

husband's health problems and failed to adequately address his medical bills. Appellant also notes that, now that he has died, she had to discontinue carrying him as a dependent under FECA, which resulted in decreased income under FECA.

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior decisions are herein incorporated herein by reference. The relevant facts are as follows.

On June 13, 2007 OWCP accepted appellant's October 16, 2000 claim for anxiety and depressive disorder. Appellant received retroactive wage-loss compensation benefits from April 24, 2001 and continuing on the periodic rolls. She completed regular EN1032 forms.

The Social Security Administration (SSA), in a form dated July 31, 2014, informed OWCP of the amount of retirement benefits appellant received, with FERS and also the hypothetical amount that she would have received without FERS, as of September 1, 2009.

By letter dated August 27, 2014, OWCP informed appellant that she received an overpayment because she had received probative dual benefits under FECA and the SSA. It noted that, for the period September 1, 2009 through August 23, 2014, she received dual compensation in the amount of \$19,366.70. OWCP calculated this overpayment as follows: for the period September 1, 2009 through November 30, 2011, a period of 821 days, appellant received an overpayment of \$7,724.62; for the period December 1, 2011 through January 31, 2012, a period of 62 days, appellant received an overpayment of \$604.40; for February 1, through November 30, 2012, a period of 304 days, appellant received an overpayment of \$3,532.75; for the period December 1, 2012 through November 30, 2013, a period of 365 days, appellant received an overpayment of \$4,313.82; and for the period December 1, 2013 through August 23, 2014, a period of 266 days, appellant received an overpayment in the amount of \$3,191.12. The total of these overpayments is \$19,366.70.

On July 7, 2015 OWCP issued a preliminary determination that appellant had been overpaid in the amount of \$19,366.70 because she received dual benefits from OWCP and SSA for the period September 1, 2009 through August 23, 2014, without FERS offset amount applied to her OWCP benefits.³ It found that she was without fault in creating the overpayment.

² Docket No. 02-1239 (issued January 16, 2003) (the Board remanded the case as appellant had submitted sufficient evidence to raise an uncontroverted inference of causal relationship in appellant's claim for an emotional condition and therefore OWCP was required to further develop the case record); Docket No. 08-1689 (issued June 19, 2009) (the Board found that OWCP failed to meet its burden of terminating appellant's medical and disability benefits as of May 31, 2002).

³ The Board notes that the cover letter to this determination and the January 20, 2016 decision, contained a typographical error by noting the start date of the overpayment as September 1, 2011. The accompanying memorandum explaining how the overpayment was calculated noted the correct date of September 1, 2009 and explained to appellant how the different periods of overpayment were calculated. As such the typographic error is harmless error. The Board further notes that although OWCP calculated \$19,366.70 the sum total of the overpayments is actually \$19,366.71.

Appellant was afforded 30 days to respond to the preliminary determination of an overpayment and to provide financial information.

By letter dated July 14, 2015, appellant, through counsel, requested a prerecoupment hearing before an OWCP hearing representative.

On October 16, 2015 appellant completed the financial forms. The prerecoupment hearing was conducted by telephone on November 2, 2015. Appellant alleged that she was without fault in the creation of the overpayment. She noted that her husband had at least 67 strokes and she had been dealing with his health issues. Appellant noted that they had many medical bills, but did not have secondary insurance to cover beyond Medicare coverage. At the hearing, she discussed her financial forms in detail. Appellant noted that the monthly income from SSA was \$1,383.90 for her husband and \$1,160.30 for herself. She noted that she received \$2,079.00 every 28 days under FECA. Appellant noted that they received \$1,400.00 monthly in rental income. With regard to expenses, she noted that mortgage was \$952.72 monthly (which included property tax), food was \$450.00 per month, and clothing was \$75.00 per month. Appellant noted utilities of \$832.00 monthly for the multiple properties and \$1,818.00 for miscellaneous household expenses, medical, dental, automobile, and other transportation costs. She noted that she paid \$80.00 to \$100.00 a month on her American Express Card, \$100.00 on Home Depot, and \$50.00 to \$100.00 on Sam's Club. Appellant paid a mortgage on her one rental property of \$944.64 and for her second rental property \$512.55 in a home equity loan. In a supplemental statement, she noted that her monthly expenses including mortgage for her primary residence, with taxes was \$925.72, electricity was \$202.00, gas was \$90.00, house telephone/wireless/cable was \$283.00, and water was \$60.00.

Regarding assets, appellant testified that she owned two rental properties valued at \$80,000.00 and \$125,000.00, she had cash on hand of less than \$200.00, \$19,000.00 in a checking account, and \$376.00 in savings.

By decision dated January 20, 2016, OWCP finalized the determination that appellant received an overpayment of compensation in the amount of \$19,366.70. It also determined that although she was not at fault in the creation of the overpayment, she was not entitled to a waiver of recovery of the overpayment as repayment would not defeat the purpose of FECA or be against equity and good conscience. Finally, the hearing representative related that the overpayment would be collected by deducting \$700.00 from each of appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of FECA provides that, in pertinent part, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴

⁴ 5 U.S.C. § 8129(a).

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 attributable to his or her federal service.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 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.⁷

ANALYSIS -- ISSUE 1

Appellant received both wage-loss compensation under FECA and SSA retirement benefits from September 1, 2009 through August 23, 2014. As previously noted, the portion of the SSA benefits she received as a federal employee as part of her FERS retirement package concurrently with the benefits she received under FECA is a prohibited dual benefit.⁸ 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 she received from September 1, 2009 through August 23, 2014 created an overpayment of compensation in the amount of \$19,366.70.⁹

The Board has reviewed OWCP's calculations of benefits received for the period September 1, 2009 through August 23, 2014 and finds that OWCP properly determined that appellant received dual benefits totaling \$19,366.70 for this period, thus creating an overpayment of compensation in that amount.

⁵ *Id.* at § 8116(d). See *D.S.*, Docket No. 12-689 (issued October 10, 2012); *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 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (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 also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁸ See *P.G.*, Docket No. 13-589 (issued July 9, 2013); *id.*

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

LEGAL PRECEDENT -- ISSUE 2

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁰

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, and mutual funds) 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. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has 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.¹¹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹²

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.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

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment 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.¹⁵

¹⁰ 20 C.F.R. § 10.434. See 5 U.S.C. § 8129(b).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). See *Miguel A. Muniz*, 54 ECAB 217 (2002); *id.* at §§ 10.436 and 10.437.

¹² *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹³ 20 C.F.R. § 10.437(a).

¹⁴ *Id.* at § 10.437(b).

¹⁵ *Id.*

The hearing representative determined that appellant's income exceeded her debt by \$727.20 per month. He noted that she had income of approximately \$6,022.20 per month (\$2,543.20 SSA benefits, \$2,079.00 in FECA benefits, and \$1,400.00 rental income). The hearing representative listed appellant's expenses as \$5,295.00 per month, which included \$2,120.00 for rent/mortgage including property taxes; \$450.00 for food; \$75.00 for clothing; \$832.00 for utilities; and other expenses of \$1,818.00 (appellant had large medical expenses due to her husband having numerous strokes). As this leaves her with a surplus of \$727.20, the Board finds that she is not entitled to waiver of recovery of the overpayment as she did not need substantially all of her income to meet current ordinary and necessary expenses.¹⁶ The Board also notes that appellant's assets, which include \$19,000.00 in a checking account, exceed the resource base.¹⁷

The Board therefore finds that OWCP properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of FECA. Moreover, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, OWCP properly determined that recovery would not be against equity and good conscience. OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provide that, 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 hardship.¹⁸

ANALYSIS -- ISSUE 3

The hearing representative required repayment of the \$19,366.70 overpayment by deducting \$700.00 from appellant's continuing compensation payments every four weeks. The Board finds that OWCP abused its discretion in setting the amount of recovery of the overpayment because there was no discussion of the relevant factors found in section 10.441 of the implementing federal regulations nor did the hearing representative apply the factors to her specific financial circumstances.¹⁹ The hearing representative simply declared, after denying

¹⁶ See *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

¹⁷ *Supra* note 11.

¹⁸ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. See *Desiderio Martinez*, 55 ECAB 245, 251 (2004); see also *J.M.*, Docket No. 10-1913 (issued July 11, 2011).

¹⁹ *Id.* See also *L.M.*, Docket No. 12-405 (issued October 1, 2012).

waiver of recovery of the overpayment, that OWCP should commence deduction from appellant's continuing payments in the amount of \$700.00.²⁰

The Board will set aside the January 20, 2016 finding with respect to the issue of recovery only. On remand, OWCP should evaluate the factors under section 10.441 and provide justification for determining the recovery amount. Following any necessary further development, it shall issue a *de novo* decision on that aspect of appellant's claim.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,366.70 and properly denied waiver of recovery of the overpayment. However, the Board finds that OWCP abused its discretion with regard to determining the amount of recovery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2016 is affirmed in part and set aside in part and remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 7, 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

²⁰ The Board notes that it cannot consider any new financial information submitted by appellant after the January 20, 2016 decision, as the Board's review is limited to evidence in the case record at the time OWCP made the decision over which the Board has jurisdiction. *See* 20 C.F.R. § 501.2(c)(1).