

FACTUAL HISTORY

On October 22, 2002 appellant, then a 55-year-old language instructor, injured his knees at work. OWCP initially accepted left knee sprain and internal derangement of the left knee. Later, the claim was expanded to include consequential aggravation of right knee arthritis. Appellant stopped work on April 28, 2008. He received disability compensation on the supplemental rolls beginning January 23, 2007 and on the periodic rolls effective June 8, 2008. On June 23, 2008 appellant was provided a Form EN1049 which explained that appellant needed to report any retirement income he received from any federal agency.

On May 5, 2009 OWCP further advised appellant that FECA requires that a claimant's continuing compensation benefits be reduced if he begins to receive SSA retirement benefits based upon age and federal service. It noted that a failure to report receipt of such benefits to OWCP could result in an overpayment of compensation. OWCP requested that appellant advise it immediately upon being approved for or receiving SSA retirement benefits.

A December 23, 2009 letter from SSA reflected that appellant had applied for SSA benefits and that he had requested benefits beginning June 2009. A January 8, 2010 letter from SSA further advised that appellant had retired in June 2009 and noted his monthly SSA retirement benefit. Appellant provided a copy of the January 8, 2010 SSA letter with a Form EN1032 that he had completed on June 10, 2010, in which he answered OWCP's questions about his employment, dependents, and income over the previous 15 months. He responded "no" to the question of whether he received benefits from SSA as part of an annuity for federal service.² Appellant subsequently submitted annual EN1032 forms. By signing the forms, he certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of his knowledge and belief.

On July 1, 2014 OWCP requested that SSA provide information regarding appellant's SSA rate with FERS and without FERS. On July 30, 2014 SSA provided the requested information.

Using this information, OWCP on October 15, 2014 performed a FERS offset calculation which reflected a \$39,608.74 overpayment of compensation for the period June 1, 2009 to October 18, 2014 due to the failure to offset SSA benefits.³

² Each form covered the 15-month period preceding the date appellant signed each form. In Form EN1032 signed on July 22, 2011 appellant responded "yes," to the question of whether he received benefits from SSA as part of an annuity for federal service. In EN1032 forms signed on June 2012, June 15, 2013, and June 7, 2014 appellant responded "no," to the question of whether he received benefits from SSA as part of an annuity for federal service.

³ OWCP determined that there was FERS offset every 28 days of \$534.00 from June 1 to November 30, 2009, resulting in a \$3,490.07 overpayment; a \$534.00 offset every 28 days from December 1 to 31, 2009, resulting in a \$591.21 overpayment; a \$550.43 offset every 28 days from January 1, 2010 to November 30, 2011, resulting in a \$13,741.11 overpayment; a \$570.28 offset every 28 days from December 1, 2011 to November 30, 2012, resulting in a \$7,454.33 overpayment; a \$580.06 offset from December 1, 2012 to November 30, 2013, resulting in a \$7,561.52 overpayment; and a \$588.74 offset from December 1, 2013 to October 18, 2014, resulting in a \$6,770.49 overpayment. It totaled these amounts to equal a \$39,608.74 overpayment. The Board notes that the total amount calculates to \$39,608.73 rather than \$39,608.74.

On November 3, 2014 OWCP made a preliminary determination that appellant was overpaid in the amount of \$39,608.74 because he received FECA benefits concurrently with SSA retirement benefits from June 1, 2009 through October 18, 2014 without deduction of the FERS offset. It made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP gave appellant the opportunity to respond to the determination, informed him that he could request waiver of the overpayment, and advised him to submit an OWCP-20 with supporting financial documents. It advised that effective October 19, 2014 it would reduce ongoing OWCP benefits by \$588.74 every four weeks. In an accompanying November 3, 2014 memorandum, it set forth its overpayment calculation for the period at issue.

On November 20, 2014 appellant contended that the overpayment occurred through no fault of his own and requested a waiver. He argued that he reported all his income and that many years passed without OWCP saying anything. Appellant advised that he could not pay back the overpayment because he and his wife were both disabled and had many expenses. He advised that his total expenses included: \$1,800.00 for rent; \$400.00 for food; \$200.00 for clothes; \$500.00 for bills; and \$800.00 for other expenses. Appellant further advised that he had a total of \$1,822.37 in funds including: \$20.00 in cash; \$1,602.37 in his checking account; and \$200.00 in personal property and other funds. He listed monthly income that included \$725.00 SSA and provided a benefit statement from OWCP noting a net payment of \$2,655.18 from October 19 to November 15, 2014 reflecting a net income of \$3,380.18. Supporting his request, appellant submitted a garbage services bill for \$61.68, covering almost two months; a water bill for \$136.48 covering over two months; a \$41.05 monthly electric and gas bill; an \$11.81 monthly telephone bill; a monthly bank statement listing a \$2,985.89 balance; automobile insurance documents listing annual premiums for four vehicles that totaled \$2,802.00; and an October 30, 2014 receipt indicating that he paid \$1,800.00 in rent.

By decision dated March 24, 2015, OWCP found that appellant received an overpayment of compensation in the amount of \$39,607.74. It determined that he was not at fault in the creation of the overpayment. However, it further found that waiver of recovery was not warranted. OWCP determined that appellant's total monthly income was \$3,380.18; including \$2,655.18 in FECA benefits and \$725.00 in social security benefits. Based on the financial documentation provided by appellant, it determined that his monthly expenses totaled \$2,653.00 including: \$1,800.00 for rent; \$400.00 for food; \$200.00 for clothing; \$155.00 for utilities; \$86.00 for auto expenses; and \$12.00 for telephone. OWCP advised that the \$500.00 for bills and \$800.00 for other expenses reported by appellant were disallowed as he failed to provide documentation. It determined that appellant had \$727.18 in excess monthly expenses. OWCP determined that he had failed to provide information to support a finding that the recovery would defeat the purpose of FECA or would be against equity and good conscience. It directed repayment by deducting \$300.00 from appellant's continuing compensation every 28 days effective April 5, 2015.

On appeal appellant argues that having \$300.00 deducted from his continuing compensation would cause significant hardship. He updated his monthly expenses to include: \$500.00 for a home keeper and \$100.00 for over-the-counter medications. Appellant noted that his dentist recently informed him that he needed dental work which would incur expenses of \$5,000.00 out of pocket. He also indicates that he consulted with an attorney who advised that

he required \$10,000 00 to take his case. Appellant reiterates that he had been transparent to both SSA and OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits 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.⁴

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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant received wage-loss compensation under FECA and benefits under SSA beginning June 1, 2009. The portion of the SSA benefits appellant received as a federal employee as part of his FERS retirement package concurrently with the benefits he received under FECA is a prohibited dual benefit.⁷ OWCP requested, and SSA provided, information regarding appellant's applicable SSA rates and their effective dates. Based on information provided by SSA, it calculated a required offset of \$39,608.74 for the period June 1, 2009 through October 18, 2014, which it properly declared an overpayment.

⁴ 5 U.S.C. § 8116(d). *See D.S.*, Docket No. 12-689 (issued October 10, 2012).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000(e)(2) (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 R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

⁷ *See P.G.*, Docket No. 13-589 (issued July 9, 2013).

The Board has reviewed OWCP's calculations of benefits appellant received for the period June 1, 2009 through October 18, 2014 and finds that appellant received an overpayment in the amount of \$39,608.74.⁸

LEGAL PRECEDENT -- ISSUE 2

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.⁹ These statutory requirements are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."¹⁰ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determines that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 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 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 determined by OWCP from data provided by the Bureau of Labor Statistics.¹¹ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹² To establish that a valuable right has been relinquished, it must be shown 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.¹³

⁸ See *supra* note 3. The one cent error is harmless error. *C.N.*, Docket No. 16-0134 (issued March 8, 2016).

⁹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 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) (June 2009); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹² *Id.* at § 10.437(a), (b).

¹³ *Id.* at § 10.437(b)(1).

Section 10.438 of OWCP's regulations provides:

“(a) 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.

“(b) 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.”¹⁴

ANALYSIS -- ISSUE 2

The fact that appellant is without fault in creating the overpayment does not mean that OWCP cannot collect the overpayment. Appellant is still required to repay the debt unless: (1) recovery of the overpayment would defeat the purpose of FECA; or (2) recovery of the overpayment would be against equity and good conscience. OWCP properly determined that appellant failed to establish waiver of recovery of the \$39,608.74 overpayment under the relevant standards. Appellant did not provide sufficient financial information to establish that he was entitled to waiver of recovery of the overpayment.

In determining that appellant was not entitled to a waiver of the recovery of the overpayment, OWCP reviewed appellant's income, expenses, and assets. In an OWCP-20 form appellant alleged that his total monthly expenses totaled \$3,700.00 including: \$1,800.00 for rent, \$400.00 for food, \$200.00 for clothes, \$500.00 for bills, and \$800.00 for other expenses. As noted, appellant submitted some documentation of his expenses, but these documents do not fully support the overall expenses claimed by appellant on his OWCP-20 form. OWCP properly found that his monthly expenses listed as \$500.00 for bills and \$800.00 for other expenses were not supported by documentation.¹⁵ Based on the financial documentation supplied by appellant, it found that appellant had a household income of \$3,380.18 and total monthly expenses of \$2,653.00. As the household income exceeded his listed expenses by \$727.18, OWCP properly determined that recovery of the overpayment was not against equity and good conscious. Its procedures provide that 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 \$50.00,¹⁶ which is not the case here. Thus, appellant did not submit sufficient financial information to establish that recovery of the overpayment would defeat the purpose of FECA. Because appellant has not met the first prong of the two-prong test

¹⁴ *Id.* at § 10.438.

¹⁵ Appellant also provided documentation for automobile insurance for four cars. OWCP properly reduced this amount as OWCP procedures provide that insurance expense is only allowed for up to two vehicles. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3)(a) (June 2009).

¹⁶ *See supra* note 10.

of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.¹⁷

Further, there is no evidence in this case that appellant relinquished a valuable right or changed position for the worse in reliance on the excess compensation she received. The Board therefore finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹⁸

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 any hardship.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information appellant submitted as well as the factors set forth in section 10.441. As appellant's monthly household income was \$3,380.18 and his monthly household expenses were \$2,653.00, OWCP did not abuse its discretion in setting the rate of recovery as \$300.00 from each of appellant's continuing compensation payments. The Board will affirm its decision with regard to rate of recovery.

On appeal appellant reiterated that recovery of the overpayment would cause significant hardship, updated his monthly expenses, and noted that his dentist advised him that he required dental work that would cost him \$5,000.00. However, the Board lacks jurisdiction to review new evidence for the first time on appeal.²⁰ As explained, the Board finds that OWCP properly denied waiver and properly set the rate of repayment.

CONCLUSION

The Board finds that OWCP properly found a \$39,608.73 overpayment of compensation for the period June 1, 2009 to October 18, 2014 as he received a prohibited dual benefit and for which he was found without fault and the Board finds that OWCP properly denied waiver of

¹⁷ *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁸ *Id.* at § 10.436.

¹⁹ *Id.* at § 10.441(a).

²⁰ *See* 20 C.F.R. § 501.2(c).

recovery of the overpayment. The Board further finds that it properly required repayment of the overpayment by deducting \$300.00 every four weeks from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.²¹

Issued: September 9, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²¹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.