

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

E.K., Appellant	)	
	)	
and	)	<b>Docket No. 18-0587</b>
	)	<b>Issued: October 1, 2018</b>
DEPARTMENT OF DEFENSE, DEFENSE	)	
COMMISSARY AGENCY, Quantico, VA,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 19, 2018 appellant filed a timely appeal from a July 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>3</sup>

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from July 25, 2017, the date of OWCP's last merit decision, was Monday, January 22, 2018. Since using January 25, 2018, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights for this merit decision, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 19, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence as its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. Therefore, the Board is precluded from reviewing this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,127.13 because she concurrently received Social Security Administration (SSA) age-based benefits while receiving FECA benefits for the period March 1, 2013 to September 17, 2016; (2) whether OWCP properly denied waiver of recovery of the overpayment; and, (3) whether OWCP properly required repayment of the overpayment by deducting \$241.11 every 28 days from appellant's continuing compensation.

## **FACTUAL HISTORY**

On July 16, 1998 appellant, then a 46-year-old store worker, filed a traumatic injury (Form CA-1) alleging that she injured her back picking up pallets while in the performance of her federal employment. OWCP accepted the claim for mid and low back strains on September 18, 1998 and paid appellant compensation on the daily rolls. It placed her on the periodic compensation rolls in January 1999.

By decision dated July 30, 2003, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as an information clerk, effective August 10, 2003. It utilized the *Shadrick* formula<sup>4</sup> and found that appellant had 66 percent loss of wage-earning capacity (LWEC).

On EN1032 forms signed by appellant on March 17, 2013, March 26, 2014, March 23, 2015, and March 16, 2016, she indicated that she was not receiving SSA benefits as part of an annuity for federal service. On the EN1032 form she signed on March 16, 2017, she indicated that she received \$1,185.00 monthly from SSA as an annuity for federal service. In the 2013 and 2014 submissions, she also indicated that she was receiving an SSA annuity based on her previous husband's income.

On December 30, 2016 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. This indicated that appellant received SSA retirement benefits beginning in March 2013 when appellant's SSA rate with FERS was \$952.70 and without FERS \$285.20, that beginning in December 2013, the SSA rate with FERS was \$966.90 and without FERS \$289.40, that beginning in December 2014 and December 2015, the SSA rate with FERS was \$983.30 and without FERS \$294.30.

On September 29, 2016 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$29,127.13 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from March 1, 2013 to September 17, 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. The preliminary determination included as an attachment an overpayment calculation form which explained the total overpayment amount. OWCP found appellant not at fault and provided an overpayment action request form

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<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

and an overpayment recovery questionnaire (OWCP-20 form).<sup>5</sup> OWCP informed appellant of the actions she could take and afforded 30 days for her to respond.

By letter dated October 21, 2016, 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.<sup>6</sup>

On October 24, 2016 appellant requested waiver and a prerecoupment hearing with OWCP's Branch of Hearings and Review regarding the \$29,127.13 overpayment. She attached an overpayment recovery questionnaire indicating monthly income of \$983.00 in FECA benefits and \$1,185.00 from SSA, for a total income of \$2,168.00, and noted monthly expenses of \$1,878.72.<sup>7</sup>

A hearing regarding the \$29,127.13 overpayment was held on May 16, 2017.<sup>8</sup> Counsel maintained that repayment would cause financial hardship, noting that appellant's current monthly expenses exceeded her current monthly income by approximately \$700.00. Appellant testified her expenses included a mortgage, credit cards, personal loans, car payment, house and mobile telephones, television, electricity, water, gas, automobile insurance, extermination, food, and other miscellaneous expenses. She stated that her daughter, who has health issues, lived with her, and received monthly income from SSA. The hearing representative advised appellant that she needed to furnish documentation of her claimed expenses including her daughter's income.

On June 12, 2017 appellant forwarded invoices and receipts concerning telephone service, car payment, water and sewer service,<sup>9</sup> gasoline, and grocery purchases.

By decision dated July 25, 2017, an OWCP hearing representative found that the preliminary determination regarding the \$29,127.13 overpayment should be affirmed. She denied waiver, noting that appellant, who was not at fault, had not provided evidence with regard to her income and expenses as requested and hence did not provide the evidence necessary to establish

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<sup>5</sup> OWCP explained that she was to attach documents to the overpayment recovery questionnaire including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

<sup>6</sup> On October 24, 2016 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$636.00 had been created for the period September 18 to October 15, 2016, due to her receipt of LWEC compensation when her compensation should have been offset due to receipt of SSA age-based benefits. OWCP found appellant not at fault and provided an overpayment action request form and an overpayment recovery questionnaire. By decision dated December 9, 2016, OWCP finalized the preliminary overpayment determination regarding the \$636.00 overpayment. It noted that, while appellant submitted an overpayment recovery questionnaire, she did not submit supporting financial documentation as requested. OWCP set recovery at a rate of \$25.00 every 28 days from continuing compensation. Appellant did not appeal this decision to the Board.

<sup>7</sup> On November 20, 2016 appellant requested waiver and a decision based on the written record regarding the \$636.00 overpayment. She attached a second overpayment recovery questionnaire which indicated monthly FECA income of \$257.64 and monthly SSA income of \$1,442.64. Appellant again indicated that monthly expenses were \$1,878.72.

<sup>8</sup> At that time appellant was represented by legal counsel.

<sup>9</sup> The invoice for water and sewer service was addressed to another party. Appellant wrote a notation on the invoice indicating that, when her mother died, she did not have the service changed to her name.

that recovery of the overpayment should be waived. The hearing representative explained that appellant had provided no evidence regarding a mortgage and credit cards, and that she did not submit evidence regarding her daughter's income. She set repayment at \$241.11 every 28 days from appellant's continuing FECA compensation.

### **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>10</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>11</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-based benefits that are attributable to federal service of the employee.<sup>12</sup> FECA Bulletin No. 97-9 provides 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>13</sup>

Section 404.310 of SSA regulations provides that entitlement to SSA age-based compensation begins at 62 years.<sup>14</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>15</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,127.14.<sup>16</sup>

OWCP found that an overpayment of compensation was created for the period March 1, 2013 to September 17, 2016. The overpayment was based on the evidence received from SSA with respect to benefits previously paid to appellant. The record indicates that, while appellant was receiving compensation for total disability under FECA, she also received SSA age-based

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<sup>10</sup> 5 U.S.C. § 8102(a).

<sup>11</sup> *Id.* at § 8116.

<sup>12</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

<sup>13</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>14</sup> 20 C.F.R. § 404.310.

<sup>15</sup> *Id.* at § 404.409.

<sup>16</sup> The Board initially notes that OWCP's calculation of this overpayment contained an addition error. Adding the overpayment amounts from March 1 to December 1, 2013 (\$6,051.51) with the amount for December 1, 2013 to December 1, 2014 (\$8,152.34) with the amount for December 1, 2014 to September 17, 2016 (\$14,923.29) yields an overpayment of \$29,127.14 rather than \$29,127.13. The Board deems this error harmless and will modify the amount of the overpayment to \$29,127.14. *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA age-based benefits attributable to federal service for the same period.<sup>17</sup> The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period March 1, 2013 to September 17, 2016.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service were 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 March 1, 2013 to September 17, 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 March 1, 2013 to September 17, 2016 and finds that an overpayment of compensation in the amount of \$29,127.14 was created.<sup>18</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>19</sup> Section 10.438 of OWCP regulations provides that [t]he 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 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>20</sup>

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

The Board finds that OWCP properly denied waiver of recovery of the \$29,127.14 overpayment of compensation.

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<sup>17</sup> *Supra* notes 10 and 11.

<sup>18</sup> *See G.T., supra* note 15.

<sup>19</sup> 5 U.S.C. § 8129.

<sup>20</sup> 20 C.F.R. § 10.438.

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>21</sup> Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.<sup>22</sup>

In its preliminary determination dated September 29, 2016, OWCP clearly explained the importance of providing the completed overpayment questionnaire and financial information, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. While appellant submitted a completed overpayment questionnaire on October 27, 2016 and testified at the May 16, 2017 hearing that her income had decreased, the hearing representative specifically instructed her to furnish documentation of her claimed expenses including her daughter's income. Appellant thereafter submitted copies of invoices and receipts concerning telephone service, a car payment, water and sewer service, vehicle gasoline, and grocery receipts. She did not submit the requested financial information needed to support her claimed income and expenses within the defined period such as evidence regarding her mortgage, credit card bills, or regarding personal loans, and did not submit information regarding her daughter's income. As a result, OWCP's hearing representative did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment..<sup>23</sup>

### **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>24</sup>

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

The Board finds that OWCP properly set recovery of the overpayment of compensation at \$241.11 every 28 days from appellant's continuing compensation.

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<sup>21</sup> *Id.* at § 10.436.

<sup>22</sup> *Id.* at. § 10.438.

<sup>23</sup> *See S.B.*, Docket No. 16-1795 (issued March 2, 2017).

<sup>24</sup> 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

As noted, appellant did not submit financial information corroborating her claimed expenses or information regarding her daughter's income that the hearing representative requested prior to the final July 25, 2017 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>25</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>26</sup> As appellant did not submit the financial information to OWCP as requested, the Board finds that there is no evidence in the record to show that OWCP erred in directing recovery of the \$29,127.14 overpayment at the rate of \$241.11 every 28 days from appellant's continuing compensation.<sup>27</sup>

As to appellant's general assertion on appeal, that recovery of the overpayment would cause hardship, as explained above OWCP correctly found that an overpayment had been created, that appellant was not at fault, properly denied waiver of recovery, and set a reasonable recovery rate.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$29,127.14, that OWCP properly denied waiver of recovery of the overpayment, and that it properly required repayment at the rate of \$241.11 every 28 days from appellant's continuing compensation.

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<sup>25</sup> *Id.* at §10.438.

<sup>26</sup> *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

<sup>27</sup> *See S.B.*, *supra* note 22.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2018  
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