

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,461.65 because she concurrently received Social Security Administration (SSA) benefits while also receiving FECA benefits for the period May 1, 2014 through July 22, 2017; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing FECA compensation benefits.

FACTUAL HISTORY

On February 12, 2005 appellant, then a 57-year-old part-time flexible clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained multiple injuries when she slipped and fell on ice while in the performance of duty. OWCP accepted right shoulder contusion and sprain, right knee sprain, aggravation of right knee osteoarthritis, and low back strain. On October 26, 2005 appellant underwent an authorized right total knee replacement surgery. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of April 23, 2005. Appellant retired from the employing establishment on February 28, 2013 and received compensation on the periodic rolls as of June 1, 2014.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA on November 3, 2015. SSA returned the form on November 7, 2015, noting that appellant received SSA retirement benefits beginning in May 2014. It indicated that, beginning in May 2014, appellant's SSA rate with FERS was \$1,452.20 and without FERS \$654.30 and, beginning in December 2014 and December 2015, the SSA rate with FERS was \$1,476.80 and without FERS \$665.40.

OWCP requested updated dual benefits information from SSA on November 25, 2016. SSA returned the form on June 23, 2017. It noted that, beginning in December 2016, the SSA rate with FERS was \$1,481.20 and without FERS \$667.30.

By letter dated August 2, 2017, OWCP notified appellant that, based on information provided by SSA regarding the amount of her SSA benefit that was attributable to federal service, her FECA wage-loss compensation had been adjusted. The record contains a FERS offset calculation noting a total overpayment of compensation in the amount of \$31,461.65.

On August 23, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$31,461.65 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefit that she received from May 1, 2014 through July 22, 2017 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 overpayment recovery questionnaire (Form OWCP-20). It informed appellant that, in order for it to consider the question of waiver or to determine a reasonable method for collection, she must provide a completed Form OWCP-20, and attach supporting financial documentation, including copies of income tax returns, bank statements, bills, canceled checks, pay slips, and any other records

supporting claimed income and expenses. OWCP notified her that failure to submit the requested information within 30 days would result in the denial of waiver.

On October 6, 2017 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. She submitted a completed overpayment recovery questionnaire in which she listed her expenses and her income and assets in excess of \$200,000.00. Appellant enclosed copies of tax returns, bank and brokerage statements, a Thrift Savings Plan statement, and invoices for real estate taxes, pharmacy, grocery, dental services, automobile repairs and maintenance, utilities, insurance, credit cards, DirectTV, landscaping and snow removal, furniture, and a kitchen remodeling estimate.

During the hearing, held on February 5, 2018, counsel argued that appellant relied on the overpaid compensation by making capital improvements on her home. Appellant testified that the improvements to her home were to ensure that it kept fair market value. She described her husband's medical condition, noting that his treatment required additional travel and expenses. Appellant also indicated that he had received a class action settlement for bladder cancer. The hearing representative advised appellant that, based on her assets, waiver was inapplicable, and inquired of her what amount would be workable for repayment. Appellant did not provide an amount. Following the hearing, she submitted correspondence and written information regarding her expenses. Appellant maintained that it would be a hardship to repay the overpayment.

By decision dated March 8, 2018, an OWCP hearing representative finalized the August 8, 2017 preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$31,461.65 had been created. She explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from May 2, 2014 through July 22, 2017 was based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was a prohibited dual benefit.⁴ The hearing representative found appellant without fault in the creation of the overpayment, but denied waiver of recovery as there was no evidence to support that recovery would be against good conscious or defeat the purpose of FECA. She noted that appellant had a total monthly income of \$3,809.65 and, while appellant reported expenses of \$3,945.71, the hearing representative found that many reported expenses were nonessential. The hearing representative further found that appellant's assets of over \$200,000.00 were of a sufficient degree such that waiver could not be considered. She noted that appellant did not respond with a preferred amount of recovery. Therefore, recovery was required by deducting \$300.00 each 28-day period from appellant's continuing FECA 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.⁵ Section 8116 limits the right of an employee to receive compensation:

⁴ The Board notes that the March 8, 2018 decision contains a typographical error. It noted that the period of overpayment was through July 23, 2017, whereas the correct date is through July 22, 2017.

⁵ 5 U.S.C. § 8102(a).

While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

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.⁷ FECA Bulletin No. 97-09 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 part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

Section 404.310 of SSA's regulations provides that entitlement to SSA compensation begins at 62 years.⁹ Section 404.409 of SSA's regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$31,461.65.

OWCP found that an overpayment of compensation was created for the period May 1, 2014 through July 22, 2017. The overpayment was 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 concurrent FECA wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹¹ The information provided by SSA confirmed that appellant received age-based SSA benefits that were attributable to federal service during the period May 1, 2014 through July 22, 2017. Therefore, the Board finds that 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. SSA provided the SSA rate with FERS and without FERS, for specific periods from May 2014 through July 2017. OWCP provided its calculations for each relevant period based on the SSA worksheets. No contrary evidence was provided. The Board has reviewed OWCP's

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁹ 20 C.F.R. § 404.310.

¹⁰ *Id.* at § 404.409.

¹¹ *Supra* notes 9 and 10.

calculation of benefits received by appellant for the period May 1, 2014 through July 22, 2017 and finds that an overpayment of compensation in the amount of \$31,461.65 was created.¹²

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.”¹³ Section 10.438 of OWCP’s 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 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.¹⁴

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’s regulations.¹⁵

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.¹⁶ 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.¹⁷ 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 \$50.00.¹⁸

OWCP procedures in effect at the time of the March 8, 2018 decision¹⁹ provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual

¹² See *M.B.*, Docket No. 18-1101 (issued January 17, 2019).

¹³ 5 U.S.C. § 8129.

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Id.* at §§ 10.434-10.437.

¹⁶ *Id.* at § 10.436.

¹⁷ *Id.*

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

¹⁹ The procedures were revised in September 2018.

with a spouse or dependent plus \$960.00 for each additional dependent.²⁰ 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.²¹

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.²² OWCP's 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 on the payments or on the notice of payment.²³ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁴ 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.²⁵

ANALYSIS -- ISSUE 2

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

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.²⁶ The supporting financial information of record documents assets in excess of \$200,000.00. 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 \$50.00.²⁷ Appellant did not establish that she was entitled to waiver on the basis of defeating the purpose of FECA.²⁸

Although appellant contends on appeal that it would be a hardship to deny waiver, the Board finds that the reported financial information does not support this assertion. There is also no evidence to support that appellant gave up a valuable right or changed her position for the

²⁰ *Supra* note 18.

²¹ *Id.*

²² 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

²³ Federal (FECA) Procedure Manual, *supra* note 18 at Chapter 2.600.b(3) (June 2009).

²⁴ 20 C.F.R. § 10.437(b)(1); *see E.H.*, *supra* note 22.

²⁵ 20 C.F.R. § 10.437(b)(2) (2011); *see M.B.*, *supra* note 12.

²⁶ *Supra* note 18.

²⁷ *Id.*

²⁸ *See A.C.*, Docket No. 18-1550 (issued February 21, 2019).

worse, in reliance on her FECA compensation. Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.²⁹

As appellant failed to establish that recovery of the overpayment of compensation would either 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.³⁰

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.³¹

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.³²

ANALYSIS -- ISSUE 3

The Board finds that OWCP's hearing representative 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 exceeded her ordinary and necessary expenses, and her assets totaled greater than \$200,000.00, the hearing representative did not abuse her discretion in requiring recovery by deducting \$300.00 every 28 days from each of appellant's continuing compensation payments.³³ The Board finds that the hearing representative properly determined recovery of the overpayment in this case.³⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,461.65, and that OWCP properly denied waiver of recovery

²⁹ *Id.*

³⁰ *Id.*

³¹ 20 C.F.R. § 10.441; *see M.B., supra* note 12.

³² *Id.*

³³ *See G.C.*, Docket No. 18-1062 (issued December 4, 2018).

³⁴ *See A.C., supra* note 28.

of the overpayment. OWCP also properly required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2019
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