

directed recovery of the overpayment by withholding \$207.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

OWCP accepted that on or before December 18, 1997 appellant, then a 50-year-old medical instrument technician, sustained obstructive lung disease due to occupational exposure to glutaraldehyde. Appellant stopped work on December 18, 1997 and returned to work shortly thereafter with restrictions against chemical exposure. On November 16, 1998 she claimed a recurrence of disability (Form CA-2a) commencing October 19, 1998 due to additional chemical exposures at work. Appellant stopped work on October 19, 1998 and did not return.

Appellant received compensation on the daily rolls from October 19, 1998 to July 17, 1999. OWCP placed her case on the periodic rolls, effective July 18, 1999. Appellant remained under medical treatment for occupationally-related respiratory disease.

The employing establishment provided a June 12, 1994 Request for Personnel Action (Form SF-50) demonstrating that appellant began work in 1986 as a vocational nurse. Appellant was covered by the Federal Employees Retirement System (FERS).

On August 3, 1999 OWCP informed appellant of her obligation to report "any retirement income you receive from any Federal agency. This is because a person who receives compensation benefits under FECA is not permitted to receive benefits under the Civil Service Retirement System or FERS." It explained that if she was covered under FERS, "OWCP must deduct from your compensation entitlement at least part of any [s]ocial [s]ecurity [r]etirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in [s]ocial [s]ecurity retirement benefits. Therefore, advise OWCP immediately upon filing for or receiving [s]ocial [s]ecurity [r]etirement benefits." Appellant signed the form (Form EN1049) on August 16, 1999. She executed a direct deposit authorization on August 17, 1999.

Appellant completed affidavits of earnings and employment (Forms EN1032) annually from August 1999 through March 2015.³ She reached age 65 on April 15, 2012, converting the Social Security Administration (SSA) disability benefits she received to age-related retirement benefits.

On April 3, 2015 OWCP requested information from the SSA regarding appellant's SSA age-related retirement benefits. It forwarded a form entitled FERS and SSA Dual Benefits Calculation, which requested the effective date of her social security benefits, as well as separate calculations of the SSA rate with FERS and without FERS.

On September 8, 2015 SSA provided the requested information, noting the pay rates for the following periods with and without FERS: April 1 to November 30, 2013, \$665.30 without and \$1,161.40 with; December 1, 2013 to November 30, 2014, \$686.60 without and \$1,178.80 with; and December 1, 2014 through September 19, 2015, \$686.60 without and \$1,198.80 with.

³ Appellant retired from the employing establishment in early 2003. OWCP adjusted her compensation payments to reflect the change in postretirement life insurance premiums.

In an October 6, 2015 memorandum, OWCP calculated that, based on the fiscal information provided by SSA on September 8, 2015, a \$14,997.92 overpayment of compensation was created in appellant's case for the period April 1, 2013 to September 19, 2015.⁴

By notice dated October 19, 2015, OWCP advised appellant of its preliminary determination that she had received a \$14,997.92 overpayment of compensation because she received FECA benefits simultaneously with FERS retirement payments from April 1, 2013 through September 19, 2015. It provided a calculation of the overpayment, noting that she was without fault in its creation, as she knew or should have known that she was not entitled to the dual payments received. OWCP afforded appellant 30 days to contest the fact and amount of over payment and to provide financial information. Appellant did not respond.

By decision dated November 27, 2015, OWCP finalized that appellant had received an overpayment of compensation in the amount of \$14,997.92 for the period April 1, 2013 through September 19, 2015 as she had received FERS retirement benefits simultaneously with FECA benefits. It found that she was without fault in the creation of the overpayment. Appellant did not contest the finding of overpayment. As she did not submit financial information as requested, OWCP was unable to determine whether she needed essentially all of her income to meet ordinary and necessary living expenses. Therefore, OWCP determined that collection of the overpayment would not defeat the purpose of FECA. It further found that recovery of the overpayment would not be against equity and good conscience as appellant did not submit evidence of financial hardship, that she relinquished a valuable right, or changed her position for the worse based on her compensation payments. OWCP directed recovery of the overpayment by deducting \$207.00 every 28 days from her continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ 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.⁶

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 received 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.⁷ OWCP

⁴ OWCP calculated the overpayment as follows: \$3,990.61 from April 1 through November 30, 2013; \$6,059.80 from December 1, 2013 through November 30, 2014; and \$4,947.51 from December 1, 2014 through September 19, 2015.

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

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 the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁸ Section 8116(d)(2) provides that the receipt of SSA benefits "does not affect the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained obstructive lung disease due to occupational chemical exposures. Appellant's June 12, 1994 personnel action form (Form SF-50) documented her enrollment in the FERS retirement plan. She stopped work on October 19, 1998.

Appellant received FECA wage-loss compensation and SSA age-related retirement benefits concurrently from April 1, 2013 to September 19, 2015. OWCP requested, and SSA provided, information regarding her applicable SSA rates and their effective dates. Based on these rates, it determined that appellant received a prohibited dual benefit from April 1, 2013 to September 19, 2015 in the amount of \$14,997.92, because she received compensation from OWCP and SSA benefits without an appropriate offset. The offset provision of section 8116(d)(2) applies to SSA benefits that are attributable to federal service. Appellant received SSA benefits under the FERS system. As noted, the receipt of concurrent FECA and FERS benefits attributable to federal employment is a prohibited dual benefit.¹⁰ As she received SSA benefits based on her federal service concurrently with disability compensation from OWCP without an appropriate offset, she received an overpayment of compensation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that it properly determined that she received dual benefits totaling \$14,997.92, creating an overpayment of compensation in that amount. The Board notes that, on appeal, she does not contest the fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs because of an error of fact of law, adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹¹ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(3) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁹ 5 U.S.C. § 8116(d)(2).

¹⁰ *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

¹¹ 5 U.S.C. § 8129(a).

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.

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations¹² provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (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 beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual.¹³ 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).¹⁴

Recovery of an overpayment is 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.¹⁵ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered 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. This information will also be used to determine the repayment schedule, if necessary.¹⁷

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation and considered whether she was entitled to waiver of recovery. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience. In

¹² 20 C.F.R. § 10.436.

¹³ *Id.* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹⁴ *Id.*

¹⁵ *Id.* at § 10.437(b).

¹⁶ *See supra* note 13, Chapter 6.200.6.b(3) (October 2004). *C.P.*, Docket No. 14-975 (issued September 11, 2014).

¹⁷ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the established limit as determined by OWCP's procedures.¹⁸

OWCP found that as appellant failed to submit any financial information, it could not properly consider waiver of recovery of the overpayment. It therefore found that the overpayment was not subject to waiver.

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no argument that she relied upon the incorrect payments to her detriment or evidence she would experience severe financial hardship attempting to repay the debt. Consequently, OWCP properly denied waiver of recovery of the overpayment.

On appeal, appellant requests waiver of recovery due to financial hardship. As explained above, she failed to provide her financial information as requested by OWCP. Appellant did not respond to the preliminary determination of overpayment. OWCP therefore properly found that the overpayment was not subject to waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of the regulations provide.

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 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.¹⁹

ANALYSIS -- ISSUE 3

OWCP reduced appellant's future compensation benefits by \$207.00 per month, taking into account the amount of the compensation, as well as the factors set forth in section 10.441. It found that in the absence of any financial information from her, this method of recovery would minimize any resulting hardship on her. The Board finds that OWCP properly required repayment of the overpayment by deducting \$207.00 from appellant's ongoing compensation payments every four weeks.

¹⁸ *Id.* at § 10.436.

¹⁹ 20 C.F.R. § 10.441.

CONCLUSION

The Board finds that appellant received a \$14,997.92 overpayment of compensation for the period April 1, 2013 through September 19, 2015, for which she was not at fault. The Board further finds that the overpayment was not subject to waiver of recovery. The Board further finds that OWCP properly directed recovery of the overpayment by withholding \$207.00 from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 27, 2015 is affirmed.

Issued: October 14, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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