

FACTUAL HISTORY

OWCP accepted that on December 5, 1988 appellant, then a 49-year-old drill rig operatory helper, sustained degeneration of the lumbar or lumbosacral intervertebral disc under File No. xxxxxx868. It further accepted that he sustained a temporary aggravation of degenerative disc disease causally related to factors of his federal employment under File No. xxxxxx922.² OWCP paid appellant compensation for total disability beginning July 24, 1998.

In a form dated December 17, 2013, SSA advised appellant that his benefits were changing from disability benefits to retirement benefits as he had reached the age of full retirement. Appellant submitted the form to OWCP with a note indicating that SSA had changed his benefit status from disabled to retired, and asked that it inform him if it affected his FECA benefits.

On January 11, 2016 SSA provided the amount that appellant received in retirement benefits including the amount earned through the Federal Employees' Retirement System (FERS) and the hypothetical amount that he would have received without FERS. Including FERS, it indicated that he was entitled to a monthly pay rate of \$1,821.30 effective December 2013 and \$1,852.50 effective December 2014 and December 2015. Without FERS, appellant was entitled to a monthly payment of \$1,267.50 effective December 2013 and \$1,289.00 effective December 2014 and December 2015.

On April 12, 2016 OWCP adjusted appellant's compensation to offset the portion of his SSA retirement benefits attributable to his federal service. It indicated that he would receive net compensation of \$2,183.12.

OWCP, on April 19, 2016, notified appellant of its preliminary determination that he received an overpayment of \$15,743.14 because it had failed to reduce his compensation benefits from December 31, 2013 through April 2, 2016 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$15,743.14. It further made a preliminary determination that appellant was at fault in creating the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On April 27, 2016 appellant requested a telephone conference. He maintained that he was not at fault in creating the overpayment as he had notified OWCP of his change in benefits in December 2013. Appellant listed monthly income of \$606.00 for his spouse, \$1,716.00 in SSA benefits, and \$333.00 from a state fund, for total monthly income of \$2,655.00. He also listed expenses of \$4,016.66, which included in part \$600.00 for food, \$100.00 for clothing,

² The two claims have been administratively combined.

\$1,105.95 for utilities, and \$1,709.71 in other expenses.³ Appellant noted that he had assets of \$700.99.

OWCP held a telephone conference with appellant on May 5, 2016. Appellant noted that he had submitted a copy to OWCP of a letter from SSA dated December 2013 informing him he would begin receiving retirement benefits. He indicated that he also had monthly automobile payments of \$885.45. OWCP informed appellant that he was without fault in creating the overpayment.

On May 12, 2016 appellant submitted copies of his bank statements.

By decision dated June 2, 2016, OWCP found an overpayment of compensation in the amount of \$15,743.14 for the period December 31, 2013 through April 2, 2016 as OWCP had failed to offset appellant's compensation payments for the portion of his SSA retirement benefits that were attributable to his federal service. It found that he was not at fault in creating the overpayment, but denied waiver as his income exceeded his expenses. OWCP noted that appellant had not included his compensation of \$2,183.12 from OWCP as part of his income. When included, his income was \$4,838.12 and his expenses were approximately \$4,016.66, which yielded a monthly surplus of \$821.46. OWCP determined that it would recover the overpayment by deducting \$500.00 per month from continuing compensation payments.

On appeal appellant contends that OWCP did not ask him to provide his income, which included his compensation and SSA benefits. He indicated that he only listed documented expenses rather than actual amounts. Appellant maintained that he was not at fault in creating the overpayment and repayment would cause financial hardship.

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.⁴ 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.⁵

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

³ Appellant listed expenses for house insurance of \$101.26, trash removal of \$25.79, life insurance of \$308.25, water of \$26.90, \$223.21 for his home telephone, \$353.21 for his mobile telephone, \$149.94 for natural gas, \$187.50 for electricity, \$140.00 for gasoline, \$170.00 for automobile insurance, \$600.00 for food, \$100.00 for clothes, \$200.00 for medication, \$885.45 for automobile expenses, \$45.00 for personal necessities, and \$500.00 for credit card payments, for a total of \$4,016.66.

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8129(a).

employee received SSA benefits based on federal service, his compensation benefits shall be reduced by the amount of SSA benefits attributable to his federal service.⁶

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 the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefits, OWCP will obtain information from the SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It 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 overpayment.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained degeneration of a lumbar intervertebral disc under file number xxxxxx868 and an aggravation of degenerative disc disease under file number xxxxxx922. It paid him compensation for total disability commencing July 24, 1998.

On December 17, 2013 SSA informed appellant that he would receive retirement benefits beginning January 2014. Appellant provided the form to OWCP with a note advising that his SSA payments changed from disability to retirement benefits. OWCP, however, failed to deduct the portion of appellant's retirement benefits attributable to his FERS service from his compensation until April 2, 2016. Appellant cannot receive both wage-loss compensation and federal retirement benefits concurrently.⁹ Consequently, he received an overpayment of compensation.

OWCP calculated the amount of overpayment by determining the difference between his SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$15,743.41. There is no contrary evidence of record and the Board, accordingly, finds an overpayment of compensation in the amount of \$15,743.41.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery

⁶ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁸ *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

⁹ *See G.T.*, Docket No. 14-0653 (issued May 21, 2014).

would defeat the purpose of [FECA] or would be against equity and good conscience.”¹⁰ (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹¹

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 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.¹² An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹³ 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, and supplies.¹⁴

Section 10.437 provides that 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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436. OWCP procedures provide that 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) (October 2004).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.437.

¹⁶ *Id.* at § 10.437(b)(1).

requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by OWCP's procedures.¹⁷

OWCP determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. Appellant asserted that he had monthly income of \$2,655.00 on his overpayment recovery questionnaire and monthly expenses of \$4,016.66 per month. As noted by OWCP, however, he did not include his net workers' compensation benefits of \$2,183.12 in his monthly income, which when added yielded a monthly income of \$4,838.12. 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 \$50.00.¹⁸ As appellant's current income exceeds his ordinary and necessary living expenses by \$821.46, he does not need substantially all of his income for ordinary and necessary living expenses.¹⁹

Additionally, the evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt.²⁰ Consequently, OWCP properly denied waiver of the overpayment.

On appeal appellant argues that OWCP failed to ask him about his income, which included his compensation and SSA benefits. He indicated that he only listed documented expenses rather than actual amounts. OWCP, however, in its April 19, 2016 preliminary determination of overpayment, requested that appellant complete the overpayment recovery questionnaire and provide information and documentation regarding his income and expenses.

Appellant maintained that he was not at fault in creating the overpayment and repayment would cause financial hardship. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.²¹ Further, as found by the Board, the evidence does not demonstrate that appellant would experience financial hardship repaying the overpayment.

¹⁷ *Id.* at § 10.436.

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004); *see also Desiderio Martinez*, 55 ECAB 336 (2004).

¹⁹ As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether his assets exceed the allowable resource base.

²⁰ *Supra* note 15.

²¹ 20 C.F.R. § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

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 FECA.²² Section 10.441(a) of the regulations provides:

“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 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.”²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information provided by appellant. Appellant's monthly household income totaled \$4,838.12 and his expenses totaled \$4,016.66, a difference of \$821.46. OWCP thus properly determined the rate of recovery should be \$500.00 from appellant's continuing compensation payments. The Board will affirm OWCP's decision with regarding to rate of recovery.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$15,743.14 from December 31, 2013 through April 2, 2016 because he concurrently received FECA benefits and retirement benefits from the SSA without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly determined that it would recover the overpayment by deducting \$500.00 from his continuing compensation payments.

²² *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²³ 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2017
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