

FACTUAL HISTORY

On November 8, 1988 appellant, then a 52-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that he slipped and hit his chest on the edge of the table top railing on that date bruising his ribs. He filed a second Form CA-1 on March 23, 1989 alleging that he sustained a laceration of his left hand when an elevator door trapped his hand with a cart. Appellant filed a third Form CA-1 on September 8, 1989 due to lifting trays on that date with resulting left elbow pain. OWCP accepted his claims for brachial plexus lesions, synovitis, and tenosynovitis on October 26, 1989 and left ulnar irritation on January 11, 1990. On February 27, 1991 it reduced appellant's compensation benefits based on his capacity to earn wages as a self-service gas station attendant.

In a letter dated June 25, 1992, OWCP provided appellant with his rate of compensation and informed him that he was not entitled to receive benefits from both OWCP and the Office of Personnel Management. It further noted that his FECA benefits would be reduced by Social Security Act (SSA) benefits paid on the basis of age and attributable to his federal service. On August 23, 1992 appellant elected to receive FECA benefits. OWCP granted him a schedule award for five percent permanent impairment of his left upper extremity on January 27, 1992.

In a decision dated September 13, 2000, OWCP waived an overpayment in the amount of \$6,121.14 created by the death of appellant's dependent spouse.

In a letter dated July 18, 2001, appellant informed OWCP that he would be turning 65 years old on August 11, 2001 and requested information regarding his change in compensation status. He reported receiving SSA disability benefits on Form CA-1032's from September 15, 2000 through August 21, 2013. In a letter dated December 3, 2002, OWCP provided the regulation governing dual benefits and noted that SSA benefits may need to be offset.

In a letter dated October 30, 2013, OWCP informed appellant that he had been receiving SSA dual benefits. It noted that the portion of the SSA benefits earned as a federal employee was part of the Federal Employees Retirement System (FERS) retirement package and that receipt of FECA benefits and federal retirement benefits at the same time was a prohibited dual benefit. OWCP asserted that the SSA benefits which were attributable to appellant's federal service must be adjusted. It indicated that his four-week compensation amount would be adjusted in the amount of \$64.06.

On December 5, 2013 OWCP provided appellant with a preliminary determination that he had received an overpayment of compensation in the amount of \$8,974.23 for the period August 1, 2001 through October 19, 2013, because his compensation benefits were not reduced for the portion of his SSA retirement benefit earned while in federal service.² It found that he was without fault in the creation of the overpayment. OWCP included calculations of the overpayment and noted that appellant had consistently reported his SSA benefits. It provided him with an overpayment recovery questionnaire and informed him of his appeal rights, noting that he had 30 days to request a prerecoumpment hearing before a representative of the Branch of

² The calculations provided with the preliminary finding actually indicate that the overpayment was calculated from August 2, 2001 to December 1, 2012.

Hearings and Review, that he could request a telephone conference, or that he could request a final decision from the district office. OWCP also provided appellant with an appeals form to complete and submit.

Appellant requested a prerecouplement hearing on a form received by the Branch of Hearings and Review on January 27, 2014. The envelope indicated that the postmark was January 22, 2014. Appellant provided arguments in a narrative statement dated January 20, 2014.

Appellant also submitted an overpayment recovery questionnaire and additional financial documents. He listed total household income of \$4,161.00 consisting of SSA benefits of \$1,090.00 and his wife's SSA benefits of \$1,682.00, Supplemental Security Income of \$1,220.00 and his wife's pension of \$169.00. Appellant did not include his monthly FECA benefits in his income calculation. He described his monthly expenses of mortgage \$1,418.00, food \$400.00, clothing \$100.00, utilities \$493.00, and other expenses of \$700.00 per month. In a separate statement, appellant detailed the \$700.00 per month as including \$200.00 a month for gasoline, \$24.00 for car maintenance, \$474.00 for his over-the-counter medication and special foods. He also listed monthly credit card payments of \$261.62, \$25.00, \$65.00, \$129.00, and \$163.00. Appellant listed monthly debts of \$3,754.00 on the form. He further indicated that he had additional medical expenses and averaged medical costs for his wife and himself over three years and reached an amount of \$150.00 per month. Appellant indicated that he had total monthly expenses of \$4,290.00, but the total expenses listed reach only \$3,904.00. He provided lists of medications purchased from January 1, 2001 through December 31, 2013.

By decision dated April 14, 2014, the Branch of Hearings and Review denied appellant's request for a prerecouplement hearing as untimely. The Board affirmed this decision on October 7, 2014, determining that OWCP properly denied his request for a prerecouplement hearing as untimely filed.³

On January 29, 2015 OWCP issued a final decision determining that appellant had received an overpayment of compensation in the amount of \$8,974.23, for the period August 1, 2001 to December 1, 2012, for which he was not at fault. It noted that he received FECA compensation in the amount of \$1,185.08 per month for a total household income of \$5,346.08. OWCP determined to collect the overpayment through withholding \$240.00 from appellant's continuing compensation payments beginning February 8, 2015. It noted that he had submitted an unsigned overpayment recovery questionnaire (OWCP-20) with no corroborating documentation of most expenses. OWCP found that appellant had monthly household income of \$5,346.08 and monthly expenses of \$3,790.62. It further found that he had assets in the amount of \$1,197.00. OWCP determined that appellant was not entitled to waiver as recovery would not defeat the purpose of FECA or be against equity and good conscience.

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

³ Docket No. 14-1432 (issued October 7, 2014).

performance of duty.⁴ 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.⁵ Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay.⁶ 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.⁷ When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.⁸

ANALYSIS -- ISSUE 1

The record supports that appellant received FECA wage-loss compensation beginning in 1988 and that he received SSA retirement benefits beginning on August 1, 2001. The portion of the SSA benefits he earned as a federal employee was part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit. Appellant's FECA compensation was not offset until October 19, 2013. The SSA notified OWCP of the applicable SSA rates for him and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit appellant received from August 1, 2001 through December 1, 2012. This yielded an overpayment of compensation in the amount of \$8,974.23. 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 August 1, 2001 through December 1, 2012 and finds that he received dual benefits totaling \$8,974.23.

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.⁹ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹⁰

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(d); *see B.R.*, Docket No. 15-1247 (issued October 26, 2015); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-9 (issued February 3, 1997).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17(d)(4) (April 1996).

⁹ 5 U.S.C. § 8129.

¹⁰ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

Section 10.433(a) of OWCP regulations provide that OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ According to 20 C.F.R. § 10.436, recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because 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 the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.¹² Recovery of an overpayment is considered to be against equity and good conscience under section § 10.437 of OWCP regulations when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹³ 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.¹⁴

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.¹⁵

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 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).

¹³ *Id.* at § 10.437(a).

¹⁴ *Id.* at § 10.437(b).

¹⁵ *B.R.*, *supra* note 6.

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. The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his income exceeds his monthly expenses by more than \$50.00 a month. He provided an overpayment recovery questionnaire and listed monthly income of \$5,346.08, including his FECA benefits, and monthly expenses of \$3,904.00. Appellant's income exceeds his largely unsubstantiated expenses by \$1,442.08 a month. Because he 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 to consider the second prong of the test, *i.e.*, whether he has more than \$8,000.00 in assets.

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. Appellant has not alleged that he gave up a valuable right or changed his position for the worse and has not established that recovery would be against equity and good conscience.

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.¹⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$8,974.23 overpayment by deducting \$240.00 from appellant's compensation payments every four weeks, OWCP took into consideration the financial information submitted by him resulting in a monthly surplus of \$1,442.08 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 him. Therefore, it properly required repayment of the overpayment by deducting \$240.00 from his compensation payments every four weeks.

¹⁶ 20 C.F.R. § 10.441(a).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,974.23 for the period August 1, 2001 through December 1, 2012 as offset for the federal employment portion of his social security retirement benefits was not made to his compensation benefits for which he was not at fault. The Board further finds that he is not entitled to waiver of recovery of the overpayment. The Board also finds that OWCP properly determined collection of the overpayment in the amount of \$240.00 from appellant's continuing compensation payments was appropriate.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 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