

ISSUES

The issues are: (1) whether appellant received a \$25,940.06 overpayment of wage-loss compensation for the period January 1, 2014 through May 27, 2017; (2) whether OWCP properly determined that she was not entitled to waiver of recovery of the overpayment; and (3) whether it properly found that it would recover the overpayment of compensation by withholding \$400.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On July 28, 1999 appellant, then a 51-year-old rural route carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 21, 1999 she injured her right shoulder while in the performance of duty. She stopped work on July 30, 1999. OWCP accepted the claim for right limb pain and right reflex sympathetic dystrophy of the upper limb. It paid appellant wage-loss compensation for intermittent disability until May 9, 2000, when she stopped work and did not return.⁴ OWCP paid her wage-loss compensation on the periodic rolls effective January 26, 2003.

A notification of personnel action form (SF-50) dated February 23, 2002 indicated that appellant had retirement coverage under the Federal Employees Retirement System (FERS).

By letter dated December 9, 2009, OWCP notified appellant that it would need to reduce her FECA benefits if she began receiving age-related retirement benefits from the Social Security Administration (SSA) and that failure to report receipt of such benefits could result in an overpayment of compensation.

On June 8, 2017 SSA provided appellant's SSA rate with FERS and her hypothetical SSA rate without FERS from January 2014 to December 2016. With FERS, her SSA rate was \$964.40 effective January 2014, \$980.70 effective December 2014 and 2015, and \$983.60 effective December 2016. Without FERS, appellant's SSA rate was \$339.40 effective January 2014, \$345.10 effective December 2014 and 2015, and \$346.10 effective December 2016.

In a pay rate memorandum dated June 8, 2017, OWCP calculated the amount that it should have offset from appellant's wage-loss compensation from January 2014 to December 1, 2016 due to her receipt of retirement benefits from SSA. It found that effective January 1, 2014, the monthly offset was \$625.00 (\$964.40-\$339.40), or \$576.92 every 28 days; effective December 1, 2014, the monthly offset was \$635.60 (\$980.70-\$345.10) or \$586.71 every 28 days; and effective December 1, 2016, the monthly offset was \$637.50 (\$983.60-\$346.10), or \$588.46 every 28 days. OWCP divided the 28-day offset amount to obtain the daily amount, which it multiplied by the number of days in each period from January 1, 2014 to May 27, 2017 to calculate the amount that it overpaid appellant for each period. It added the amounts for each period and determined that it should have offset \$25,940.06 from her wage-loss compensation.

⁴ By decision dated February 8, 2000, OWCP found that appellant had not established that she was disabled from employment for intermittent periods in 1999. By decision dated September 10, 2001, it terminated her wage-loss compensation after finding that she had no further employment-related disability; however, by decision dated August 20, 2002, an OWCP hearing representative vacated the September 10, 2001 decision.

OWCP, on June 13, 2017, informed appellant that she had been receiving a prohibited dual benefit. It noted that the portion of SSA benefits that she had 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 effective May 28, 2017, which reduced her net compensation payments every 28 days to \$1,698.14.

On September 28, 2017 OWCP advised appellant of its preliminary determination that she had received an overpayment of wage-loss compensation in the amount of \$25,940.06 for the period January 1, 2014 through May 27, 2017 because it failed to offset the portion of her age-related SSA benefits that she received due to her federal service from her workers' compensation benefits. It set forth its calculations of the overpayment, indicating that it had obtained the daily amount to be offset during each period and had multiplied this amount by the number of days in each period to obtain the overpayment of compensation. OWCP noted that appellant began receiving age-related SSA benefits on February 1, 2014 and that she reached 66 years of age in January 2010. It further informed her of its preliminary determination that she was at fault in the creation of the overpayment of wage-loss compensation, noting that it had advised her in a December 9, 2009 letter that receiving SSA retirement benefits would affect the amount of her FECA compensation and could result in a prohibited dual benefit and overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents so that it could determine whether she was entitled to waiver of recovery of the overpayment. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant, on October 14, 2017, requested a telephonic prerecoupment hearing before an OWCP hearing representative. She challenged the finding that she had received an overpayment of wage-loss compensation. In an October 21, 2017 overpayment recovery questionnaire (OWCP-20), appellant provided her monthly income as \$3,708.00 and monthly expenses of \$4,020.00.⁵ She indicated that she had assets of \$1,224.00 in a checking account. Appellant related that she had yearly bills for a trailer because she had to relocate to a warmer climate from January through April because of her reflex sympathetic dystrophy.

At the telephonic hearing, held on March 13, 2018, counsel challenged the period of the overpayment, noting that appellant had not received SSA benefits until February 1, 2014, but OWCP found that the period of the overpayment commenced January 1, 2014. He further challenged the finding that she was at fault in the creation of the overpayment of compensation. Appellant advised that her credit card debt resulted from medical expenses. She indicated that she spent winters in Arizona to avoid the cold due to her reflex sympathetic dystrophy. The hearing representative requested that appellant provide documentation supporting her claimed expenses, noting that failure to provide the information would result in a denial of waiver of recovery of the

⁵ Appellant listed her monthly expenses as \$678.00 for housing, \$196.00 for electricity, \$34.00 for water, \$38.00 for sewer, \$130.00 for telephone, \$180.00 for wood and gas heat, \$800.00 for food, \$100.00 for car insurance, \$300.00 for a car payment, \$200.00 for gasoline, \$500.00 for medical insurance, \$300.00 for a credit card, \$250.00 for air travel, \$28.00 for life insurance, \$22.00 for cancer insurance, \$33.00 for other insurance, and \$316.00 for a rental in Arizona.

overpayment. She advised that she had \$8,000.00 in a savings account that she planned to use for new windows. Appellant and her husband also owned a hunting shelter and a camping trailer.

Thereafter, appellant submitted an updated list of monthly and annual expenses. She asserted that she had monthly expenses of \$3,476.00. Appellant explained that she had a monthly house payment of \$555.00, a car payment of \$212.00, average heating costs of \$84.00, average utilities of \$137.00, average garbage and telephone expenses of \$66.00, shared cable expenses of \$56.00, and shared mobile telephone expenses of \$31.00. She paid \$240.00 monthly for gasoline, \$800.00 for food, \$26.00 for medication, \$228.00 for acupuncture, \$57.00 for electricity, \$63.00 for heat, \$23.20 for car insurance, \$33.91 for life insurance, and \$8.60 for accident insurance. Appellant totaled her annual expenses for car insurance, house insurance, taxes on her winter and summer homes, her lot in Arizona and camper rental, insurance and taxes on her Arizona camper, truck plates, van plates, and wood for heat as \$10,262.00, which she divided by 12 to find a monthly average of \$855.21. She indicated that her monthly income was \$3,694.00. Appellant submitted copies of bank statements and bills.

By decision dated May 25, 2018, OWCP's hearing representative found that appellant had received an overpayment of compensation in the amount of \$25,940.06 for the period January 1, 2014 through May 27, 2017 because she received wage-loss compensation from OWCP and age-related benefits from SSA without the appropriate offset. She modified the preliminary overpayment determination to find that she was not at fault in the creation of the overpayment. The hearing representative denied waiver of recovery of the overpayment of compensation as appellant's income exceeded her ordinary and necessary expenses. She found that the expenses for spending the winter in Arizona did not constitute ordinary and reasonable expenses, and that after omitting these expenses appellant's income exceeded her expenses by over \$1,000.00 monthly in discretionary income. The hearing representative also noted that appellant had assets of \$6,000.00 in a bank account, a trailer worth \$2,000.00, and a hunting property of unknown value. She determined that OWCP should recover the overpayment by deducting \$400.00 from her continuing compensation payments every 28 days.

On appeal counsel asserts that OWCP did not establish that appellant received dual benefits. He further challenges the calculation and period of the overpayment.

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.⁶ 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.⁷

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of SSA benefits that are attributable to the federal service of the

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

employee.⁸ 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.⁹

Section 404.310 of SSA regulations provides that entitlement to SSA benefits begins at 62 years.¹⁰ Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$25,940.06 for the period January 1, 2014 through May 27, 2017.

OWCP accepted that appellant sustained right limb pain and right reflex sympathetic dystrophy due to a May 21, 1999 employment injury. It paid her wage-loss compensation for total disability on the periodic rolls effective January 26, 2003. Beginning January 1, 2014, appellant also received age-related retirement benefits from SSA. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹² The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to her federal service from January 1, 2014 through May 27, 2017, and thus she received an overpayment of wage-loss compensation.¹³

OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. The SSA provided her SSA rate with FERS and without FERS for specific periods commencing January 1, 2014 through December 1, 2016. The difference between these amounts must be deducted from appellant's FECA benefits. OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received dual benefits totaling \$25,940.06, creating an overpayment of compensation in that amount.¹⁴

On appeal counsel challenges fact, amount, and the period of the overpayment. He maintains that she did not receive age-related SSA benefits until February 2014, when she turned

⁸ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also G.K.*, Docket No. 18-0243 (issued August 17, 2018).

¹⁰ 20 C.F.R. § 404.310.

¹¹ *Id.* at § 404.409.

¹² *See S.M.*, Docket No. 17-1802 (issued August 20, 2018); *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹³ *Id.*

¹⁴ *See E.K.*, Docket No. 18-0587 (issued October 1, 2018); *L.M.*, Docket No. 16-1035 (issued November 27, 2017).

66 years old. Appellant, however, turned 66 years old in January 2014, and SSA indicated that she had received benefits commencing that month. Counsel has not submitted evidence supporting his contention that OWCP erred in calculating the period or amount of the overpayment of wage-loss compensation or that she had not received age-related SSA benefits as found.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁵ 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.” (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver 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.¹⁶

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.¹⁷ 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.¹⁸ 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 and supplies.¹⁹

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.²⁰ To establish that a valuable right has been relinquished, it must be

¹⁵ 5 U.S.C. § 8129(1)-(b); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁶ *See V.T.*, Docket No. 18-0628 (issued October 24, 2018).

¹⁷ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *M.P.*, Docket No. 18-0902 (issued October 16, 2018). 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).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 20 C.F.R. § 10.437.

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.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$25,940.06 overpayment of wage-loss compensation.

OWCP determined that appellant was without fault in the creation of the overpayment. It may, therefore, only require recovery of the overpayment if it would not defeat the purpose of FECA or be against equity and good conscience.²²

The Board finds that OWCP properly determined that appellant did not require substantially all of her income to meet ordinary living expenses. Appellant indicated that she had monthly expenses of \$3,476.00 and monthly income of \$3,694.00. The hearing representative noted that appellant had a monthly surplus of \$200.00 and further determined that the expenses appellant incurred by spending winters in Arizona did not constitute ordinary and reasonable expenses and resulted in a monthly surplus of \$1,000.00. As her monthly income exceeded her ordinary and necessary living expenses by more than \$50.00, appellant did not need substantially all of her income for ordinary and necessary living expenses.²³

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 had relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.²⁴ Consequently, OWCP properly denied waiver of recovery of the overpayment.

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.²⁵

²¹ *Id.* at § 10.437(b)(1).

²² *See supra* note 14; *see also S.M.*, Docket No. 17-1802 (issued August 20, 2018).

²³ *See V.T.*, Docket No. 18-0628 (issued October 25, 2018). The hearing representative also noted that appellant had a travel trailer worth \$2,000.00 and \$6,000.00 in a bank account. However, as her 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 J.W.*, Docket No. 16-1355 (issued January 10, 2017).

²⁴ 20 C.F.R. § 10.437; *see also V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁵ 20 C.F.R. § 10.441(a).

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 exceeded her ordinary and necessary expenses by more than \$400.00, OWCP did not abuse its discretion in requiring recovery of the overpayment by deducting \$400.00 every 28 days from each of her continuing compensation payments. The Board finds that OWCP properly required recovery of the overpayment in this case.²⁶

CONCLUSION

The Board finds that appellant received a \$25,940.06 overpayment of wage-loss compensation for the period January 1, 2014 through May 27, 2017. The Board further finds that OWCP properly determined that she was not entitled to waiver of recovery of the overpayment and properly found that it would recover the overpayment of compensation by withholding \$400.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2019
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

²⁶ See *M.P.*, Docket No. 18-0902 (issued October 16, 2018).