

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

_____)	
L.A., claiming for the estate of N.W. widow of the)	
employee A.W., Appellant)	
)	
and)	Docket No. 19-0708
)	Issued: August 21, 2019
)	
DEPARTMENT OF THE AIR FORCE,)	
MATERIEL COMMAND, RANDOLPH AIR)	
FORCE BASE, TX, Employer)	
_____)	

Appearances:
Lacey P. Wallace, Esq., for the appellant¹
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
JANICE B. ASKIN, Judge

JURISDICTION

On February 19, 2019 appellant, through counsel, filed a timely appeal from a March 27, 2019² merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Following appellant's February 19, 2019 appeal to the Board from a February 6, 2019 merit decision, OWCP held a conference call and filed an amended decision dated March 27, 2019. Following OWCP's filing of the amended decision, counsel resubmitted the notice of appeal on April 2, 2019.

³ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether the widow, whose estate appellant now represents, received a \$15,875.17 overpayment of compensation for the period from December 9, 1996 to March 3, 2018 for which she was not at fault; and (2) whether OWCP abused its discretion by denying waiver of recovery of the overpayment.

FACTUAL HISTORY

In May 1992, OWCP accepted that the employee, then a 63-year-old equipment cleaner, sustained aggravation of preexisting liver disease due to inhaling toxic fumes at work. The employee died on December 9, 1996 and the employee's widow (hereinafter the widow) filed a claim for survivor's benefits. OWCP accepted the widow's claim and began paying survivor's benefits effective December 9, 1996. In a November 7, 2006 letter, the widow advised OWCP that her daughter, the present appellant, was authorized to handle her OWCP matters.

In February 2018, OWCP requested that the Social Security Administration (SSA) provide information about amounts of FECA compensation to be offset against SSA benefits. It received documentation, signed on March 1, 2018 in which an SSA official described the applicable SSA rates for the widow and their effective dates for the period from December 9, 1996 to March 3, 2018.

In an August 28, 2018 notice, OWCP advised the widow of its preliminary determination that she received a \$15,875.17 overpayment of compensation for the period from December 9, 1996 to March 3, 2018 as FECA compensation was not properly offset against SSA benefits for this period.⁴ It also made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised the widow that she could submit evidence challenging the fact or amount and request waiver of the overpayment. It informed her that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that the widow complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

On September 25, 2018 OWCP received a collection of documents, including an overpayment recovery questionnaire that was completed by counsel on September 20, 2018. Counsel advised that the widow was in a post-stroke state and that she had Alzheimer's disease.⁵ The questionnaire listed monthly income of \$2,948.37, monthly expenses of \$9,094.00, and assets of \$136,000.00. The submitted materials included a document indicating that, since October 25, 2011, appellant had power of attorney with respect to the widow's affairs, including those of a

⁴ In this and other documents, OWCP indicated that the overpayment was calculated for the period December 9, 1996 to March 3, 2018. However, the overpayment actually was calculated for the period December 1, 1996 to March 3, 2018. The text of the August 28, 2018 notice contained a detailed description of how the overpayment was calculated. OWCP attached various supporting documents, including worksheets, which also detailed how the overpayment was calculated.

⁵ The case record contains a document indicating that counsel had been authorized to handle the claim before OWCP since September 14, 2018.

legal nature. The submitted materials also included an “overpayment action request” form in which a request for waiver of the claimed overpayment was made along with a request for a telephone conference with OWCP’s district office regarding the claimed overpayment. Appellant signed the form on September 20, 2018.

In early December 2018, appellant advised OWCP that the widow had died on November 25, 2018 and she submitted a death certificate confirming the same.

On December 21, 2019 OWCP issued another preliminary overpayment notice which contained much of the content of its August 28, 2019 notice. It incorporated the August 28, 2019 notice by reference and attached a copy of that notice to the December 21, 2019 notice.⁶ The December 21, 2019 notice was sent to the proper address of record for appellant given her presumed role in representing the widow’s estate.

By decision dated January 23, 2019, OWCP determined that the widow, whose estate appellant then represented, received a \$15,875.17 overpayment of compensation. It found that the widow was not at fault in the creation of the overpayment, but further determined that the overpayment was not subject to waiver because the widow’s \$136,000.00 in assets exceeded the allowable assets resource base.

On March 27, 2019 counsel participated in a telephone hearing with OWCP’s district office regarding the claimed overpayment.

By decision dated March 27, 2019, OWCP again finalized its preliminary determination regarding appellant’s overpayment of compensation.⁷ It again found that the widow was not at fault in the creation of the overpayment, but further determined that the overpayment was not subject to waiver because the widow’s \$136,000.00 in assets exceeded the allowable assets resource base. OWCP noted that counsel requested waiver of the claimed overpayment during the telephone conference, but that he was advised that waiver would not be possible given the widow’s assets.⁸

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits that are attributable to federal service and that, if an employee receives SSA benefits

⁶ OWCP indicated that reference should be made to the August 28, 2018 notice for a description of how the overpayment was calculated.

⁷ OWCP indicated in the March 27, 2019 decision that it was being issued to account for the March 27, 2019 telephone conference.

⁸ With respect to the recovery of an overpayment, the Board’s jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.B.*, Docket No. 18-0915 (issued October 24, 2018); *Miguel A. Muniz*, 54 ECAB 217 (2002). As the widow’s estate was not in receipt of continuing compensation at the time of OWCP’s overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

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.⁹

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.¹⁰ 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 the 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the widow, whose estate appellant now represents, received a \$15,875.17 overpayment of compensation for the period from December 9, 1996 to March 3, 2018.

The record supports that the widow received FECA survivor's benefits for the period from December 9, 1996 to March 3, 2016 and that she also received SSA benefits for the same period. The portion of the SSA benefits earned through federal employment was part of the employee's FERS retirement package to which the widow succeeded, and the widow's receipt of benefits under FECA and federal retirement benefits concurrently was a prohibited dual benefit.¹² The widow's FECA compensation was not offset until March 4, 2018. The SSA notified OWCP of the applicable SSA rates for the widow and their effective dates. Based on these rates, OWCP was able to calculate the dual benefit appellant received from December 9, 1996 to March 3, 2018 which yielded an overpayment of compensation in the amount of \$15,875.17. The record includes overpayment worksheets explaining the overpayment calculation.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹³ These statutory guidelines are

⁹ 5 U.S.C. § 8116(d). *See G.T.*, Docket No. 15-1314 (issued September 9, 2016).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000(e)(2) (February 1995). OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. *See R.C.*, Docket No. 09-2131 (issued April 2, 2010).

¹¹ FECA Bulletin No. 97-09 (February 3, 1997); *E.C.*, Docket No. 14-1743 (issued December 4, 2014).

¹² *See P.G.*, Docket No. 13-0589 (issued July 9, 2013).

¹³ *See A.C.*, Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

found in section 8129(b) of FECA which states: “Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience.”¹⁴ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, pursuant section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.¹⁵

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.¹⁶ According to 20 C.F.R. § 10.437, 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.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

Evidence in the case record shows that the widow had \$136,000.00 in assets, which is now part of estate represented by appellant, and the Board notes that it has not been established that recovery of the \$15,875.17 overpayment would defeat the purpose of FECA because these assets exceed the allowable resource base of \$6,200 for an individual.¹⁹ Because the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA has not

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ A.S., Docket No. 17-0606 (issued December 21, 2017).

¹⁶ 20 C.F.R. § 10.436. 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. Assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2), (3) (September 2018).

¹⁷ 20 C.F.R. § 10.437(a), (b).

¹⁸ *Id.* at § 10.437(b)(1).

¹⁹ See *supra* note 15.

been met, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether all of current income was substantially needed to meet ordinary and necessary living expenses.

It also has not been established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that severe financial hardship would be experienced in attempting to repay the debt or that a valuable right had been relinquished or that a position had been changed for the worse in reliance on the payment, which created the overpayment.²⁰

Because it has not been established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, it has not been shown that OWCP abused its discretion by refusing to waive the overpayment.

The Board finds that OWCP complied with the appropriate OWCP procedures by issuing a second preliminary overpayment notice on December 21, 2018 and sending it to appellant as the presumed representative of the widow's estate.²¹

On appeal counsel argues that due process rights were violated because a telephone conference was not held with OWCP's district office regarding the claimed overpayment. However, the case record reflects that such a conference was in fact held at counsel's request.

CONCLUSION

The Board finds that the widow, whose estate appellant now represents, received a \$15,875.17 overpayment of compensation for the period from December 9, 1996 to March 3, 2018. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

²⁰ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²¹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.15a, g (September 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board