

**United States Department of Labor  
Employees' Compensation Appeals Board**

G.K., Appellant	)	
	)	
and	)	<b>Docket No. 18-0243</b>
	)	<b>Issued: August 17, 2018</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, BRADLEY</b>	)	
<b>INTERNATIONAL AIRPORT,</b>	)	
<b>Windsor Locks, CT, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 13, 2017 appellant filed a timely appeal from an October 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,215.22 because she concurrently received Social Security Administration (SSA) benefits while receiving FECA compensation benefits for the period February 1, 2013 through December 10, 2016; (2) whether OWCP properly denied

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$250.00 every 28 days from appellant's continuing compensation.

### **FACTUAL HISTORY**

On October 13, 2009 appellant, then a 62-year-old lead transportation security officer (screener) filed a traumatic injury claim (Form CA-1), alleging that on October 9, 2009 she sustained right shoulder and arm injury while placing a bag on a baggage belt in the performance of duty. OWCP accepted her claim for sprain of shoulder and upper arm, supraspinatus, right. Appellant stopped work on May 25, 2011 when she underwent right shoulder arthroscopic rotator cuff repair. She received wage-loss compensation through September 3, 2011 and returned to modified-duty work on September 5, 2011. On November 1, 2011 appellant returned to regular, full-time duty.

On September 26, 2012 appellant filed a notice of recurrence (Form CA 2) alleging a recurrent right rotator cuff tear. OWCP accepted her recurrence claim as of May 24, 2012. Appellant underwent revision right shoulder arthroscopic surgery on November 2, 2012. OWCP expanded the acceptance of the claim to include right shoulder rotator cuff tear. It placed appellant on the periodic compensation rolls in November 2012. The right shoulder tear recurred on May 27, 2015 and, as a result, she underwent a right shoulder reverse total shoulder arthroplasty. Appellant has not returned to work.<sup>2</sup>

EN1032 forms signed by appellant on August 25, 2014, August 25, 2015, and August 15, 2016 indicated that she was receiving SSA benefits as part of an annuity for federal service.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA on December 7, 2016. SSA returned the form on December 30, 2016, noting that appellant received SSA retirement benefits beginning in February 2013. It indicated that beginning in February 2013 appellant's SSA rate with FERS was \$1,432.40 and without FERS \$1,170.30, beginning in December 2013, the SSA rate with FERS was \$1,453.80 and without FERS \$1,187.80, beginning in December 2014 and December 2015, the SSA rate with FERS was \$1,478.50 and without FERS \$1,207.90, and beginning December 2016, the SSA rate with FERS was \$1,482.50 and without FERS \$1,211.50.

By letter dated January 3, 2017, OWCP notified appellant that, based on information provided by SSA regarding the amount her SSA benefit was attributable to federal service, her FECA wage-loss compensation had been adjusted.

On January 5, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$12,429.39 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from February 1, 2013 to December 10, 2016 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 her without fault in the creation of the overpayment and provided an overpayment action request form and an

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<sup>2</sup> Appellant refused a limited-duty job offer on April 30, 2013 indicating that she also had an employment-related left rotator cuff tear. She underwent physical therapy and pain management.

overpayment recovery questionnaire (Form OWCP-20) for her completion. OWCP allotted appellant 30 days to respond.

Appellant requested waiver of recovery of the overpayment and a decision on the record. She submitted partial copies of EN1032 forms dated 2014, 2015, and 2016 showing that she was in receipt of SSA benefits and financial information. Appellant did not forward a completed overpayment recovery questionnaire.

On January 27, 2017 SSA forwarded an additional FERS/SSA dual benefits calculation form. This contained the same figures for appellant's SSA rate with FERS, but different rates for SSA rate without FERS. It indicated: beginning in February 2013, her SSA rate with FERS was \$1,432.40 and without FERS was \$1,153.70; beginning in December 2013, the SSA rate with FERS was \$1,453.80 and without FERS was \$1,171.00; beginning in December 2014 and December 2015, the SSA rate with FERS was \$1,478.50 and without FERS was \$1,190.80; and beginning December 2016, the SSA rate with FERS was \$1,482.50 and without FERS was \$1,194.30.

On March 16, 2017 OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire. In an OWCP memorandum dated March 16, 2017, it noted that clarification was needed regarding the offset information as conflicting reports had been received from SSA.

Appellant forwarded the completed overpayment recovery questionnaire on March 30, 2017. She indicated that she had a monthly income of \$1,373.00 from SSA, and a monthly pension from private employment of \$414.67, for total monthly income of \$1,787.67. Appellant listed \$2,568.05 in monthly expenses and a checking account balance of \$17,739.87.

On March 16 and May 4, 2017 OWCP forwarded FERS/SSA dual benefits calculation forms to SSA.<sup>3</sup> On May 23, 2017 SSA returned the form completed on January 27, 2017. A handwritten notation stated, "This is to verify that this computation is correct and replaces any previous computations." It was signed by R.S., an SSA claims technical examiner.

By letter dated June 28, 2017, OWCP informed appellant that her FECA compensation would be reduced further based on new information provided by SSA. It administratively terminated an overpayment of compensation in the amount of \$113.08 for the period December 11, 2016 to June 24, 2017 when she had been paid at an incorrect offset rate.<sup>4</sup>

On September 1, 2017 OWCP issued a *de novo* preliminary determination that an overpayment of compensation in the amount of \$13,215.22 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from February 1, 2013 to December 10, 2016, when her FECA compensation was adjusted, 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 provided a calculation of the overpayment and found

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<sup>3</sup> OWCP also forwarded the inconsistent forms forwarded by SSA on December 30, 2016 and January 27, 2017.

<sup>4</sup> The record contains an overpayment worksheet explaining this calculation.

her without fault in its creation. It again provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) for her completion. OWCP allotted appellant 30 days to respond. The record contains an overpayment worksheet and printouts of FECA compensation paid to appellant.

Appellant requested waiver of recovery of the overpayment and a decision on the record. She submitted another completed overpayment recovery questionnaire. Appellant listed monthly income of \$1,373.00 from SSA, \$414.67 as a state or local welfare payment, for total monthly income of \$1,787.67. She listed monthly expenses totaling \$2,957.58 and a checking account balance of \$20,085.94.

By decision dated October 12, 2017, OWCP finalized the September 1, 2017 preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$13,215.22 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from February 1, 2013 to December 10, 2016 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 her without fault in the creation of the overpayment, but that she was not entitled to waiver of recovery as there was no evidence to support that recovery would be against equity and good conscious or defeat the purpose of FECA. It calculated appellant's monthly income from SSA, FECA, and other disbursements reported, for a total monthly income of \$3,780.20<sup>5</sup> and reported monthly expenses of \$2,957.58. OWCP further noted that appellant had a checking account balance of \$20,085.94 and set recovery of the overpayment at \$250.00, to be deducted every 28 days from her continuing compensation benefits.

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

Section 8102(a) 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>6</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>7</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.<sup>8</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

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<sup>5</sup> The Board notes that OWCP did not recalculate appellant's 28-day FECA benefit to a monthly amount, and instead listed her 28-day FECA income of \$1,992.53 rather than a monthly FECA income of approximately \$2,158.57, for a total monthly income of \$3,946.24.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>9</sup>

Section 404.310 of SSA's regulations provides that entitlement to SSA benefits begins at 62 years.<sup>10</sup> Section 404.409 of SSA's regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>11</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,215.22.

OWCP found that an overpayment of compensation was created in the amount of \$13,215.22 from February 1, 2013 to December 10, 2016. The overpayment was based on the evidence received from SSA with respect to benefits it 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 concurrent FECA wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.<sup>12</sup> The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period February 1, 2013 to December 10, 2016.

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. SSA provided the SSA benefit pay rate with FERS, and without FERS for specific periods commencing in February 2013 through December 2016. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits received by appellant for the period for the period February 1, 2013 to December 10, 2016 and finds that an overpayment of compensation in the amount of \$13,215.22 was created.<sup>13</sup>

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

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."<sup>14</sup> Section 10.438 of OWCP regulations provides that the individual who

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

<sup>10</sup> 20 C.F.R. § 404.310.

<sup>11</sup> *Id.* at § 404.409.

<sup>12</sup> *Supra* notes 8 and 9.

<sup>13</sup> *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

<sup>14</sup> 5 U.S.C. § 8129.

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 on 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>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> For waiver under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.<sup>18</sup> 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.<sup>19</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.<sup>20</sup> 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.<sup>21</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>22</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

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<sup>15</sup> 20 C.F.R. § 10.438.

<sup>16</sup> *Id.* at §§ 10.434-10.437.

<sup>17</sup> *Id.* at § 10.436.

<sup>18</sup> *Id.*

<sup>19</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 20 C.F.R. § 10.437; *see W.P.*, 59 ECAB 514 (2008).

on the payments or on the notice of payment.<sup>23</sup> Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.<sup>24</sup> An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.<sup>25</sup>

### ANALYSIS -- ISSUE 2

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

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.<sup>26</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's procedures.<sup>27</sup> The supporting financial information of record documents assets in excess of \$20,000.00. 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 not necessary 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>28</sup> Appellant did not establish that she was entitled to waiver of recovery of the overpayment on the basis of defeating the purpose of FECA.<sup>29</sup>

Appellant contends on appeal that she should not have to repay the overpayment because she reported her SSA benefit to OWCP on OWCP EN1032 forms in 2014, 2015, and 2016. Section 10.435(a) of OWCP's regulations provides that, an error by a government agency, including OWCP, which resulted in an overpayment does not by itself relieve a claimant from liability for repayment.<sup>30</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

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<sup>23</sup> Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 2.600.b(3) (June 2009).

<sup>24</sup> 20 C.F.R. § 10.437(b)(1) (2011); *see J.A.*, Docket No. 09-1678 (issued June 9, 2010).

<sup>25</sup> *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

<sup>26</sup> *Id.* at § 10.436.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See K.K.*, Docket No. 09-0207 (issued October 2, 2009).

<sup>30</sup> *J.W.*, Docket No. 16-1355 (issued January 10, 2017).

if she had never received the overpayment at all. OWCP properly found that appellant was not entitled to waiver on the grounds that recovery would be against equity and good conscience.<sup>31</sup>

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.

### **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>32</sup>

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

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$250.00 per every 28 days from continuing compensation payments.

The record indicates that appellant's monthly income exceeds her reported monthly expenses by approximately \$988.00 per month.<sup>33</sup> OWCP therefore did not abuse its discretion in requiring recovery of the overpayment at the rate of \$250.00 per every 28 days from continuing compensation payments.<sup>34</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,215.22, and that OWCP properly denied waiver of recovery

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<sup>31</sup> Federal (FECA) Procedure Manual, *supra* note 19.

<sup>32</sup> 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>33</sup> *Supra* note 5.

<sup>34</sup> *N.S.*, Docket No. 14-2081 (issued February 12, 2015).



of the overpayment. OWCP also properly required recovery of the overpayment by deducting \$250.00 every 28 days from her continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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