

FACTUAL HISTORY

On September 16, 1991 appellant's husband, the employee, a 41-year-old electrician, died as a result of a motor vehicle accident in the performance of duty. The initial notice of death, (Form CA-6), did not indicate whether the employee was covered by the Federal Employees Retirement Systems (FERS) or Civil Service Retirement Service.

On September 24, 1991 appellant filed a claim for death benefits (Form CA-5). OWCP awarded her and her four children death benefits and paid compensation in the amount of \$2,070.66 every 28 days commencing September 17, 1991.

Appellant completed and signed a series of annual, mandatory reports (Form EN1032) dated October 8, 2009, October 17, 2010, October 25, 2011, October 11, 2012, and November 5, 2013. She indicated on these forms that she was receiving SSA widow benefits as part of an annuity under FERS.

In a facsimile (fax) transmittal dated November 19, 2013, OWCP requested SSA to provide information regarding any dual benefits appellant may have received.

An SSA representative responded that, effective January 1, 2009, appellant's SSA rate with FERS was \$761.00 a month and without FERS it was \$496.60 a month.² Beginning December 2011, the amounts increased to \$788.40 with FERS and \$514.50 without FERS. In December 2012, appellant's SSA rate with FERS was \$801.80 and \$523.20 without FERS. In December 2013, her SSA rate with FERS was \$813.80 and \$531.00 without FERS. OWCP determined that an offset in the amount of \$261.05 should be taken from future compensation payments and reduced her 28-day compensation rate effective October 19, 2014.

In an October 22, 2014 letter, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$18,879.82 for the period January 1, 2009 to October 18, 2014 due to OWCP's failure to properly offset her FERS annuity for the SSA benefits she received. It calculated the overpayment by subtracting the amount she should have received every month (SSA monthly earnings without FERS) from the amount she did receive every month (SSA monthly earnings with FERS) and multiplying that amount by the number of months she received that overpayment amount. OWCP indicated that from January 1, 2009 to November 30, 2011 appellant was overpaid \$264.40 for 35 months for a total of \$9,254.00. From December 1, 2011 to November 30, 2012 appellant was overpaid \$273.90 for 12 months for a total of \$3,286.80. From December 1, 2012 to November 30, 2013 she was overpaid \$278.60 for 12 months totaling \$3,343.20. From December 1, 2013 to September 30, 2014 appellant was overpaid \$282.80 for 10 months for a total of \$2,828.00. From October 1 to 18, 2014 she was overpaid \$167.82. Based on these calculations, OWCP determined that appellant was overpaid in the total amount of \$18,879.82 for the period January 1, 2009 to October 18, 2014.

OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment because she was not aware, nor could have reasonably been aware,

² The offset was effective January 1, 2009 because that was the month that appellant turned 62 years of age.

that she was not entitled to dual compensation benefits. It advised her that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the recovery of the overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Appellant was advised that she had 30 days to request a telephone conference, a financial decision based on the written evidence, or a precoupment hearing.

On November 6, 2014 appellant requested a telephonic precoupment hearing and waiver of recovery of the overpayment. She indicated that she quit her job in 2009 based on her combined SSA and OWCP benefits and lost \$51,564.00 in annual earnings. Appellant explained that she would not have quit her job if she had known her monthly income would have been less. She further reported that she bought a house based on her anticipated income for the rest of her life and also had to buy a \$1,800.00 furnace. Appellant noted that she had \$4,850.00 in credit card debt that she paid off monthly and that \$15,000.00 of her investments were designated for a new car. She stated that since 2009 her portfolio had fallen from \$300,989.00 to \$273,044.00 and she was concerned that this would be insufficient to support her for the rest of her life.

In a completed Form OWCP-20, appellant reported total monthly income of \$3,540.70, which included \$708.00 in SSA benefits, \$2,273.70 in FECA benefits, and \$559.00 in reinvested dividends. She also reported approximately \$3,184.04 in monthly household expenses³ and did not list any outstanding debts. Appellant indicated the following assets: \$25.00 cash on hand, \$18,370.00 in a checking account, \$3,500.00 in a savings account, and \$273,044.00 in investments for a total of \$294,044.00 in assets. She submitted various financial documents supporting these figures.

A telephonic precoupment hearing was held on October 5, 2015. Appellant stated that she went to the SSA office, but they were unable to verify the figures on which OWCP based its overpayment calculations. She also noted that it took OWCP five years to correct the dual benefits and that the overpayment occurred at no fault of her own. Appellant again asserted that she would not have quit her job and suffered a loss of income of \$55,000.00 in wages if she had known what her monthly income would actually be based on compensation benefits. The hearing representative went through the financial information appellant provided in her completed Form OWCP-20 for appellant to verify its accuracy.

In a January 4, 2013 decision, the hearing representative affirmed the fact and amount of overpayment with modification. She noted that appellant received dual benefits from SSA and OWCP for the period January 1, 2009 to October 18, 2014 and accordingly, received an overpayment of compensation. The hearing representative noted, however, that OWCP calculated appellant's total overpayment amount based on the number of months overpaid, as opposed to the number of days overpaid, even though the more accurate calculation is the specific number of days overpaid. She calculated that from January 1 to November 30, 2009, the 28-day offset was \$244.06 for 334 days for a total overpayment amount of \$2,911.31 for this period. From December 1, 2009 to November 30, 2010, the 28-day offset amount was \$244.06 for 365 days for a total overpayment amount of \$3,181.52 for this period. From December 1,

³ Appellant specified \$911.04 for mortgage payment, \$430.00 for food, \$55.00 for clothing, \$750.00 for utilities, and \$1,038.00 in miscellaneous expenses.

2010 to November 30, 2011, the 28-day offset amount was \$244.06 for 365 days for a total overpayment amount of \$3,181.52 for this period. From December 1, 2011 to November 30, 2012, the 28-day offset amount was \$252.83 for 366 days for a total overpayment amount of \$3,304.86 for this period. From December 1, 2012 to November 30, 2013, the 28-day offset amount was \$257.17 for 365 days for a total overpayment amount of \$3,352.38 for this period. From December 1, 2013 to October 18, 2014, the 28-day offset was \$261.05 for 322 days for a total overpayment amount of \$3,002.03 for this period. The hearing representative totaled the various amounts and determined that appellant received an overpayment of compensation in the amount of \$18,933.61 for the period January 1, 2009 to October 18, 2014.

The hearing representative also affirmed OWCP's finding that appellant was not at fault in the creation of the overpayment. She determined that appellant was not entitled to waiver of recovery of the overpayment because recovery of overpayment would not defeat the purpose of FECA nor be against equity or good conscience. The hearing representative noted that because appellant's monthly income exceeded her expenses by \$494.51 each month, it was reasonable to deduct \$300.00 each cycle from her continuing compensation payments in order to repay the overpayment amount.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.⁴

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death 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.⁵

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.⁶ The offset of FECA benefits by SSA benefits attributable to employment under 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 benefits to determine the amount

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(d); see *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); see *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.⁷

ANALYSIS -- ISSUE 1

Effective September 17, 1991, OWCP began to pay appellant FECA wage-loss compensation benefits. Appellant reported that she began to receive SSA benefits in January 2009. The Board has found that the portion of the SSA benefits that her husband earned as a federal employee as part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.⁸ The SSA notified OWCP of the applicable SSA rates for appellant and their effective dates from January 1, 2009 to October 19, 2014. Based on these numbers, OWCP determined that the prohibited dual benefit she received during this period created an overpayment in the amount of \$18,933.61.

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period January 9, 2009 through October 18, 2014 and concludes that it properly determined that she received dual benefits totaling \$18,933.61 for this period. OWCP determined what the offset amount should have been for each 28-day compensation period, divided that number by 28 to calculate the daily amount, and multiplied that daily overpayment amount by the number of days that she received compensation at that rate. The Board has previously found that the offset amount should be calculated on a 28-day basis, rather than on a monthly basis.⁹ Thus, the Board finds that OWCP properly calculated that appellant was overpaid in the amount of \$18,933.61.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰ 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

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

⁷ See *P.G.*, Docket No. 13-0589 (issued July 9, 2013).

⁸ *Supra* note 6. See also *L.B.*, Docket No. 12-1202 (issued February 6, 2013); *D.P.*, Docket No. 09-64 (issued August 10, 2009).

⁹ See *C.N.*, Docket No. 16-0134 (issued March 8, 2016).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings account, mutual funds, and certificates of deposits.¹³ Additionally, 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 or when any individual, in reliance on such payment 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 show 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 An individual must show that he or she made a decision she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.¹⁶

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 FECA or be against equity and good conscience. The information will also be used to determine the repayment schedule, if necessary. 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.¹⁷

ANALYSIS -- ISSUE 2

As OWCP found that as appellant was without fault in the creation of the overpayment, it must consider whether she was eligible for consideration of waiver of recovery. Although appellant was without fault in the creation of the overpayment, repayment of the overpayment will still be required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or recovery of the overpayment would be against equity and good conscience.

The Board finds that recovery of overpayment in this case would not defeat the purpose of FECA. OWCP reviewed appellant's income, expenses, and assets as detailed in her completed overpayment recovery questionnaire (Form OWCP-20) received on November 18, 2014. Appellant reported total monthly income of \$3,540.70 and monthly expenses of \$3,184.04. The Board notes that as her monthly income exceeds her monthly

¹² 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (June 2009).

¹³ *Id.* at Chapter 6.200.6a(4)(a) (June 2009). *See S.S.*, Docket No. 12-1302 (issued February 22, 2013).

¹⁴ 20 C.F.R. § 10.437(a)(b).

¹⁵ *Id.*

¹⁶ *Id.* at § 10.437(b)(2); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

¹⁷ *Id.* at § 10.438.

expenses by over \$50.00, she does not need substantially all of her current income to meet ordinary and necessary living expenses. Furthermore, appellant reported assets of \$25.00 cash on hand, \$18,370.00 in a checking account, \$3,500.00 in a savings account, and \$273,044 in investments for a total of \$294,939 in assets. The Board finds, therefore, that she is not entitled to waiver because her assets far exceed her \$10,880.00 resource base.¹⁸

The Board further finds that recovery of overpayment in this case would not be against equity or good conscience. Appellant contends on appeal that recovery of the overpayment should be waived because she detrimentally relied on the additional funds. She has asserted that she made decisions, including to stop working and to buy a house, based on her anticipated monthly income. Appellant alleges that she would not have made those decisions if she had known that her monthly income was actually \$261.05 less than what was represented to her. The claimant must show that she would not have made that decision if OWCP had informed her of the compensation she was correctly entitled.¹⁹

In *O.G.*,²⁰ the claimant received an overpayment of compensation and argued detrimental reliance indicating that once OWCP informed him how much compensation he would receive weekly, he immediately decided that he could let his two daughters continue to attend their colleges. His assets exceeded \$200,000.00, including a second, nonincome-producing property and a boat. The Board found that, although the employee showed that the amount he was overpaid caused him to make a decision to his own detriment, he failed to show that he would not have made that decision if OWCP had informed him of the compensation to which he was correctly entitled. In other words, he did not establish that the \$83.06 error in his weekly pay rate made all the difference and that if he had instead received compensation benefits at the correct and slightly reduced pay rate it would not have been possible for his daughters to remain at their respective universities.

In contrast, OWCP procedures provide that if a widow entered her daughter in college because the difference in monthly benefits between her entitlement to a Civil Service death annuity and her entitlement to a FECA death annuity made this possible and it was subsequently discovered that all FECA benefits were paid in error, she would have had no other funds from which to pay her daughter's tuition. The widow would qualify for waiver of recovery of the overpayment of compensation under the principle of detrimental reliance as she was in a worse position financially than if she and her daughter had never been entitled to FECA benefits because she entered her daughter in college and incurred a financial obligation in spending the benefits.²¹

¹⁸ As noted, the resource base is \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. For appellant and one son (\$8,000.00) must be added to three other children (\$960.00 x 3 = \$2,880.00) for a total of \$10,880.00. *Supra* note 11.

¹⁹ *See O.G.*, Docket No. 11-1112 (issued January 20, 2012).

²⁰ Docket No. 11-1112 (issued January 20, 2012).

²¹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.b(3) (June 2009), Example 3.

To establish detrimental reliance, appellant must show that the amount she was overpaid caused her to make a decision, to her detriment, that she would not have otherwise made. The record establishes that she has over \$294,044.00 in assets in addition to \$3,540.70 in monthly income. Appellant did not show that OWCP's failure to conduct a proper FERS offset for SSA benefits she received for the period January 1, 2009 to October 18, 2014 made all the difference and that, if she had instead received compensation benefits at the correct rate, it would not have been possible for her to stop working, or that she would not have purchased a new home or a new furnace nor would she have committed to taking a cruise. She has not shown that her assets and income would have precluded the specific purchases at issue. Further, appellant has not shown that the amount of the overpayment, when compared to her other income and assets, would have resulted in her inability to leave her prior employment. As she has failed to present any evidence or compelling argument that her specific purchases and her decision to stop all work were reliant upon her benefit rate at the improper amount, she has not met her burden of proof to establish her claimed detrimental reliance.

Furthermore, the Board has previously explained that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit.²²

Appellant has not submitted any evidence to establish that she gave up a valuable right or changed her position for the worse in detrimental reliance on the prohibited dual benefits. Accordingly, she does not qualify for waiver of recovery of the overpayment under the principle of detrimental reliance. As appellant did not 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

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.”²³

The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.²⁴

²² *Robert Crow*, 38 ECAB 253 (1986).

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

²⁴ *See Howard R. Nahikian*, 53 ECAB 406 (2002).

ANALYSIS -- ISSUE 3

OWCP determined that the overpayment should be recovered from appellant's continuing compensation payments by deducting \$300.00 every 28 days. The Board finds that OWCP took into consideration the financial information of record and the factors set forth in section 10.441(a). OWCP considered that appellant had assets totaling \$294,939.00 and that her monthly income exceeded her expenses by \$494.51. It followed collection guidelines by requiring installments large enough to collect the debt promptly and minimizing any resulting hardship on her. Accordingly, the Board will affirm OWCP's determination regarding rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$18,933.61 for the period January 1, 2009 through October 18, 2014. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and directed recovery of overpayment by deducting \$300.00 from her continuing compensation every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 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