



OWCP properly required repayment of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation.

On appeal appellant asserts that repaying the overpayment would cause financial hardship, noting that she became responsible for her husband's debts after his death in October 2015.

### **FACTUAL HISTORY**

On March 24, 1986 appellant, then a 38-year-old warehouse worker at the employing establishment commissary, filed a traumatic injury claim (Form CA-1) alleging that she injured her left knee when she fell from a forklift on March 19, 1986. She transferred to a facility at Warner Robins Air Force Base, Georgia, where she worked as a materials handler. OWCP accepted acute hemarthrosis and tear of the anterior cruciate ligament (ACL) of the left knee.

On April 27, 1995 appellant underwent left knee arthroscopic surgery and received wage-loss compensation until she returned to modified duty on May 12, 1995. OWCP accepted a recurrence of disability on June 3, 1996 and she was placed on the periodic compensation rolls. Appellant had surgical reconstruction of the ACL on August 16, 1996, and hardware removal on February 5, 1997.

Appellant was referred for vocational rehabilitation in February 1997. By decision dated November 9, 1999, OWCP reduced her compensation based on her capacity to earn wages as a telephone answering service operator.

On March 24, 2000 Dr. Thomas Branch, an attending Board-certified orthopedic surgeon, performed authorized total left knee replacement surgery.<sup>3</sup> Appellant had additional left knee surgery on June 12, 2001, and in April 2003 a second total left knee arthroplasty was authorized, but was not performed. She continued treatment with Dr. Branch. On July 29, 2009 Dr. Branch performed left knee manipulation under anesthesia.

OWCP had informed appellant as part of receiving wage-loss compensation on the periodic rolls that her FECA compensation could be reduced if she began receiving SSA retirement benefits based on her age or her Federal Service. Appellant was advised to notify OWCP should she begin receiving SSA retirement benefits. In November 2012, she moved from Georgia to Virginia. On October 22, 2014 OWCP requested offset information from SSA. On an EN1032 form signed by appellant on March 17, 2015, she reported that she was not receiving SSA benefits.

On April 2, 2015 SSA provided information regarding appellant's SSA rate with and without Federal Employees Retirement System (FERS) benefits, effective February 2014. On July 24, 2015 OWCP informed appellant that her FECA benefits were being reduced to reflect the contribution from her SSA benefits attributable to her federal employment. It attached

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<sup>3</sup> In November 1999, appellant elected to receive disability retirement from the Office of Personnel Management (OPM). Following the knee replacement surgery, she returned to FECA compensation, until April 30, 2001, when she resumed OPM retirement. Appellant returned to FECA compensation on July 1, 2001.

documentation explaining the calculation of the offset.<sup>4</sup> A computer print-out indicated that the reduction was effective June 28, 2015.

Appellant submitted a signed EN1032 form on March 7, 2016, in which she also reported that she was not receiving SSA benefits.

On March 23, 2016 OWCP issued a preliminary finding that a \$10,590.39 overpayment of compensation had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she had received from February 1, 2014 through June 27, 2015, was based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found that she without fault in creating the overpayment. The preliminary decision provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (OWCP Form 20). She was informed of the required financial documentation and actions she could take and was afforded 30 days to respond. A July 13, 2015 offset calculation worksheet indicated that the FERS offset for the period February 1, 2014 to June 27, 2015 totaled \$10,590.39.

Appellant timely requested a prerecoupment hearing with OWCP's Branch of Hearings and Review. She asserted that she was not at fault and did not have the money to repay the overpayment, noting that her husband had recently died.<sup>5</sup> On an overpayment recovery questionnaire, appellant indicated that her income consisted of SSA benefits of \$1,734.00 monthly, Veterans benefits of \$1,254.19 monthly, and two annuities of \$275.00 and \$115.94 monthly, plus her periodic FECA compensation of \$1,616.31. She listed cash on hand of \$1,000.00, savings of \$210,314.00, and provided a list of claimed monthly expenses totaling \$6,762.38.

At the hearing, held on July 22, 2016, OWCP's hearing representative explained how the overpayment of compensation was created. Appellant testified regarding her income and expenses, stating that she had three vehicles and \$182,000.00 in savings.<sup>6</sup>

By decision dated September 22, 2016, an OWCP hearing representative finalized the preliminary overpayment decision, finding an overpayment of compensation in the amount of \$10,590.39 and, while appellant was not at fault, she was not entitled to waiver of the overpayment because her assets exceeded the resource base of \$4,800.00 for an individual. He set repayment at \$200.00 every 28 days from appellant's ongoing FECA compensation.<sup>7</sup>

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<sup>4</sup> In a second July 24, 2015 letter, OWCP informed appellant of the evidence needed to support a schedule award claim.

<sup>5</sup> An obituary notice dated May 23, 2016 indicated that he died on October 26, 2015.

<sup>6</sup> Appellant's FECA compensation was reduced to the 2/3 unaugmented rate effective July 24, 2016. On August 15, 2016 she filed a schedule award claim (Form CA-7).

<sup>7</sup> The Board notes that the hearing representative initially identified the period of the overpayment as April 1, 2014 through June 27, 2015. However, in discussing his analysis of the case, he correctly identified the period as beginning February 1, 2014.

### LEGAL PRECEDENT -- ISSUE 1

Section 8102 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.<sup>8</sup> 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.<sup>9</sup> Section 10.421 of the implementing regulations provides that an employee may not receive compensation for total disability concurrently with separation pay.<sup>10</sup> FECA Bulletin No. 97-9 states 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.<sup>11</sup> When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give all necessary due process rights.<sup>12</sup>

### ANALYSIS -- ISSUE 1

The record supports that appellant has received FECA wage-loss compensation continually since 2001,<sup>13</sup> and that she received SSA benefits beginning February 1, 2014. The portion of the SSA benefits she earned as a federal employee was part of her FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>14</sup>

Appellant's FECA compensation was not offset until June 28, 2015. The SSA notified OWCP of the applicable SSA rates for her and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit appellant received from February 1, 2014 through June 27, 2015, which yielded an overpayment of compensation in the amount of \$10,590.39. The record includes an overpayment worksheet explaining the overpayment calculation. Appellant has not contested the amount of payment.

The Board finds OWCP's properly calculated the dual benefits for the period February 1, 2014 through June 27, 2015 to be \$10,590.39 for this period, thus creating an overpayment of compensation in that amount.

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<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.*, at § 8116(a).

<sup>10</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

<sup>11</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000 (June 2009).

<sup>13</sup> *Supra* note 3.

<sup>14</sup> *Supra* note 11.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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.”<sup>15</sup> Section 10.438 of OWCP regulations provides 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 of 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.<sup>16</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (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 a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.<sup>17</sup> Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.<sup>18</sup> 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.<sup>19</sup>

OWCP procedures provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery would defeat the purpose of FECA if both the individual from whom recovery is sought needed substantially all of his or her current income (including FECA periodic benefits) to meet current ordinary and necessary living expense, and if the individual’s assets did not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. 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). If an individual has disposable current income or assets in excess

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<sup>15</sup> 5 U.S.C. § 8129.

<sup>16</sup> 20 C.F.R. § 10.438.

<sup>17</sup> *Id.*, at § 10.436(b).

<sup>18</sup> *Id.*, at § 10.437(a).

<sup>19</sup> *Id.*, at § 10.437(b).

of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>21</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because her assets exceed the resource base of \$4,800.00, as provided in OWCP procedures.<sup>22</sup> On the overpayment recovery questionnaire and in her hearing testimony, she admitted that she had assets of at least \$180,000.00. 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 first prong of the test, *i.e.*, whether her monthly income exceeded her monthly ordinary and necessary expenses by more than \$50.00.<sup>23</sup> She did not establish that she was entitled to waiver of recovery.<sup>24</sup>

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.<sup>25</sup> OWCP procedures provide 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.<sup>26</sup> Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.<sup>27</sup> An individual must show that he or she made a decision he

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<sup>20</sup> *Supra* note 12 at Chapter 6.200.6.a(1) (October 2009).

<sup>21</sup> 20 C.F.R. § 10.436.

<sup>22</sup> *Id.* See *A.W.*, Docket No. 15-0190 (issued August 10, 2016).

<sup>23</sup> *Id.*

<sup>24</sup> See *K.K.*, Docket No. 09-0207 (issued October 2, 2009).

<sup>25</sup> 20 C.F.R. § 10.437; see *W.P.*, 59 ECAB 514 (2008).

<sup>26</sup> *Supra* note 12 at Chapter 2.600.b(3) (June 2009).

<sup>27</sup> 20 C.F.R. § 10.437(b)(1) (2011); see *J.A.*, Docket No. 09-1678 (issued June 9, 2010).

or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.<sup>28</sup>

Appellant submitted no evidence to show that she gave up a valuable right or changed her position for the worse in reliance on anticipated compensation payments. Thus, she has not shown that if required to repay the overpayment, she would be in a worse position after repayment than if she had never received the overpayment at all. OWCP properly found that appellant was not entitled to waiver as recovery would be against equity and good conscience.<sup>29</sup>

As appellant failed to establish that recovery of the overpayment 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**

OWCP's implementing regulations provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>30</sup>

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

The record supports that, in requiring repayment of the \$10,590.39 overpayment by deducting \$200.00 from appellant's FECA compensation payments every four weeks, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441(a) of its regulations and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every four weeks.<sup>31</sup>

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<sup>28</sup> *Id.*, at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

<sup>29</sup> *Supra* note 20.

<sup>30</sup> 20 C.F.R. § 10.441(a).

<sup>31</sup> *Id.*; *see C.P.*, Docket No. 13-1341 (issued January 6, 2014).

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received a \$10,590.59 overpayment of compensation that she was not entitled to waiver, and that OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from her continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board