

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

V.T., Appellant

and

**DEPARTMENT OF THE NAVY, NAVY
REGION SOUTHWEST, San Diego, CA,
Employer**

)
)
)
)
)
)

**Docket No. 18-0628
Issued: October 25, 2018**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 25, 2018 appellant filed a timely appeal from an August 4, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,769.00 during the period February 1 through December 10, 2016; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes additional evidence was submitted to OWCP and on appeal following the August 4, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Thus the Board is precluded from considering this additional evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1).

required recovery of the overpayment by deducting \$50.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On October 24, 2005 appellant, then a 55-year-old administrative/technical specialist filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her right knee when it struck the underside of a table while in the performance of duty. On December 2, 2005 OWCP accepted her claim for right knee contusion. It paid appellant wage-loss compensation and medical benefits on the supplemental rolls beginning December 26, 2005, and on the periodic rolls beginning July 9, 2006. OWCP later expanded acceptance of the claim to include aggravation of right knee medial meniscus tear on July 17, 2006. On September 28, 2007 appellant underwent arthroscopic partial medial and lateral meniscectomies. On February 19, 2010 she underwent total right knee arthroplasty.

In an informational letter dated February 10, 2012, OWCP informed appellant that FECA required her wage-loss compensation benefits to be reduced if she began receiving Social Security Administration (SSA) retirement benefits based on her age and federal service. It notified her of her obligation to report receipt of such retirement benefits to avoid an overpayment of compensation. On Form CA-1032s dated February 27, 2012, March 4, 2014, and February 18, 2015, appellant informed OWCP that she was receiving SSA benefits as part of an annuity for federal service.

On May 8 and September 12, 2012 OWCP provided SSA with a form for calculation of dual benefits. In a memorandum dated August 7, 2015, the employing establishment requested that OWCP contact SSA to determine whether appellant was in receipt of SSA benefits. On September 10, 2015 OWCP again provided SSA with a form for calculations of dual benefits. The SSA responded on September 24, 2015 and reported that no Federal Employees Retirement System (FERS) offset applied for the period beginning October 12, 2005. The employing establishment submitted a second memorandum dated October 18, 2016 and again requested that OWCP contact SSA to determine whether appellant was in receipt of SSA benefits. SSA responded on October 21, 2016 and indicated that beginning February 2016 her SSA rate including her federal employment under FERS was \$2,032.50 per month. The SSA rate that appellant was entitled to without her federal employment was \$758.40. Beginning in December 2016 these rates increased to \$2,038.50 and \$760.60 respectively. On November 26, 2016 the employing establishment informed OWCP that appellant was eligible for aged-based social security in February 2016.

On December 14, 2016 OWCP issued a preliminary determination that appellant had been overpaid compensation benefits in the amount of \$12,769.00 because she received FECA wage-loss compensation benefits concurrently with SSA retirement benefits from February 1 through December 10, 2016. It found that she was without fault in the creation of the overpayment. OWCP explained the calculation of the overpayment noting that beginning February 1, 2016 appellant received SSA benefits in the amount of \$2,032.50 which included her federal employment. Without her federal employment, appellant was entitled to SSA benefits in the amount of \$760.60. The difference between the amount of SSA benefits properly owed and the amount paid was \$1,277.90. OWCP noted that it paid wage-loss compensation benefits every 28 days and converted

the \$1,277.90 amount to a 28-day equivalent of \$1,179.60. It then multiplied this amount by 10.825, the number of 28-day pay periods from February 1 through December 10, 2016, and found an overpayment of compensation in the amount of \$12,769.00. OWCP recommended that appellant be found without fault in the creation of the overpayment because she was not aware nor could she reasonably have been expected to know that OWCP had paid compensation incorrectly. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. It also noted that appellant could request waiver of recovery of the overpayment. OWCP provided her with her appeal rights and afforded 30 days for a response.

In a letter dated December 14, 2016, OWCP again informed appellant that she had been receiving a prohibited dual benefit. It noted that the portion of SSA benefits earned as a federal employee was part of her retirement and that the receipt of wage-loss compensation under FECA and federal retirement was prohibited. OWCP adjusted appellant's FECA benefits to account for her SSA offset, which reduced her FECA wage-loss compensation payments from \$2,527.33 to \$1,347.73.³

On January 10, 2017 appellant requested a telephone conference on the issues of fault and possible waiver of recovery of the overpayment. She provided a completed Form OWCP-20 and supporting financial documents. Appellant indicated that she had no cash on hand and that her bank accounts totaled \$6,002.59. She listed her monthly income as \$1,926.00. Appellant's housing cost was \$1,200.00 and she provided her bank statements for the remainder of her living expenses.

Appellant's telephone conferences occurred on July 10 and August 2, 2017. She noted that she received SSA in the amount of \$1,826.00 and that her SSA compensation was reduced from \$1,926.00 due to an overpayment. Appellant's wage-loss compensation from FECA was calculated as \$1,388.57 every 28 days or \$1,504.28 per month. Her total monthly income was \$3,330.28. Appellant's monthly expenses included: rent, \$1,200.00; food and necessities, \$300.00; clothing, \$50.00; utilities, \$185.00; medication, \$50.00; car payment, \$400.88; car insurance, \$97.00; extended car warranty, \$261.56; cable, internet, and telephone, \$247.88; cellphone, \$66; insurance on cellphone \$8.99; renter's insurance \$23.00; gasoline, \$106.00; life insurance, \$87.00; credit monitoring service, \$9.95; and storage fees, \$115.00. Her monthly expenses totaled \$3,208.26 per month. Appellant noted that she had filed for bankruptcy in 2015 and listed her assets as \$712.00.

By decision dated August 4, 2017, OWCP determined that appellant received an overpayment of compensation in the amount of \$12,769.00 as she received SSA benefits in addition to her wage-loss compensation benefits under FECA. It further found that she was not at fault in the creation of the overpayment, but it denied waiver of recovery of the overpayment as her monthly income exceeded her monthly expenses by \$98.00 and recovery would therefore not defeat the purpose of FECA. OWCP further noted that recovery would not be against equity and good conscience. It required recovery of the overpayment by deducting \$50.00 every 28 days from appellant's continuing wage-loss compensation payments.

³ The amount of the SSA offset was noted as \$1,179.60.

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 her federal employment.⁴ Section 8129(a) of FECA provides, 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.”⁵

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.⁶ If an employee receives 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.

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: 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.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the 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 the overpayment.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,769.00 for the period February 1 through December 10, 2016 because she received wage-loss compensation for total disability while also receiving SSA retirement benefits attributable to her federal service without the appropriate offset.

The SSA provided appellant’s SSA rate with FERS and her hypothetical SSA rate without FERS. The difference between the amounts must be deducted from FECA benefits. Based on the

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d); *see also M.P.*, Docket No. 17-1703 (issued June 26, 2018); *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); *see R.C.*, Docket No. 09-2131 (issued April 2, 2010) (OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee’s federal service).

⁸ *See M.P., supra* note 5; *L.B.*, Docket No. 11-2076 (issued August 29, 2012).

information provided by SSA, OWCP determined that she received an overpayment of compensation in the amount of \$12,769.00 for the period February 1 to December 10, 2016. The Board has reviewed OWCP's calculations of the dual benefits that appellant received and finds that it properly determined that she received a \$12,769.00 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment must be recovered 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."⁹ Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

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.¹¹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.¹² 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, vehicle(s) (*i.e.*, any vehicles above the two allowed per immediate family), jewelry, and artwork.¹³

Section 10.437 provides that 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 or her position for the worse.¹⁴ 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.¹⁵

⁹ 5 U.S.C. § 8129(a)-(b); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ *See D.C., id.; L.S.*, 59 ECAB 350 (2008).

¹¹ 20 C.F.R. § 10.436. 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹² *Id.*

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.437.

¹⁵ *Id.* at § 10.437(b)(1).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant was without fault in the creation of the overpayment of compensation, however, recovery of the overpayment cannot be waived.

OWCP properly determined that appellant did not require substantially all of her income to meet ordinary and normal living expenses. Appellant asserted that she had a monthly income of \$3,330.28 and monthly expenses of \$3,208.26. OWCP found that her monthly income of \$3,330.28 and her monthly expenses of \$3,208.26 yielded a monthly surplus amount of approximately \$100.00. 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 \$50.00.¹⁶ As appellant's current income exceeds her ordinary and necessary living expenses by approximately \$100.00, she does not need substantially all of her income for ordinary and necessary living expenses.¹⁷

Additionally, the evidence of record does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant submitted no evidence that she relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.¹⁸ Consequently, OWCP properly denied waiver of recovery of the overpayment.

Appellant maintains on appeal that she was without fault in the creation of the overpayment. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.¹⁹

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.²⁰

¹⁶ *Supra* note 11 at Chapter 6.200.6(a)(3) (June 2009); *D.C.*, *supra* note 9.

¹⁷ As appellant's income exceeds her ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether her assets exceed the allowable resource base. *See D.C.*, *supra* note 9; *J.W.*, Docket No. 16-1355 (issued January 10, 2017).

¹⁸ 20 C.F.R. § 10.437.

¹⁹ *Id.* at § 10.435(a); *D.C.*, *supra* note 9; *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

²⁰ *Id.* at § 10.441(a); *P.E.*, Docket No. 16-0321 (issued May 29, 2018).

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information appellant submitted as well as the factors set forth in section 10.441. As appellant's monthly income was \$3,330.28 and her monthly expenses were \$3,208.26, OWCP did not abuse its discretion in requiring recovery by deducting \$50.00 every 28 days from each of her continuing compensation payments. The Board finds that OWCP properly required recovery of the overpayment in this case.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,769.00 for the period February 1 through December 10, 2016. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$50.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²¹ T.M., Docket No. 17-1482 (issued May 4, 2018).