



## **FACTUAL HISTORY**

On April 30, 2014 appellant, then a 66-year-old letter carrier, filed a recurrence of disability claim (Form CA-2a) alleging a recurrence of disability commencing March 21, 2014.<sup>2</sup> OWCP developed the claim as a new injury since he described new work activities such as casing mail. The claim was accepted for displacement of C6-7 intervertebral disc, cervical disc degeneration, cervical spinal stenosis, and cervical radiculitis. OWCP paid wage-loss compensation benefits, effective March 21, 2014.

OWCP requested that the social security administration (SSA) provide information regarding appellant's SSA benefits. On September 17, 2015 it received a Federal Employee Retirement System (FERS), SSA dual benefit worksheet with information regarding the SSA rate with FERS, and without FERS. According to the SSA, as of January 2014 the SSA rate with FERS was \$1,752.40 and without FERS was \$992.40. As of December 2014, with FERS the rate was \$1,781.10 and without FERS was \$1,009.20.

The record contains a November 18, 2015 offset calculation regarding appellant's compensation from March 21, 2014 to November 14, 2015. For the period March 21 to November 30, 2014, OWCP found that the monthly offset for FERS was \$759.00 or \$700.62 based on a 28-day compensation payment. For this period the FERS offset was \$5,980.28. With respect to the period December 1, 2014 to November 14, 2015, the FERS offset was \$712.52 every 28-day compensation payment, or \$8,881.05 for the period, resulting in a total offset of \$14,861.33.

OWCP issued a preliminary determination on December 2, 2015 that an overpayment in the amount of \$14,861.33 had been created from March 21, 2014 to November 14, 2015. The letter explained that part of the money received from SSA was due to FERS and was therefore a dual benefit to appellant that is prohibited under FECA. With respect to fault, OWCP made a preliminary determination that he was not at fault. Appellant was notified that he could request a telephone conference with the district, request that OWCP issue a final decision on the written record, or request a pre-recoupment hearing before a representative of the Branch of Hearings and Review.

In a note received on January 4, 2016, appellant indicated that he had approximately \$100,000.00 in his Thrift Savings Plan (TSP) retirement account. On January 5, 2016 he submitted a Form OWCP-20 Overpayment Recovery Questionnaire dated December 30, 2015 and supporting financial documents. Appellant indicated on the form he did not understand the FERS offset or why it should affect his compensation. He indicated that he was told by SSA that he could get benefits without penalty, that he had not retired, and he thought FERS would not affect his benefits. As to monthly income, appellant reported \$995.00 from his wife and \$1,786.00 in SSA benefits. He listed expenses that included rent or mortgage of \$616.33, with a number of credit card payments and a bank loan. Appellant included copies of tax documents, credit union bank accounts, statements and bills, and reported \$275.00 in cash and bank account assets. A credit union statement dated July 13, 2015 indicated that he had received a \$5,000.00

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<sup>2</sup> Appellant also had a traumatic injury claim, accepted on December 20, 2010 for right shoulder tendinitis, right shoulder rotator cuff tear, and exacerbation of cervical degenerative disc disease under OWCP File No. xxxxxx802.

loan, and was required to pay back \$5,242.05 as of January 15, 2016. One of the documents was dated December 21, 2015 from the employing establishment with respect to an amount due of \$3,552.05. Included in the documents submitted on January 5, 2016 was a request for a telephone conference.

By decision dated January 20, 2016, OWCP finalized its determination that an overpayment of \$14,861.33 was created. It denied waiver based on an analysis of monthly income versus expenses. OWCP found that appellant had \$5,536.26 in monthly income, with \$995.00 from the spouse, \$1,786.00 from SSA, and \$2,755.26 in compensation. For monthly expenses, it calculated \$5,044.23. This included mortgage, clothing, food, utilities, insurance, medical expenses, credit card payments, and a bank loan of \$5,200.00. In addition, OWCP had question marks with respect to a \$3,552.05 amount to the employing establishment and another credit union loan of \$5,242.05.<sup>3</sup> It noted that there was no documentation regarding payments for these debts, but even if \$100.00 per month were allocated, appellant would still have \$282.03 in excess monthly income. As to recovery of the overpayment, OWCP found that it would be reasonable to deduct \$150.00 from continuing compensation payment.

### **LEGAL PRECEDENT -- ISSUE 1**

5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by “the amount of any such [SSA] benefits payable that are attributable to federal service.” OWCP’s procedures provide that, while SSA benefits are payable concurrently with FECA benefits, in disability cases, FECA benefit will be reduced by SSA benefits paid on the basis of age and attributable to the employee’s federal service.<sup>4</sup> It obtains 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 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.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, OWCP found that an overpayment of \$14,861.33 was created from March 21, 2014, when appellant began receiving wage-loss compensation, through November 14, 2015. The overpayment in this case is based on the evidence received from the SSA with respect to benefits paid to appellant. The record indicates that while appellant was receiving compensation for total disability, he received SSA benefits. As the above legal precedent indicates, a claimant cannot receive both compensation for wage loss and the portion

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<sup>3</sup> Both the \$5,200.00 and the \$5,242.05 appear to be a reference to the \$5,000.00 credit union loan on July 13, 2015.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (June 2009). This same section of the manual explains that if social security benefits are paid for disability rather than age, SSA benefits paid for disability shall be reduced by FECA compensation payable.

<sup>5</sup> FECA Bulletin No. 97-09 (issued February 3, 1997). *See also P.G.*, Docket No. 13-589 (issued July 9, 2013).

of SSA benefits that are attributable to federal service for the same period. The information provided by SSA was that appellant had received SSA benefits some of which were attributable to federal service during the period March 21, 2014 to November 14, 2015. Therefore, OWCP properly found that an overpayment of compensation was created.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of SSA benefits attributable to federal service. For the period March 21 to November 30, 2014, the portion of SSA benefits attributable to federal service was \$759.00 per month, or \$700.62 every 28 days. For the period December 1, 2014 to November 14, 2015, the amount was \$712.52. OWCP provided its calculations that for the period March 21, 2014 to November 14, 2015, appellant had received \$14,861.63 in SSA benefits attributable to federal service. No contrary evidence was provided. The Board finds that the evidence of record is sufficient to establish an overpayment of \$14,861.63.<sup>6</sup>

Appellant did not contest that he received SSA benefits during the period March 21, 2014 to November 14, 2015. Rather, he questioned why there was a FERS offset, since he had not retired, and he had been told by SSA that he could get benefits without penalty. The issue is not whether he had retired, as appellant was eligible for SSA benefits because of his age, not retirement. The reference to FERS is with respect to the portion of those benefits that are attributable to federal service. For the above reasons, the Board finds that appellant had received a prohibited dual benefit in the amount of \$14,861.33 and an overpayment of compensation was created.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA<sup>7</sup> provides: “Adjustment or recovery 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 [FECA] or would be against equity and good conscience.”<sup>8</sup> Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. 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 Title 20 of the Code of Federal Regulations.

According to section 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 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

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<sup>6</sup> When SSA provides a proper calculation of SSA benefits attributable to federal service during a period FECA compensation was received, an overpayment is properly found in that amount. *See W.C.*, Docket No. 15-1280 (issued November 13, 2015).

<sup>7</sup> *Supra* note 1.

<sup>8</sup> 5 U.S.C. § 8129(b).

determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>9</sup> For waiver under the “defeat the purpose” of FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.<sup>10</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>11</sup>

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the 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.

### ANALYSIS -- ISSUE 2

Appellant submitted a Form OWCP-20 and submitted documents that included bank statements and loan information. The initial question is whether recovery of the overpayment would defeat the purpose of FECA. The Board notes that appellant acknowledged that he had approximately \$100,000.00 in his TSP retirement account. A claimant’s contributions to TSP and earnings from those contributions are considered to be assets which OWCP may consider in determining waiver.<sup>12</sup> Therefore, the evidence indicates that appellant’s assets exceed the resource base and recovery would not defeat the purpose of FECA. In addition, OWCP reviewed the financial evidence submitted and provided a list of income and expenses. The expenses included housing, food, clothing, insurance, medical expenses, as well as several credit cards. OWCP included a minimum payment on a bank loan, which represented a credit union loan of \$5,000.00. The second reference to a loan of \$5,242.05 appears to be the same loan, as that is that amount appellant was required to pay back on the \$5,000.00 loan. The nature of the amount owed to the employing establishment of \$3,552.05 is unclear, but even if a minimum payment was included, he had over \$200.00 excess income over expenses. The Board finds that OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA.

Furthermore, there is no evidence that recovery would be against equity and good conscience. The factors considered regarding financial hardship are substantially the same as those for defeat the purpose of FECA and, as noted above, appellant has sufficient available assets and excess income.<sup>13</sup> Appellant has not shown that he gave up a valuable right or changed his position for the worse in reliance on compensation payments. The Board finds that the

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<sup>9</sup> 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

<sup>10</sup> See *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>11</sup> *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>12</sup> *C.W.*, Docket No. 11-1338 (issued December 19, 2011).

<sup>13</sup> See *James K. Fitzgerald*, 51 ECAB 659 (2000).

evidence of record does not establish that recovery of the overpayment would defeat the purpose of FECA, or be against equity and good conscience. Therefore, OWCP properly denied waiver of the overpayment in this case.

### **LEGAL PRECEDENT -- ISSUE 3**

20 C.F.R. § 10.441 provides:

“Whenever 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 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 other relevant factors, so as to minimize any hardship.”<sup>14</sup>

### **ANALYSIS -- ISSUE 3**

OWCP reviewed the financial circumstances of appellant based on the evidence submitted. As discussed above, it had included a duplicate bank loan and still found that he had over \$200.00 in excess income over expenses. OWCP made a reasonable determination that the overpayment could be recovered by deducting \$150.00 from continuing compensation without undue financial hardship.

As the above regulations indicate, OWCP takes into account the probable extent of future payments, financial circumstances of appellant, and other relevant factors. The record indicates that OWCP did consider relevant factors to minimize hardship while recovering the overpayment promptly.<sup>15</sup> The Board finds no evidence that OWCP abused its discretion with respect to recovery of the overpayment.

On appeal, appellant notes that he requested a telephone conference with respect to the overpayment. The December 2, 2015 preliminary determination provided that he could request a telephone conference within 30 days, but in this case the request was received on January 5, 2016, more than 30 days after the preliminary determination.<sup>16</sup> Appellant submitted significant financial evidence on that date, and the Board has considered the evidence of record before OWCP at the time of the January 20, 2016 decision. On appeal, he also referred to OWCP reaching a decision without properly considering all the evidence, and not responding to telephone calls and letters. It is not clear what specific evidence or requests to which appellant is referring. The evidence of record before OWCP as of January 20, 2016 has been reviewed, and for the reasons discussed, the Board finds the evidence of record supports a finding of an

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<sup>14</sup> 20 C.F.R. § 10.441.

<sup>15</sup> See *E.J.*, Docket No. 15-1734 (issued April 12, 2016).

<sup>16</sup> See *Percy L. Stowall*, Docket No. 05-0459 (issued September 8, 2005) (request for telephone conference received more than 30 days after preliminary determination and was untimely). In the present case, the 30<sup>th</sup> day was January 1, 2016, a Friday and Holiday. Monday, January 4, 2016 was the next workday.

overpayment in the amount of \$14,861.33, and that recovery of the overpayment in the amount of \$100.00 a month would not defeat the purpose of FECA, or be against equity and good conscience.

**CONCLUSION**

The Board finds that the record establishes an overpayment of \$14,861.33 was created from March 21, 2014 to November 14, 2015. The Board further finds that OWCP properly denied waiver of the overpayment, and OWCP properly found that the overpayment would be recovered by deducting \$150.00 from continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 20, 2016 is affirmed.

Issued: November 15, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board