



## **FACTUAL HISTORY**

On February 12, 1998 appellant, then a 48-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral hand, wrist, arm, and shoulder and neck conditions as a result of her federal employment duties which involved keying on a letter sorting machine. On April 20, 1998 OWCP accepted the claim for bilateral carpal tunnel syndrome and cervical radiculopathy. Subsequently, it expanded acceptance of the claim to include brachial neuritis or radiculitis, displacement of cervical intervertebral disc without myelopathy, and a brief depressive reaction. OWCP paid appellant wage-loss compensation benefits on the periodic rolls as of March 21, 2004.

By letter dated September 20, 2013, OWCP explained appellant's entitlement to compensation benefits. In an accompanying Form 1049, it also advised her that, since she was covered under the Federal Employees Retirement System (FERS), OWCP must deduct at least part of her SSA retirement benefit to which she would be entitled based on age, explaining that a portion of a FERS benefit was included in SSA retirement benefits. Appellant was therefore advised to notify OWCP immediately after filing for or receiving SSA retirement benefits.

On EN1032 forms signed by appellant on July 7, 2015, July 6, 2016, and July 3, 2017, she indicated that she was receiving SSA benefits as part of an annuity for federal service.

On August 3, 2017 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. This indicated that appellant had received SSA retirement benefits beginning in July 2015 when her SSA rate with FERS was \$1,685.30 and without FERS \$484.20, and that beginning in December 2016, her SSA rate with FERS was \$1,690.30 and without FERS \$485.60.

By letter dated August 15, 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 August 16, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$29,844.09 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from July 1, 2015 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 at fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for her completion.<sup>2</sup> It informed appellant of the actions she could take and allotted 30 days for her to respond.

On a September 9, 2017 overpayment action request form, appellant requested a decision based on the written evidence. She disagreed that the overpayment occurred and with the amount of the overpayment, and she also requested a waiver of recovery of the overpayment. Appellant maintained that the overpayment occurred through no fault of her own, indicating that she reported

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<sup>2</sup> OWCP also requested that appellant submit supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

all information required, and that OWCP had taken no action. On an attached overpayment recovery questionnaire, she noted monthly income of \$1,890.97 in FECA benefits and \$1,690.00 from SSA, for a total monthly income of \$3,584.97, and monthly expenses of \$3,925.00 with assets totaling \$66,601.53. Appellant attached limited financial information including dental, optical, wellness center services, wellness products, chiropractic services, pest control, household repair, credit card, bank loan, lawn maintenance water, home fuel, and electric service statements. In attached statements, she contended that repaying the overpayment would cause severe financial hardship because it would restrict her health care and would jeopardize her ability to stay in her home. Appellant also contended that it would be against equity and good conscience because OWCP had failed to act in a timely manner.

By decision dated November 1, 2017, OWCP finalized the preliminary determination of a \$29,844.09 overpayment of compensation. It determined that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. After converting her 28-day FECA compensation to a monthly amount, OWCP determined that her combined monthly income from FECA and SSA was \$3,738.55 and that she had \$2,920.77 in current and ordinary monthly expenses. It set repayment at \$300.00 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>3</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>4</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>5</sup> FECA Bulletin No. 97-09 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>6</sup>

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>6</sup> FECA Bulletin No. 97-09 (February 3, 1997).

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.<sup>7</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,844.09.

In its August 3, 2017 decision, OWCP found that an overpayment of compensation had been created for the period July 1, 2015 through July 22, 2017. The overpayment was based on the evidence received from SSA with respect to benefits paid to appellant. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period July 1, 2015 through July 22, 2017.

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. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing July 1, 2015 through July 22, 2017. 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 July 1, 2015 through July 22, 2017 and finds that an overpayment of compensation in the amount of \$29,844.09 was created.<sup>10</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>11</sup> Section 10.438 of OWCP 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.

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<sup>7</sup> 20 C.F.R. § 404.310.

<sup>8</sup> *Id.* at § 404.409.

<sup>9</sup> *Supra* notes 5 and 6; *see E.K., supra* note 5.

<sup>10</sup> *See D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>11</sup> 5 U.S.C. § 8129.

Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>12</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>13</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>14</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>15</sup> 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.<sup>16</sup>

OWCP procedures in effect at the time of the November 1, 2017 decision<sup>17</sup> provided 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>18</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>19</sup>

Recovery of an overpayment is also considered to be against equity and good conscience 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.<sup>20</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>12</sup> 20 C.F.R. § 10.438.

<sup>13</sup> *Id.* at §§ 10.434-10.437.

<sup>14</sup> *Id.* at. § 10.436.

<sup>15</sup> *Id.*

<sup>16</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

<sup>17</sup> The procedures were revised in September 2018.

<sup>18</sup> *Supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> 20 C.F.R. § 10.437; *see G.K.*, Docket No. 18-0243 (issued August 17, 2018).

on the payments or on the notice of payment.<sup>21</sup> Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.<sup>22</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>23</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. 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>24</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 procedures.<sup>25</sup> The supporting financial information of record documents assets in excess of \$66,000.00. 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>26</sup> She did not establish that she was entitled to waiver on the basis of defeating the purpose of FECA.<sup>27</sup>

Appellant asserts on appeal that OWCP's hearing representative did not properly consider reported expenses. However, as noted above, OWCP need not address whether her monthly expenses exceeded her monthly income as her assets exceed the resource base of \$4,800.00.<sup>28</sup> Moreover, the guidelines for determining ordinary and necessary expenses are set forth in OWCP's procedures, and the Board finds that OWCP properly calculated such expenses in this case.<sup>29</sup>

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<sup>21</sup> *Supra* note 16 at Chapter 2.600.b(3) (June 2009).

<sup>22</sup> 20 C.F.R. § 10.437(b)(1) (2011); *see R.E.*, Docket No. 17-1625 (issued July 18, 2018).

<sup>23</sup> *Id.* at § 10.437(b)(2) (2011); *see G.K.*, *supra* note 20.

<sup>24</sup> *Id.* at § 10.436.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See S.H.*, Docket No. 16-0680 (issued August 4, 2016).

<sup>28</sup> *Supra* note 16.

<sup>29</sup> 20 C.F.R. § 10.437; *see also D.C.*, Docket No. 17-0559 (issued June 21, 2018).

As appellant has not met her burden of proof to establish that recovery of the overpayment of 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.<sup>30</sup>

### **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.<sup>31</sup>

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 \$300.00 per compensation period, and finds that OWCP's hearing representative did not abuse his discretion in setting appellant's current and ordinary monthly expenses at \$2,920.77 every 28 days.<sup>33</sup>

The record indicates that appellant's monthly income of \$3,738.55 exceeds her current and ordinary monthly expenses by approximately \$817.00 per month. OWCP therefore did not abuse its discretion in finding that she should repay the overpayment at the rate of \$300.00 per compensation period.<sup>34</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,844.09 and that OWCP properly denied waiver of recovery

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<sup>30</sup> *G.K.*, *supra* note 20.

<sup>31</sup> 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>32</sup> *Id.*

<sup>33</sup> *Supra* note 14.

<sup>34</sup> *See V.T.*, Docket No. 18-0628 (issued October 25, 2018).

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 November 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2019  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board