

On appeal appellant contends that the currently structured repayment would impose a significant financial hardship on him and his wife.

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On September 14, 1999 appellant, then a 62-year-old refrigeration/air conditioning mechanic, sustained an employment-related low back strain. A recurrence of disability on September 30, 1999 was also accepted. Appellant returned to four hours of modified duty per day on January 5, 2000, stopped work on February 27, 2000, did not return, and was placed on the periodic compensation rolls. On February 5, 2002 he underwent authorized decompressive laminectomy at L4-5.

EN1032 forms signed by appellant from September 22, 2000 to September 22, 2016 indicated that he was not receiving SSA benefits as part of an annuity for federal service.

In reports dated May 31 and October 12, 2016, Dr. David P. Gannon, Board-certified in anesthesiology, pain and internal medicine, noted appellant's complaint of low back pain. He described examination findings and diagnosed low back pain, postlaminectomy syndrome, and spondylosis without myelopathy or radiculopathy of the lumbar region and lumbosacral region.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA on October 13, 2016. SSA returned the form on December 19, 2016, noting that appellant received SSA retirement benefits beginning in October 1999. It indicated that beginning in January 2000 appellant's SSA rate with FERS was \$955.80 and without FERS \$679.40. Each year the rates increased through December 2016.

By letter dated December 29, 2016, OWCP notified appellant that, based on information provided by SSA regarding the amount his SSA benefit was attributable to federal service, his FECA benefits had been adjusted.

On January 5, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$47,003.18 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that he received from January 3, 2000 to December 10, 2016 was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found appellant not at fault in creating the overpayment and provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20). Appellant was informed of the actions he could take and was allotted 30 days to respond. The record contains overpayment worksheets and computer printouts of compensation paid to appellant from January 3, 2000 to December 10, 2016.

² Docket No. 13-1729 (issued December 12, 2013).

Appellant requested a decision based on the record. He submitted an overpayment recovery questionnaire which he had signed, but had not completed. An attached handwritten statement noted monthly income of \$4,098.30 and described monthly expenses. Financial information was also enclosed. This included bank and brokerage statements listing assets in excess of \$50,000.00, and also indicated that appellant received additional monthly income of approximately \$135.00.

By decision dated April 6, 2017, OWCP finalized the preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$47,003.18 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that he received from January 3, 2000 to December 10, 2016 was based on credits earned while working for the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found appellant without fault and that he was not entitled to waiver of recovery of the overpayment. It noted that there was no evidence to support that recovery would be against good conscious or defeat the purpose of FECA. OWCP calculated appellant's monthly income from SSA, FECA, and other disbursements reported, for a total monthly income of \$4,233.00,³ and reported monthly expenses of \$3,130.00. It further noted that appellant had bank and brokerage assets totaling \$56,264.00. OWCP set repayment at \$475.00, to be deducted each period from appellant's continuing FECA compensation.

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 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-9 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

³ The Board notes that OWCP did not recalculate appellant's 28-day FECA benefit to a monthly amount, and instead listed his 28-day FECA income of \$2,107.00 rather than a monthly FECA income of approximately \$2,282.00.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-9 (issued February 3, 1997).

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.⁸ Section 404.409 of SSA regulations provides that for individuals born before January 1, 1938, full retirement age is 65 years.⁹

ANALYSIS -- ISSUE 1

OWCP found that an overpayment of compensation was created in the amount of \$47,003.18 for the period January 3, 2000 to December 10, 2016. The overpayment was based on the evidence received from SSA with respect to benefits paid to appellant. The record indicates that, while appellant was receiving compensation for total disability under FECA, she also received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period January 3, 2000 to December 10, 2016.

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 age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing in October 1999 through December 2016. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 3, 2000 to December 10, 2016 and finds that an overpayment of compensation in the amount of \$47,003.18 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "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."¹² Section 10.438 of OWCP regulations provide that 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹³

⁸ 20 C.F.R. § 404.310.

⁹ *Id.* at § 404.409.

¹⁰ *Supra* notes 6 and 7.

¹¹ *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

¹² 5 U.S.C. § 8129.

¹³ 20 C.F.R. § 10.438.

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 OWCP regulations.¹⁴

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his 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 determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁵ To be eligible for waiver because recovery would defeat the purpose of FECA, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁶ 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 \$50.00.¹⁷

OWCP procedure provides 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.¹⁸ An individual's liquid assets include, but are not limited to, cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings/supplies.¹⁹

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. Repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁰

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his assets exceed the resource base of \$8,000.00, as provided in OWCP procedures.²¹ Financial information of record submitted by appellant documents assets in excess of \$50,000.00. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary to consider the

¹⁴ *Id.* at §§ 10.434-10.437.

¹⁵ *Id.* at § 10.436.

¹⁶ *Id.*

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 20 C.F.R. § 10.436.

²¹ *Id.*

first prong of the test, *i.e.*, whether his monthly income exceeded his monthly ordinary and necessary expenses by more than \$50.00.²² Appellant did not establish that he was entitled to waiver on the basis of defeating the purpose of FECA.²³

Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience. As described above, the record does not support this contention.

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.²⁴ OWCP procedure provides that 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.²⁵ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁶ An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²⁷

Appellant submitted no evidence to show that he gave up a valuable right or changed his position for the worse in reliance on anticipated compensation payments. Thus, he has not shown that, if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all. OWCP properly found that he was not entitled to waiver because recovery would not be against equity and good conscience.²⁸

As appellant failed to 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 OWCP's regulations provides 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

²² *Id.*; see *M.H.*, Docket No. 17-0766 (issued July 3, 2017).

²³ See *K.K.*, Docket No. 09-0207 (issued October 2, 2009).

²⁴ 20 C.F.R. 10.437; see *W.P.*, 59 ECAB 514 (2008).

²⁵ Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.600.b(3) (June 2009).

²⁶ 20 C.F.R. § 10.437(b)(1); see *J.A.*, Docket No. 09-1678 (issued June 9, 2010).

²⁷ *Id.* at § 10.437(b)(2); see *Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁸ Federal (FECA) Procedure Manual, *supra* note 17.

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.²⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$475.00 per compensation period. The record indicates that appellant's monthly income exceeds his reported monthly expenses by \$1,278.00 per month. OWCP therefore did not abuse its discretion in finding that appellant should repay the overpayment at the rate of \$475.00 per compensation period.³⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$47,003.18, and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$475.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2017
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

²⁹ 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

³⁰ *N.S.*, Docket No. 14-2081 (issued February 12, 2015).