



## **ISSUES**

The issues are: (1) whether OWCP properly found that an overpayment of compensation in the amount of \$76,975.48 was created during the period September 1, 2009 to December 31, 2014; and (2) whether OWCP abused its discretion by denying waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On February 25, 1994 appellant, then a 50-year-old language voice analyst, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries when she slipped and fell in the performance of duty on February 18, 1994. OWCP accepted the claim for concussion, back and neck sprains, right buttock contusion, and right shoulder rotator cuff sprain. Appellant returned to part-time work at the employing establishment and as of October 28, 1996 was working six hours per day. By decision dated December 26, 1996, OWCP reduced her compensation to reflect her wage-earning capacity based on actual earnings. Appellant continued to receive wage-loss compensation based on loss of wage-earning capacity.

Appellant periodically submitted EN1032 forms that requested information regarding receipt of other federal benefits. In an October 8, 2010 form, she noted that she was receiving Social Security Administration (SSA) benefits as part of an annuity for federal service. Appellant also reported receipt of SSA benefits on EN1032 forms dated October 6, 2011, October 24, 2012, October 21, 2013, and October 26, 2014.

OWCP requested that SSA provide information with respect to appellant's SSA benefits with both Federal Employees Retirement Service (FERS) and without FERS. Appellant indicated that she retired from federal employment as of December 31, 2014. She also indicated that she was selecting retirement benefits from Office of Personnel Management (OPM) effective January 1, 2015.<sup>3</sup>

OWCP received a March 4, 2015 response from SSA with a dual benefits worksheet regarding SSA both with FERS and without FERS. SSA indicated that appellant was entitled to retirement benefits effective September 2009. The worksheet provided the SSA rates commencing September 2009 until December 2009, and for each year through December 2014.

On April 20, 2015 OWCP made a preliminary determination that an overpayment of compensation was created in the amount of \$76,975.48 from September 1, 2009 to December 31, 2014. It provided its calculations for each year and found that, based on the SSA information provided, an overpayment of compensation was created in the amount of \$76,975.48. In addition, OWCP found appellant was not at fault in creating the overpayment. An overpayment recovery questionnaire (OWCP-20) was provided, and appellant was advised to submit relevant financial information within 30 days.

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<sup>3</sup> By decision dated April 2, 2015, OWCP found an overpayment of compensation was created in the amount of \$1,764.29 because appellant received compensation through February 7, 2015. That decision is not before the Board.

By decision dated June 4, 2015, OWCP finalized its preliminary determination that an overpayment of compensation was created in the amount of \$76,975.48. It also denied waiver of recovery of the overpayment, noting that appellant did not submit financial information.

A memorandum of telephone call dated June 8, 2015 indicated that appellant reported that she did not receive the preliminary determination of overpayment. On June 15, 2015 OWCP reissued the preliminary determination that an overpayment of compensation was created in the amount of \$76,975.48.

By letter dated July 7, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A hearing was held on March 7, 2016. Counsel testified at the hearing that appellant had been employed in the private sector from 1979 to 1993.

On April 6, 2016 counsel submitted additional evidence. This evidence included a statement as to monthly expenses and documents as to account balances in the federal retirement Thrift Savings Plan (TSP). The statements showed approximately \$440,000.00 in appellant's TSP account, and a balance over \$650,000.00 in her spouse's account. In addition, an affidavit from appellant reported additional assets that included approximately \$9,000.00 in savings accounts and \$250,000.00 in stocks. Additional evidence included an SSA benefits calculator and retirement planner.

In an affidavit appellant asserted that OWCP had never informed her that an offset to her compensation was required for receipt of SSA benefits and that she had no knowledge of a FERS offset until OWCP notified her of an overpayment in 2015. She stated that, if she had known there was an offset, she would have delayed receipt of SSA benefits. Counsel argued that the preliminary determination did not explain the calculation of SSA benefits derived from federal employment, as opposed to the private sector. Additionally he also argued the issue of detrimental reliance, asserting that appellant gave up a valuable right when she elected SSA benefits at age 66 rather than wait until she was 70 and receive higher SSA benefits. According to counsel, it was against equity and good conscience to require repayment of the overpayment.

By decision dated April 25, 2016, the hearing representative found that an overpayment of compensation was created in the amount of \$76,975.48. He denied waiver of recovery of the overpayment, finding that appellant had sufficient assets to repay the overpayment, and that there had been no detrimental reliance.

### **LEGAL PRECEDENT -- ISSUE 1**

5 U.S.C. § 8116(d)(2) requires that compensation benefits be reduced by “the amount of any such [SSA] benefits payable that are attributable to federal service.” OWCP's procedures provide that, while SSA benefits are payable concurrently with FECA benefits, in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.<sup>4</sup> It obtains information from SSA on the amount of the

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (June 2009). This same section of the manual explains that if social security benefits are paid for disability rather than age, SSA benefits paid for disability shall be reduced by “FECA” compensation payable.

claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA 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 compensation payable.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

OWCP found that an overpayment of compensation was created in the amount of \$76,975.48 from September 1, 2009 through December 31, 2014. The overpayment in this case is 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. The information provided by SSA indicated that appellant did receive age-based SSA benefits that were attributable to federal service during the period September 2009 to December 2014. Therefore an overpayment of compensation was created.

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 September 2009. For the years 2011 to 2014, there was a change in the SSA rate with FERS in December of those years. OWCP calculated the portion of SSA benefits attributable to federal service for 28-day periods. For example, effective January 1, 2011 the SSA rate with FERS was \$1,980.20 per month, with the SSA rate without FERS \$856.80, resulting in a difference of \$1,123.40. The 28-day overpayment was found to be \$1,036.90 based on this evidence. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided. The Board finds the evidence is sufficient to establish that an overpayment of compensation was created in the amount of \$76,975.48.<sup>6</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA<sup>7</sup> provides: "Adjustment or recovery 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 FECA or would be against equity and good conscience."<sup>8</sup> Since OWCP found appellant to be without fault in the creation of the

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<sup>5</sup> FECA Bulletin No. 97-09 (issued February 3, 1997). *See also P.G.*, Docket No. 13-589 (issued July 9, 2013).

<sup>6</sup> When SSA provides a proper calculation of SSA benefits attributable to federal service during a period FECA compensation was received, an overpayment is properly found in that amount. *See W.C.*, Docket No. 15-1280 (issued November 13, 2015).

<sup>7</sup> 5 U.S.C. § 8101 *et seq.*

<sup>8</sup> *Id.* at § 8129(b).

overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. 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 Title 20 of the Code of Federal Regulations.

According to section 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 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.<sup>9</sup> For waiver under the “defeat the purpose” of FECA standard, appellant must show that she needs substantially all of his current income to meet current ordinary and necessary living expenses, and that her assets do not exceed the resource base.<sup>10</sup> An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>11</sup>

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.

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

In support of her request for waiver of recovery of the overpayment, appellant submitted an OWCP-20 and submitted financial documents. The initial question is whether recovery of the overpayment would defeat the purpose of FECA. The Board finds that OWCP did not abuse its discretion by denying waiver of recovery of the overpayment.

As discussed above, recovery of an overpayment does not defeat the purpose of FECA if a claimant has assets that exceed the \$8,000.00 resource base for an individual with a spouse. The Board notes that appellant indicated that she had approximately \$440,000.00 in her TSP retirement account. A claimant’s contributions to TSP and earnings from those contributions are considered to be assets which OWCP may consider in determining waiver.<sup>12</sup> In addition, appellant reported savings account assets of \$9,000.00 and stock holdings worth approximately

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<sup>9</sup> 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

<sup>10</sup> See *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>11</sup> *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>12</sup> *C.W.*, Docket No. 11-1338 (issued December 19, 2011).

\$250,000.00. Therefore the evidence indicates that appellant's assets exceed the resource base and recovery would not defeat the purpose of FECA.

There is no evidence that recovery would be against equity and good conscience. The factors considered regarding financial hardship are substantially the same as those for defeat the purpose of FECA and, as found above, appellant has sufficient available assets and excess income.<sup>13</sup>

Moreover, appellant has not shown that she gave up a valuable right or changed her position for the worse in reliance on compensation payments. Counsel argues that there was detrimental reliance as appellant had given up rights with respect to SSA benefits. He asserts that appellant could have declined SSA retirement benefits and waited until she was 70 years of age to receive higher monthly benefits, and if she lived long enough would have received more in SSA benefits over her lifetime. This speculative argument does not establish detrimental reliance.<sup>14</sup> Appellant was not deprived of any right to collect SSA benefits due to the receipt of compensation. 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>15</sup> The argument that appellant possibly would have waited to collect SSA benefits and possibly could have benefited if she lived to a certain age is insufficient to establish a valuable right has been relinquished.

In *M.B.*,<sup>16</sup> the claimant argued that if she had known her compensation benefits would be offset by SSA benefits, she would not have stopped working and moved to Florida. The Board found there was no detrimental reliance established, noting there is no provision for conjecture regarding future income. The Board further noted that the claimant's arguments would support her reliance on the receipt of compensation benefits in general, but did not support her reliance on the overpaid amount, which was the relevant inquiry. To establish detrimental reliance, the claimant must show that the amount she was overpaid caused her to make a decision, to her detriment, that she would not have otherwise made.

The Board finds the evidence of record does not establish that recovery of the overpayment would defeat the purpose of FECA, or be against equity and good conscience. Therefore OWCP properly denied waiver of recovery of the overpayment in this case.

On appeal counsel again argues detrimental reliance. He claims that the current case is similar to an example of detrimental reliance found in OWCP's procedures, where a claimant resigns his job and withdraws his contributions to his retirement fund based on receipt of

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<sup>13</sup> See *James K. Fitzgerald*, 51 ECAB 659 (2000).

<sup>14</sup> See *M.T.*, Docket No. 16-0229 (issued May 10, 2016). The Board found that there was no evidence to substantiate appellant's claim of detrimental reliance. Specifically, other than appellant's own statements there was no evidence that appellant chose to retire once she learned of a schedule award.

<sup>15</sup> *L.B.*, Docket No. 12-1202 (issued February 6, 2013).

<sup>16</sup> Docket No. 14-0446 (issued September 8, 2014).

compensation benefits.<sup>17</sup> The Board finds the present case is not similar to the cited example. Appellant has not lost her job, been unable to find employment, or lost retention rights, as discussed in the procedure manual example. Rather, she has speculated that she may have delayed selecting SSA benefits had she known she was not entitled to compensation, and may have received more in benefits over her lifetime. Appellant has not established that the portion of social security benefits she received which constituted the overpayment influenced her decision regarding the date of social security retirement.<sup>18</sup> The Board finds she has not established detrimental reliance in this case.

### **CONCLUSION**

The Board finds that OWCP properly found that an overpayment of compensation was created in the amount of \$76,975.48. The Board further finds that OWCP properly denied waiver of recover of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 25, 2016 is affirmed.

Issued: September 5, 2017  
Washington, DC

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

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

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

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<sup>17</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (June 2009).

<sup>18</sup> *Supra* note 15.