exceeded the asset test. The hearing representative concluded that, because appellant submitted insufficient information to verify his financial situation, the overpayment was due in full.

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.³ Section 8116(a) states that, while an employee is receiving workers'

² This did not include the value of the rental property, although he indicated that its current value was \$268,543.00.

³ 5 U.S.C. § 8102(a).

compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁴ Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶ OWCP procedures also explain that the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous. This policy also applies to reemployed annuitants.⁷

ANALYSIS -- ISSUE 1

The record supports that appellant received both wage-loss compensation under FECA and OPM retirement benefits for the period November 18, 2012 through November 2, 2013. As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,⁸ an overpayment in compensation was created.⁹ At the time appellant was hired by the employing establishment, he was already a federal annuitant, and his salary as a criminal investigator was not offset by his retirement annuity under an exception provided by section 553.203 of OPM regulations.¹⁰ This, however, does not constitute offset under FECA. The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP procedures prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹¹ Although section 553.203 of OPM regulations provides that certain reemployed civilian annuitants may be reemployed with full salary and continue to receive a full retirement annuity, this exception does not apply to FECA recipients.

As appellant received \$32,957.67 in FECA benefits while concurrently receiving OPM retirement benefits, an overpayment of compensation in that amount was created.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.100.4.a (January 1997); *see also R.S.*, Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁸ *Id.*

⁹ *See Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁰ 5 C.F.R. § 553.203, status of individuals serving without reduction, provides: Annuitants reemployed with full salary and annuity under an exception granted in accordance with this part are not considered employees for purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code. They may not elect to have retirement contributions withheld from their pay; they may not use any employment for which an exception is granted as a basis for a supplemental or recomputed annuity; and they may not participate in the Thrift Savings Plan.

¹¹ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a), Federal (FECA) Procedure Manual, *supra* note 7.

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 Section 10.438 of OWCP regulations provides that [t]he 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹³

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP regulations.¹⁴

Section 10.436 provides that 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 current 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.¹⁵ For waiver under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁶ OWCP procedures provide that the 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.¹⁷

An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits. Non-liquid 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.¹⁸

¹² 5 U.S.C. § 8129.

¹³ 20 C.F.R. § 10.438.

¹⁴ 5 U.S.C. § 10.434-10.437.

¹⁵ *Id.* at § 10.436.

¹⁶ *Id.*

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a (June 2009).

¹⁸ *Id.*

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.¹⁹ At the hearing, the hearing representative advised appellant of the exact type of financial information he needed to submit. While appellant submitted some financial information, he submitted no specific evidence to substantiate claimed utility expenses or specific information such as mortgage statements or rent receipts regarding his rental property, as requested by the hearing representative. Thus, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience such that it would cause a financial burden.

Moreover, appellant testified at the hearing that he had amassed \$40,000.00 in savings which he testified was to pay off debts. As this exceeds the resource base of \$8,000.00 for an individual with one qualifying dependent,²⁰ he has not established that he is entitled to a waiver on the basis of defeating the purpose of FECA.²¹

Consequently, as appellant did not submit the financial information requested that is required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, and because his assets exceeded the allowable resource base, OWCP properly denied waiver of recovery of the overpayment in the amount of \$32,957.67.²²

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²³ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$32,957.67, and that OWCP properly denied waiver of recovery of the overpayment.

¹⁹ *Supra* note 15.

²⁰ Federal (FECA) Procedure Manual, *supra* note 17. Appellant submitted no evidence to support that his 35-year-old son was a qualifying dependent.

²¹ *See K.K.*, Docket No. 09-207 (issued October 2, 2009).

²² 20 C.F.R. § 10.438.

²³ *Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2016
Washington, DC

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

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

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