

of the overpayment by deducting \$600.00 every 28 days from appellant's continuing compensation.

On appeal appellant's representative asserts that her position would change for the worse and create a hardship for her if she were required to repay the overpayment.

FACTUAL HISTORY

On November 11, 2002 appellant, then a 65-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her back on that date when she was hit by a mail container. She stopped work that day and did not return.

OWCP initially accepted the claim for the condition of lumbar contusion, and later expanded the claim to include lumbosacral sprain, thoracic and lumbar spondylosis with myelopathy, degeneration of thoracic or thoracolumbar intervertebral disc, and major depression, single episode, unspecified. Appellant received continuation of pay from November 12 to December 26, 2002 and began receiving FECA compensation on December 27, 2002. She was placed on the periodic compensation rolls in April 2003. On November 5, 2003 appellant underwent a lumbar decompression and spinal fusion. In July 2006, she came under the care of Dr. Les Benson, a family physician.

Annual EN1032 forms signed by appellant between July 20, 2003 and July 18, 2011 and July 18, 2013 and September 9, 2016 indicated that she was receiving Social Security Administration (SSA) benefits. On the EN1032 form she signed on August 3, 2012, she indicated that she was receiving no additional benefits.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to the SSA on August 11, 2014. SSA returned the form on September 24, 2014, noting that appellant had been receiving SSA retirement benefits since August 2002. It indicated that, beginning in August 2002, appellant's SSA rate with FERS was \$1,162.90 and without FERS it would have been \$517.50. Each year the rates increased through December 2013.

In reports dated July 10, 2014 and July 31, 2015, Dr. Benson diagnosed contusion of back, sprain of lumbosacral joint, chronic pain syndrome, degeneration of thoracic or thoracolumbar intervertebral disc, major depression, single episode, unspecified, and thoracic or lumbar spondylosis with myelopathy. He described appellant's medical management and advised that she was medically disabled from her previous employment.

At OWCP's request, in October 2015, SSA furnished new rates for the period August 2002 through December 2014.

By letter dated November 10, 2015, OWCP notified appellant that, based on information provided by SSA regarding what amount of her SSA benefit was attributable to federal service, her FECA benefits had been adjusted effective October 18, 2015.

On January 4, 2016 OWCP issued a preliminary finding of an overpayment of compensation in the amount of \$133,270.45. It explained that the overpayment occurred because a portion of appellant's SSA benefits, that she received from December 27, 2002 to October 17,

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 was not at fault and provided an overpayment action request and an overpayment recovery questionnaire (OWCP-20 form). Appellant was informed of the actions she could take and was allotted 30 days to respond.

Appellant timely requested a prerecoumpment hearing with OWCP's Branch of Hearings and Review. She submitted an overpayment questionnaire which listed monthly income of \$3,433.92 and monthly expenses of \$3,795.66, with assets totaling \$29,477.60. Appellant attached addenda noting additional income and expenses, and noted additional real estate holdings of a second house and a mobile home. She maintained that she was entitled to both SSA and FECA benefits, and submitted additional documentation including income tax returns, bank statements, cancelled checks, and copies of invoices.

In a September 9, 2016 report, Dr. Benson reiterated his findings and conclusions.

Appellant, who was present, did not testify at the hearing, held on October 19, 2016. Her representative, a union representative, indicated that there was no disagreement regarding the period or amount of the overpayment and that the only issue at hand was waiver. He maintained that appellant suffered from codependency and had made bad choices regarding her children and grandchildren, noting that she had given them homes and real estate yet kept the property deeds in her name, and that because her FECA compensation was reduced in November 2015, she needed all her income to get by.

In correspondence submitted following the hearing, appellant's representative asserted that appellant was codependent with her children and grandchildren and, based on her financial situation, denial of waiver would be against equity and good conscience. He also submitted an additional overpayment questionnaire. This indicated that she had monthly income of \$1,567.00 from SSA, \$1,857.71 from FECA, and \$982.36 from the sale of her home, for a total of \$4,407.06. Monthly, expenses totaled \$4,168.63 and assets totaled \$91,975.22.

By decision dated January 27, 2017, an OWCP hearing representative noted that there was no dispute as to the occurrence of the overpayment or the calculated amount. He noted that appellant presented no evidence or argument against the calculation of the overpayment and found that she was without fault. The hearing representative further found that she was not entitled to waiver, noting that the evidence did not support that recovery would be against good conscience or defeat the purpose of FECA. He calculated appellant's FECA income in a monthly rather than a 28-day periodic basis, finding FECA income of \$2,009.54 per month. The hearing representative noted that her monthly income also included investment disbursements of \$366.77, reported on the first overpayment questionnaire. He added the \$2,009.54, \$366.77, and \$1,567.00 of monthly SSA benefits, and \$982.35 from the sale of appellant's home, for a total monthly income of \$4,925.66, which exceeded her claimed monthly expenses of \$4,168.63 by more than the allowable resource base of \$50.00. The hearing representative further noted that her assets of \$91,975.22 exceeded the allowed individual resource base of \$8,000.00. He concluded that appellant was not entitled to waiver and, based on this evidence, set repayment at \$600.00 per 28-day period. The hearing representative, however, lowered her overpayment of \$133,270.45 to \$61,900.00, based on her life expectancy.

LEGAL PRECEDENT -- ISSUE 1

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.”³ 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.⁴

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.⁵

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 or her 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.⁶ An individual is deemed to need substantially all or his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁷

OWCP procedures provide 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.⁸ 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.⁹

³ 5 U.S.C. § 8129.

⁴ 20 C.F.R. § 10.438.

⁵ *Id.* at §§ 10.434-10.437.

⁶ *Id.* at § 10.436.

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

⁸ *Id.*

⁹ *Id.*

ANALYSIS -- ISSUE 1

At the October 19, 2016 hearing, appellant's representative indicated that there was no disagreement regarding the period or amount of the overpayment of compensation, and that the only issue for determination was waiver. As the period and amount of overpayment as found by OWCP is not contested on this appeal, the Board affirms the overpayment of \$61,900.00. On appeal he asserts that appellant's position would change for the worse and create a hardship if she were required to repay the overpayment. The Board will therefore address only the issues of waiver and repayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver 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.¹⁰ The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses. OWCP 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹¹ Appellant submitted two overpayment questionnaires, one on February 3, 2016 and one on November 22, 2016.

Appellant did not testify at the October 19, 2016 hearing. Her representative maintained that she suffered from codependency, causing her to make bad choices regarding her children and grandchildren, noting that she had given them homes and real estate yet kept the deeds of the property in her name. There is, however, no medical evidence of record to show that appellant was codependent or was in any way incompetent such that she could not manage her affairs.¹²

Appellant's representative also asserted that, because her FECA compensation was reduced in November 2015, appellant needed all her income to get by. In the November 2016 overpayment questionnaire, appellant reported monthly income of \$4,407.06 and monthly expenses of \$4,168.63, with assets totaling \$91,975.22.

In his January 27, 2016 decision, OWCP's hearing representative recalculated appellant's FECA 28-day income to reflect a monthly payment of \$2,009.54. He further noted that her monthly income also included investment disbursements of \$366.77, reported on the first overpayment questionnaire. The hearing representative added the \$2,009.54 in FECA compensation, \$1,567.00 of monthly SSA benefits, \$982.35 in income reported from the sale of

¹⁰ *Supra* note 5.

¹¹ *Supra* note 9.

¹² *See generally S.S.*, Docket No. 08-0977 (issued June 23, 2010).

appellant's home, with the \$366.77 in investment income, for a total monthly income of \$4,925.66, which exceeded her claimed monthly expenses of \$4,168.63 by \$757.03, which is more than the \$50.00 allowance, as explained on OWCP procedures.¹³

As appellant's reported income exceeded her reported ordinary expenses by more than \$50.00, she has not shown that she needs substantially all of her current income to meet her current ordinary and necessary living expenses. Thus, appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA.¹⁴ It was therefore unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets exceeded the allowable resource base.¹⁵

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 or 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.¹⁶ Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience.¹⁷ Her monthly income exceeds her monthly expenses. Moreover, appellant did not show that she made a decision she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.¹⁸ She 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, appellant 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 she was not entitled to waiver on the grounds that recovery would be against equity and good conscience.¹⁹

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.

¹³ *Supra* note 7.

¹⁴ *Supra* note 6.

¹⁵ The Board, however, notes that appellant's reported assets of \$91,972.22 also exceeded the allowed individual resource base of \$8,000.00. *Supra* note 7.

¹⁶ 20 C.F.R. § 10.437.

¹⁷ OWCP procedures provide that ordinary and necessary living expenses include fixed expenses such as food, clothing, furniture, household and personal hygiene supplies, rent, mortgage payments, utilities, maintenance, burial plot or prepaid burial contract; accident, health, life and vehicle insurance; taxes; vehicle expenses and commuting expenses not included under vehicle expenses; medical expenses, church and charitable contributions made on a regular basis; and miscellaneous expenses not to exceed \$50.00 per month. The procedures add that consumer debt should not be calculated if the expenses are included in the fixed expenses. *Supra* note 7 at Chapter 6.200.6.a(3) (June 2009).

¹⁸ 20 C.F.R. § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

¹⁹ *Supra* note 7.

LEGAL PRECEDENT -- ISSUE 2

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 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.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$600.00 per compensation period. The record indicates that appellant's monthly income exceeds her reported monthly expenses by \$757.03 per month. OWCP therefore did not abuse its discretion in finding that she should repay the overpayment at the rate of \$600.00 per compensation period.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$61,900.00, and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$600.00 every 28 days from her continuing compensation payments.

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

²¹ *N.S.*, Docket No. 14-2081 (issued February 12, 2015).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 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