

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 16-0796
Issued: August 19, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2016 appellant filed a timely appeal from a September 11, 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 \$41,597.88 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 \$253.85 from appellant's compensation payments every four weeks.

FACTUAL HISTORY

On August 1, 2009 appellant, then a 65-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained upper extremity conditions due to performing her

¹ 5 U.S.C. § 8101 *et seq.*

repetitive work duties over time, including hand stamping returned mail, sorting returned mail into a modified case, culling waste mail, and counting mail. OWCP accepted bicipital tenosynovitis and impingement of her right shoulder.²

Appellant did not stop work when she filed her claim, but she continued performing modified-duty work until September 3, 2009 when the employing establishment could no longer provide work to accommodate her. She received disability compensation on the daily rolls beginning September 3, 2009 and on the periodic rolls beginning March 14, 2010.

In a memorandum dated August 21, 2014, the Social Security Administration (SSA) advised OWCP that appellant had been in receipt of age-based retirement SSA benefits since January 1, 2010 that were partially based upon work in civilian federal service. A form completed by SSA showed the SSA rate with Federal Employees Retirement System (FERS) and without FERS for the years 2010, 2011, 2012, 2013, and 2014. These figures were used to calculate the amount that appellant's FECA wage-loss compensation should have been offset during the above-noted years. Other documents of record reveal that her FECA compensation was adjusted to reflect the SSA offset of \$701.08 effective September 21, 2014. This SSA offset was to be deducted from her compensation check every 28 days. As of October 8, 2014, appellant's net 28-day compensation was \$2,122.80.

A memorandum dated September 23, 2014 explains how OWCP used the figures provided by the SSA to calculate FECA compensation offset for the period of the overpayment, January 1, 2010 to September 20, 2014. The memorandum shows that the total amount of the overpayment was \$41,597.88.

In an October 8, 2014 notice, OWCP advised appellant of its preliminary determination that she received a \$41,597.88 overpayment of compensation for the period January 1, 2010 to September 20, 2014 because she had received a prohibited dual benefit due to the fact that she received SSA benefits based on age during this period while simultaneously receiving FECA wage-loss compensation. It explained that it was required to institute an offset of FECA compensation, reducing FECA compensation benefits by the amount of the SSA retirement benefits attributed to her federal services. OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment because it was not considered reasonable that she would have known about the offset requirements. It advised her that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of recovery of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.

² Under a separate claim file, OWCP accepted in 2005 that appellant had sustained a strain and impingement of her left shoulder due to performing her repetitive work duties over time. On March 23, 2006 appellant underwent OWCP-authorized arthroscopic left shoulder surgery with debridement, subacromial decompression, and acromioplasty. She stopped work on March 20, 2006 and returned to work in a modified-duty position on July 28, 2006. The file for this claim has been doubled with the file for the present claim.

On November 7, 2014 OWCP received a partially completed Form OWCP-20 in which appellant requested waiver of recovery of the overpayment, but the form did not contain information about monthly income or expenses.

Appellant requested a telephonic prerecoumpment hearing with an OWCP hearing representative regarding the \$41,597.88 overpayment of compensation. During the hearing held on June 24, 2015 she testified that she had not been aware that she had been receiving incorrect FECA benefits for such a long period. Appellant testified that she received \$1,574.00 per month in SSA benefits and \$2,317.84 per month in FECA compensation for a total income of \$3,891.84 per month. She provided extensive testimony at the hearing regarding her monthly expenses.³ Appellant claimed \$932.00 for mobile home mortgage payments, \$560.00 for mobile home space rent (which included gas, electricity, and water), \$400.00 for food, support group expenses, and toiletries, \$125.00 for water prescribed by a physician, \$100.00 for clothing, \$75.00 for cellphone, \$167.00 for cable, \$90.00 for home phone, \$124.00 for furniture loan monthly repayment, \$68.00 for automobile insurance monthly payment, \$204.00 for Springleaf loan monthly repayment, \$220.00 for owed state and federal taxes monthly payment, \$100.00 for yard work monthly payment, \$100.00 for housework monthly payment, \$150.00 for miscellaneous expenses, \$22.00 for Experian credit reports, \$250.00 for gas, \$50.00 for out of pocket medication monthly expenses, \$8.45 for garbage collection, yearly total prorated for monthly payment, \$10.17 for yearly tax preparation fees, prorated for monthly payment, \$75.00 for life insurance, and \$47.00 for automobile repairs, yearly total pro-rated for monthly payment. These figures add up to claimed monthly expenses of \$3,877.62.

By decision dated September 11, 2015, OWCP's hearing representative determined that appellant received a \$41,597.88 overpayment of compensation for the period January 1, 2010 to September 20, 2014 due to a prohibited dual payment received because SSA benefits had not been properly offset against FECA compensation for this period. He found that she was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver. The hearing representative reviewed the documentation of record and concluded that appellant had \$3,891.84 in monthly income and \$3,530.62 in monthly expenses, and thereby her monthly income exceeded her monthly ordinary and necessary expenses by \$361.22.⁴ He required repayment of the overpayment by deducting \$253.85 from her compensation payments every four weeks.

³ Appellant testified that she had no monthly payment related to credit cards. She indicated that she had no significant assets in that she only had a little money in a checking account (about \$14.00) and that she did not have a 401(k) plan, retirement fund, or Thrift Savings Plan account. After the hearing, appellant submitted a packet containing financial documentation and an updated, completed Form OWCP-20 dated July 24, 2015. The Board notes that some of the claimed expenses listed below reflect clarifications appellant made in these documents.

⁴ The hearing representative found that the documentation of record did not support some claimed expenses or only supported portions of them. He found that appellant established the following monthly expenses: \$932.00 for mobile home mortgage payments, \$560.00 for mobile home space rent (which included gas, electricity and water), \$300.00 for food, \$125.00 for water prescribed by a physician, \$50.00 for clothing, \$75.00 for cellphone, \$167.00 for cable, \$90.00 for home phone, \$124.00 for furniture loan monthly repayment, \$68.00 for automobile insurance monthly payment, \$204.00 for Springleaf loan monthly repayment, \$220.00 for owed state and federal taxes monthly payment, \$100.00 for yard work monthly payment, \$100.00 for housework monthly payment, \$50.00 for miscellaneous expenses, \$250.00 for gas, \$50.00 for out of pocket medication monthly expenses, \$8.45 for garbage collection, yearly total prorated for monthly payment, \$10.17 for yearly tax preparation fees, prorated for monthly payment, and \$47.00 for automobile repairs, yearly total prorated for monthly payment.

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 provides that an employee may not receive compensation for total disability 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 September 2009 and that she received SSA benefits beginning on January 1, 2010. The portion of the SSA benefits she 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 21, 2014. The SSA notified OWCP of the applicable SSA rates for that period and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit appellant had received from January 1, 2010 to September 20, 2014, which yielded an overpayment of compensation in the amount of \$41,597.88. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board finds that OWCP properly determined that appellant had received a \$41,597.88 overpayment of compensation.

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.¹¹ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a).

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 Robert Atchison*, 41 ECAB 87 (1989).

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.”¹² 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.¹³ 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.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that the documentation of record supports that appellant had \$3,891.84 in monthly income and \$3,530.62 in monthly expenses, and thereby her monthly income exceeded her monthly ordinary and necessary expenses by \$361.22. The OWCP hearing representative properly arrived at these figures by carefully reviewing the documentation and determining that it did not support some claimed monthly expenses or only supported portions of them.

The Board further finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA because 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 noted above, appellant’s monthly income exceeds her monthly ordinary and necessary expenses by \$361.22. As her current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and

¹² 5 U.S.C. § 8129(b).

¹³ 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 supra* note 9 at, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹⁴ *Id.* at § 10.437(a), (b).

¹⁵ *Id.* at § 10.437(b)(1).

necessary living expenses.¹⁶ Because appellant 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 her 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

On appeal, appellant asserted that she should not have to repay the \$41,597.88 overpayment of compensation because she did not make the mistake that created it. However, she received \$41,597.88 in monies to which she was not entitled. Whether appellant must repay the overpayment is governed by the above-described procedures and, as noted, application of these standards shows that waiver of recovery is not warranted in her case.

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 provides 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 \$41,597.88 overpayment of compensation by deducting \$253.85 from appellant’s compensation payments every 28 days, OWCP took into consideration the financial information submitted by her 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 \$253.85 from her compensation payments every 28 days.

¹⁶ See *supra* note 14.

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 \$41,597.88 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment and OWCP properly required repayment of the overpayment by deducting \$253.85 from her compensation payments every four weeks.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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