

On appeal appellant contends that she was not at fault in creation of the \$4,579.11 overpayment of compensation and that she was never notified about the erroneous payment she received.

FACTUAL HISTORY

On April 25, 1994 appellant, then a 45-year-old aircraft engine repairer, filed an occupational disease claim (Form CA-2) alleging that she sustained depression, anxiety, and nervousness due to sexual discrimination at work. She became aware of her conditions and realized their relationship to her employment on April 20, 1994. Appellant stopped work on April 20, 1994 and returned to limited-duty work on April 25, 1994. She indicated that she was a WG-5, Step 3 when she filed her claim.

In a September 29, 1995 decision, OWCP denied appellant's occupational disease claim finding that the evidence of record was insufficient to establish any discrimination or abuse on the part of the employing establishment.

On October 5, 1995 appellant requested an oral hearing before an OWCP hearing representative.

By decision dated August 27, 1996, an OWCP hearing representative reversed the September 29, 1995 decision. He found that the evidence submitted, including a December 15, 1995 decision of an Administrative Law Judge (ALJ) regarding appellant's Equal Employment Opportunity (EEO) complaint were sufficient to establish that she sustained major depression and generalized anxiety disorder due to sexual discrimination by the employing establishment.²

OWCP accepted the claim for major depression disorder on September 11, 1996.

The claim before the EEO Commission contended that the date of lost exposure to the sexual discrimination was February 28, 1994. In a September 25, 1996 letter, appellant indicated that she continued to be exposed to discriminatory acts after she filed her claim, but there is no evidence to substantiate that contention. She noted that she had not worked since April 9, 1996 due to continued harassment.

On September 26, 1996 appellant filed a claim for wage-loss compensation (Form CA-7) for the period commencing September 9, 1996. On the form, appellant's supervisor indicated that appellant's base pay rate was \$11.01 per hour (WG-5) on the date of injury and \$13.40 per hour (WG-8) on the date she stopped work.

In an October 18, 1996 letter, OWCP requested that appellant submit a medical report from her physician in support of her claimed work-related disability.

² The hearing representative noted that the ALJ directed the employing establishment to take immediate action against appellant's supervisor, E.G. He also noted that the employing establishment issued an April 1, 1996 decision afterwards which essentially agreed with the ALJ. The Board notes that the ALJ found that, a week prior to the August 31 and September 1, 1995 EEO hearings, E.G. continued to engage in retaliatory actions with regard to the matter.

On November 19, 1996 OWCP noted that the medical evidence of record showed that appellant's attending physician had released appellant to return to work, but she could not return to the same job she had when she was harassed. Also on that date, the employing establishment informed OWCP that appellant had been placed in priority placement for a limited-duty position as of October 25, 1996, but that no job was available.

By letter dated November 22, 1996, OWCP informed appellant that she would be paid compensation for the period commencing September 9, 1996. A weekly pay rate of \$536.00³ effective March 12, 1996 was used to compute her gross compensation benefits and deductions for her elected benefits of health insurance plan.

On February 5, 1997 appellant filed a claim for continuing compensation on account of disability (Form CA-8) for the period April 8, 1994⁴ to September 8, 1996. She indicated that the date of injury was April 20, 1994. A September 9, 1996 leave buyback worksheet (Form CA-7b) indicated that appellant's weekly pay rate at the time of injury on April 20, 1994 and on the date she stopped work on April 8, 1994 was \$440.40.⁵

In a March 18, 1998 letter, the Office of Personnel Management (OPM) approved appellant's application for disability retirement.

In a letter dated January 31, 2001, appellant contended that she should have received compensation based on a WG-8 pay rate, not a WG-5 pay rate. She noted that she was a WG-5 by the time her occupational disease claim was denied. Appellant further noted that she later received wages at the WG-8 pay rate. She indicated that she left the employing establishment on April 9, 1996 and did not receive compensation benefits until 1997.

By letter dated February 15, 2001, OWCP responded that, when an employee files a disability claim, it considers the date that the person stopped working as the date that disability began and therefore it is the effective date and pay rate for compensation purposes. It further responded that when an employee files a claim for leave buyback or a claim for compensation for leave used during a period of disability, it considers the date that the claimant started to claim leave as the effective date that disability began. Despite appellant's affirmative claim in her EEO claim that she was last exposed to the discrimination on February 28, 1994, OWCP advised appellant that it used the effective pay rate date of April 8, 1994 for compensation purposes, noting that the Form CA-8 she filed on February 5, 1997 claimed compensation for the period April 8, 1994 through September 8, 1996.

³ The weekly pay rate of \$536.00 was based on a 40-hour workweek at \$13.40 per hour.

⁴ The time analysis form signed by appellant and the employing establishment indicated that she claimed four hours on April 8, 1994 and next claimed wage loss on April 20, 1994.

⁵ A May 23, 1997 OWCP Daily Roll Payment worksheet indicated that OWCP paid appellant for wage-loss compensation for 338 hours from April 8, 1994 to April 9, 1996 based on a \$440.40 weekly pay rate.

Automated computer payment system reports reflected disability payments for the period April 8, 1994 to September 8, 1996 and intermittent dates from August 17, 1997 to September 6, 2003 based on appellant's weekly pay rate of \$440.40 effective April 8, 1994.⁶

On October 27, 2004 OWCP expanded acceptance of appellant's claim to include post-traumatic stress disorder.

In a November 3, 2014 letter, the Social Security Administration (SSA) informed appellant that her regular retirement benefits would begin on November 1, 2014. It advised that she was no longer entitled to receive disability retirement benefits as she had reached full retirement age.

OWCP requested that the SSA provide information regarding any required Federal Employees Retirement System (FERS) offset. It faxed the questionnaire to the SSA on November 5, 2014.

On November 12, 2014 appellant advised OWCP that she would start to receive regular SSA retirement benefits that month.

In a December 1, 2014 letter, OWCP asked appellant to elect OPM retirement benefits or continuing benefits under FECA. This letter noted that benefits for wage loss paid by OWCP were not payable for the same period of time as annuity benefits paid by OPM. On December 5, 2014 OWCP advised appellant that it had made an inquiry to the SSA regarding a possible offset of her retirement benefits. No response was received from the SSA.

In an April 2, 2015 letter, OWCP again requested that the SSA provide information regarding any required FERS offset.

On June 10, 2015 the SSA noted the pay rates for the following periods with and without FERS: November 2014, \$1,265.40 with FERS and \$692.80 without FERS; and December 2014, \$1,286.90 with FERS and \$704.50 without FERS.

By letter dated June 26, 2015, OWCP informed appellant that her current monthly benefit amount was \$1,718.20, but that SSA had determined that she would only be entitled to \$1,180.60 as her federal service increased her monthly social security payment by \$537.60. It noted that this difference of \$537.60 as the portion of social security benefits attributed to federal service and was the amount that must be offset against her compensation benefits.

By notice dated July 6, 2015, OWCP advised appellant of its preliminary determination that she had received a \$4,579.11 overpayment of compensation for the period November 1, 2014 to June 27, 2015 because she received prohibited dual benefits in the form of wage-loss compensation under FECA and benefits under SSA without an appropriate offset being made.⁷ It also made a preliminary determination that she was not at fault in the creation of the

⁶ The weekly pay rate of \$440.40 was based on a 40-hour workweek at \$11.01 per hour.

⁷ OWCP provided calculations based on SSA documentation that revealed that \$4,579.11 had not been offset for the period November 1, 2014 to June 27, 2015.

overpayment as she was not aware or could have reasonably been expected to know that it had been paid incorrectly. OWCP requested that appellant complete a Form OWCP-20 and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. An overpayment worksheet dated June 25, 2015 determined that appellant was overpaid during the period November 1, 2014 to June 27, 2015 for a total of \$4,579.11.

On July 13, 2015 appellant requested a telephonic prerecoupment hearing with an OWCP hearing representative on the issue of a possible waiver of recovery of the overpayment. She contended that she neither received a letter, nor was she told, that she would be penalized for receiving social security retirement benefits. Appellant asserted that she should have received earlier notification before the overpayment amount had accumulated to \$4,579.11.

Appellant submitted a completed Form OWCP-20 dated July 13, 2015 and various financial documents. She contended that a decrease in her monthly FECA and SSA benefit payments caused a deficit in her finances each month, which required her to obtain loans. Appellant reported total monthly income of \$2,363.60, which included \$1,183.00 in SSA benefits and \$1,180.60 in FECA benefits. She also reported total monthly expenses of \$3,471.13, which included \$695.00 for rent or mortgage (which would increase to \$740.00 in September 2015), \$250.00 for food, \$100.00 for clothing, \$600.00 for utilities, \$600.00 for other expenses, \$565.46 for Check-N-Go, \$82.46 for OK Loan Company, \$118.00 for Sooner Money Loans, \$159.55 for Ace Loans, \$35.00 for JC Penney, \$100.00 for cable, \$35.00 for Visa credit card, \$8.66 for life insurance premium, \$122.00 for unspecified loans. Appellant indicated that she had no cash on hand, investments, or other personal property and funds.

In a July 13, 2015 narrative statement, appellant contended that OWCP incorrectly calculated the amount of the overpayment based on the 1994 pay rate rather than her 1996 pay rate as she had stopped work in 1996. She asserted that her pay rate was improperly reduced from a WG-8 to a WG-5 by the employing establishment after she filed a discrimination complaint against her supervisor which was settled in 1997. Appellant also claimed that repayment of the overpayment would cause financial hardship.

Prior to a March 18, 2016 telephonic hearing, OWCP received appellant's February 29, 2016 statements restating her contention that her compensation payments should have been based on her WG-8 pay rate rather than her WG-5 pay rate. Appellant again challenged the preliminary overpayment determination and reiterated her previous assertion that OWCP had failed to provide timely notice of its determination.

During the March 18, 2016 telephonic hearing, appellant again asserted that OWCP should have notified her about the debt before it became so large. She testified that her monthly expenses exceeded her monthly income. Appellant reported monthly income of \$2,343.55. She also reported expenses, which included \$68,000.00 in medical bills related to her recent fall down stairs, \$710.00 for increased current rent which would rise again in May 2016 to \$740.00, \$122.94 for cable, \$69.66 for two insurance premiums, \$486.38 for a car lease, \$170.00 for cellphones, and \$144.00 for car insurance. The hearing representative afforded appellant 30 days

to submit financial documentation corroborating her monthly expenses and income. Appellant did not respond.

In a May 18, 2016 decision, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$4,579.11 for the period November 1, 2014 to June 26, 2015 because she received prohibited dual benefits under FECA and SSA. He found that there was insufficient evidence to warrant further development of the pay rate issue as she had not provided any evidence to support her contention that OWCP should have used a 1996 pay rate rather than the 1994 pay rate. The hearing representative indicated that the evidence did not document that she continued to be exposed to injurious work factors after April 8, 1994. He determined that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because she had not submitted sufficient financial documentation to support her claimed monthly expenses. The hearing representative required repayment of the overpayment by deducting \$100.00 from her continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁸ Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.⁹ Section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as the monthly pay at the time of injury, the time disability begins, or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.¹⁰

OWCP procedures provide that, for occupational disease claims where the claimant remains exposed to the work factors claimed, the pay rate is the rate of pay effective the date of the last exposure to causal employment factors.¹¹

Once the proper date is determined, the pay rate for compensation purposes is calculated in accord with 5 U.S.C. § 8114.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined the applicable pay rate for compensation purposes. The record supports that appellant first stopped work on April 8, 1994,

⁸ 20 C.F.R. § 10.5(f).

⁹ 5 U.S.C. §§ 8105, 8106.

¹⁰ *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a) (September 2011). *See also Patricia K. Cummings*, 53 ECAB 623 (2002).

¹² *See also supra* note 10 at § 10.5(s).

the date of injury. The record further supports that OWCP paid her wage-loss compensation for 338 hours from April 8, 1994 to April 9, 1996 based on the date-of-injury pay rate of \$440.40 a week. Before OWCP, appellant raised the issue as to the pay rate used in the calculation of the \$4,579.11 overpayment. She contended that the overpayment was based on her 1994 WG-5 date-of-injury pay rate rather than her WG-8 pay rate on the date she stopped work in April 1996. However, appellant has failed to submit sufficient evidence to establish her assertion.

The Board finds that appellant's February 5, 1997 Form CA-8 and supporting documents establish that she initially stopped work on April 8, 1994, but had last been exposed to the discrimination on February 28, 1994. While the record also indicates that appellant had later returned to work and work stoppages on or about April 9 and September 9, 1996, there is no indication that she had a qualifying recurrence of disability on these dates.¹³ For a recurrence of disability to occur, the injured worker must have physically resumed regular full-time work with the employing establishment for six months.¹⁴ Thus, the record before the Board does not support any pay rate date later than April 8, 1994.¹⁵

LEGAL PRECEDENT -- ISSUE 2

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.¹⁶ 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.¹⁷

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.¹⁸

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply. The offset of FECA benefits by SSA benefits

¹³ OWCP procedures make clear that the date when compensable "disability began" is the dates the employee stopped work due to the injury, not the dates pay stopped. *See supra* note 11.

¹⁴ *See D.R.*, Docket No. 16-0378 (issued November 16, 2016).

¹⁵ The Board has held that, where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury. *N.F.*, Docket No. 08-2117 (issued April 21, 2009). Although appellant argued that discrimination continued, there is no corroborating documentation of her being exposed to discrimination after April 8, 1994, when she first stopped work.

¹⁶ 5 U.S.C. § 8102.

¹⁷ *Id.* at § 8129(a).

¹⁸ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

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 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.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$4,579.11 because she received prohibited dual benefits for the period November 1, 2014 to June 27, 2015. Appellant received both wage-loss compensation under FECA and benefits under the SSA for the same period. As previously noted, the portion of the SSA benefits she received as a federal employee as part of her FERS retirement package concurrently with the benefits she received under FECA is a prohibited dual benefit.²⁰ OWCP requested and SSA provided information regarding appellant's applicable SSA rates and their effective dates. Based on these rates, it determined that the prohibited dual benefits she received from November 1, 2014 to June 27, 2015 created an overpayment of compensation in the amount of \$4,579.11. The record includes an overpayment worksheet explaining the overpayment calculation.

The Board has reviewed OWCP's calculations of the dual benefits appellant received and finds that OWCP properly determined an overpayment of compensation in the amount of \$4,579.11 for the period November 1, 2014 to June 27, 2015.

LEGAL PRECEDENT -- ISSUE 3

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.²¹ These statutory guidelines are found in section 8129(b) of FECA which provides: "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."²² 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 determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.²³

¹⁹ See *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

²⁰ See *P.G.*, Docket No. 13-0589 (issued July 9, 2013).

²¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

²² 5 U.S.C. § 8129(b).

²³ *M.G.*, Docket No. 14-1917 (issued January 22, 2015).

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.²⁴ 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.²⁵ 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.²⁶

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. This information will also be used to determine the repayment schedule, if necessary. 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.²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore 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.

Appellant did not provide sufficient financial information within the appropriate time period to show that she was entitled to waiver of recovery of the overpayment. Before OWCP, she asserted that she had various monthly expenses which exceeded her monthly income. The Board finds that OWCP properly determined that appellant had not provided proof for all of her

²⁴ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). 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. *Supra* note 11 at Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

²⁵ *Id.* at § 10.437(a), (b).

²⁶ *Id.* at § 10.437(b)(1).

²⁷ *Id.* at § 10.438.

reported monthly expenses and/or that they constituted ordinary and necessary living expenses. While several check images documented payments of \$695.00 for rent, \$8.66 for life insurance premium, and \$118.00 to Sooner Money Loans, appellant failed to submit any documentation in support of her other reported monthly expenses. In her July 13, 2013 Form OWCP-20, she claimed monthly expenses for food (\$250.00), clothing (\$100.00), utilities (\$600.00), other expenses (\$600.00), Check-N-Go (\$565.46), OK Loan Company (\$82.46), Ace Loans (\$155.59), JC Penney (\$35.00), cable (\$100.00), Visa (\$35.00), and unspecified loans (\$122.00). During the March 18, 2016 telephonic prerecoupment hearing, appellant reported an expense of \$68,000.00 for medical bills related to her recent fall and increased or additional monthly expenses, which included \$710.00 for that would rise again in May 2016 to \$740.00, \$122.94 for cable, \$69.66 for two insurance premiums, \$486.38 for car lease, \$170.00 for cellphones, and \$144.00 for car insurance. The Board notes, however, that appellant did not provide supporting documentation to clearly establish such expenses. As noted, it is her responsibility to provide information about income, expenses, and assets as specified by OWCP.²⁸

For these reasons, appellant did not submit sufficient financial information to establish that, recovery of the overpayment would defeat the purpose of FECA. She has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As appellant has not shown that her current ordinary and necessary living expenses exceed her monthly income by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.²⁹ Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.³⁰

Appellant has failed to establish that OWCP abused its discretion by refusing to waive recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 10.441 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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

²⁸ See *id.*

²⁹ See *supra* note 24.

³⁰ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

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.”³¹

ANALYSIS -- ISSUE 4

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every 28 days, OWCP took into consideration the limited financial information submitted as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on her. Therefore, it properly required recovery of the overpayment by deducting \$100.00 from her continuing compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly determined appellant’s pay rate for compensation purposes. The Board further finds that she received a \$4,579.11 overpayment of compensation for the period November 1, 2014 to June 27, 2015 and OWCP did not abuse its discretion by refusing to waive recovery of the overpayment. The Board also finds that OWCP properly required repayment of the overpayment by deducting \$100.00 from appellant’s continuing compensation payments every 28 days.

³¹ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056 (1988).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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