

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$120,114.57 for the period November 1, 2007 through March 4, 2017; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$950.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On May 2, 2000 appellant, then a 58-year-old clerk,³ filed a traumatic injury claim (Form CA-1) alleging that, on April 24, 2000, she suffered a panic attack due to ongoing harassment by employing establishment superiors. She stopped work on the date of the claimed injury.

Following OWCP's initial denial of the claim on August 21, 2000, on October 24, 2001 OWCP accepted the claim for depression and anxiety disorder. It paid appellant retroactive wage-loss compensation and placed her on the periodic compensation rolls. Appellant has not returned to work.

Appellant signed EN1032 forms on an annual basis beginning February 21, 2008. In the forms signed in 2008 to 2011, she reported receiving Social Security Administration (SSA) benefits, and on the EN1032 forms signed on January 23, 2012, February 3, 2013, and January 24, 2014, she reported that she was receiving age-related SSA benefits. On the EN1032 form signed February 10, 2015, appellant reported no SSA benefits, and on the EN1032 forms she signed on January 14, 2016, January 26, 2017, and January 24, 2018, she reported that she received age-related SSA benefits.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA on January 28, 2016. SSA returned the form on April 21, 2016. It indicated that, beginning in November 2007, appellant's SSA rate with FERS was \$1,182.40 and without FERS was \$234.50; beginning in December 2007, appellant's SSA rate with FERS was \$1,209.50 and without FERS was \$239.80; beginning in January 2008, appellant's SSA rate with FERS was \$1,218.30, and without FERS was \$239.80; beginning in December 2008, December 2009, and December 2010, appellant's SSA rate with FERS was \$1,288.90 and without FERS was \$253.70; beginning in December 2011, appellant's SSA rate with FERS was \$1,335.30 and without FERS was \$262.80; beginning in December 2012, appellant's SSA rate with FERS was \$1,358.00 and without FERS was \$267.20; beginning in December 2013, appellant's SSA rate with FERS was \$1,378.30 and without FERS was \$271.20; beginning in December 2014 and December 2015, appellant's SSA rate with FERS was \$1,401.70 and without FERS was \$275.80.

By letter dated March 8, 2017, OWCP notified appellant that, based on information provided by SSA regarding the amount of her SSA benefit attributable to her federal service, her FECA wage-loss compensation had been adjusted. The record indicates this adjustment was effective March 5, 2017.

³ Appellant's date of birth is in January 1942.

On April 4, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$120,114.57 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefit that she received from November 2, 2007 through March 4, 2017 was based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was prohibited because it was a 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 (OWCP-20) for her completion. 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 OWCP-20 form, and attach supporting financial documentation, including copies of income tax returns, bank statements, bills, canceled checks, pay slips, and any other record to support claimed income and expenses. OWCP notified her that failure to submit the requested information within 30 days would result in the denial of waiver.

Appellant requested a preresoupment hearing with OWCP's Branch of Hearings and Review. She maintained that she was without fault and requested waiver. Appellant indicated that her granddaughter was a dependent and noted monthly expenses related to her care. She also reported that she had medical expenses for abdominal surgery in November 2006, a head cyst removal in 2007 or 2009, removal of cancerous cysts from shoulder and back in 2009, and a right knee replacement in 2013. On the overpayment recovery questionnaire, appellant wrote that she had monthly income of \$2,893.73, listed approximate monthly expenses of \$1,500.00, and assets included a checking account balance of \$2,578.80 and \$65,000.00 in other property. She attached additional financial information that indicated that she had a bank account balance of \$53,306.17.

During the hearing, held on September 27, 2017, appellant testified that she had not adopted her granddaughter, but visited her twice monthly. Her psychologist, Gerald E. Boutin, Ph.D, testified that appellant was cognitively impaired due to recent brain surgery, with short-term memory difficulties. OWCP's hearing representative advised appellant that she should itemize her expenses and submit bills for verification, including any exceptional medical costs. Appellant was given 30 days to submit additional evidence. No further evidence was submitted.

By decision dated November 13, 2017, an OWCP hearing representative finalized the April 4, 2017 preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$120,114.57 had been created. He explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from November 1, 2007 to March 4, 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. 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. He calculated appellant's monthly income from SSA, FECA, and other disbursements reported, for a total monthly income of \$3,203.00 and allowed monthly expenses of \$1,972.00. The hearing representative further noted that appellant had reported total assets of \$115,595.00 and set repayment at \$950.00, to be deducted each period 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.⁴ 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.⁵

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.⁶ FECA Bulletin No. 97-09 states that FECA benefits must 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.⁷

Section 404.310 of SSA's regulations provides that entitlement to SSA compensation begins at 62 years.⁸ Section 404.409 of SSA's regulations provides that for individuals born from January 2, 1942 to January 2, 1943, retirement age is 65 years 10 months.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$120,114.57 as identified by OWCP. A review of its calculation reveals that by adding the annual overpayment amounts, a total overpayment of \$120,114.57 is found.

OWCP found that an overpayment of compensation was created for the period November 1, 2007 to March 4, 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.¹⁰ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period November 1, 2007 to March 4, 2017.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁸ 20 C.F.R. § 404.310.

⁹ *Id.* at § 404.409.

¹⁰ *Supra* notes 8 and 9.

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 commencing in November 2007 through March 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 November 1, 2007 to March 4, 2017 and finds that an overpayment of compensation in the amount of \$120,114.57 was created.¹¹

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."¹² 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹³

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.¹⁴

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.¹⁵ 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.¹⁶ An individual is deemed to need substantially all of his

¹¹ See *G.K.*, Docket No. 18-0243 (issued August 17, 2018).

¹² 5 U.S.C. § 8129.

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.* at §§ 10.434-10.437.

¹⁵ *Id.* at § 10.436.

¹⁶ *Id.*

or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

OWCP's procedures in effect at the time of the November 13, 2017 decision¹⁸ provide 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.¹⁹ 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.²⁰

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.²¹ 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 on the payments or on the notice of payment.²² Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²³ 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.²⁴

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, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁵

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

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

¹⁸ The procedures were revised in September 2018.

¹⁹ *Supra* note 17.

²⁰ *Id.*

²¹ 20 C.F.R. 10.437; *see W.P.*, 59 ECAB 514 (2008).

²² Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.600.b(3) (June 2009).

²³ 20 C.F.R. § 10.437(b)(1) (2011); *see J.A.*, Docket No. 09-1678 (issued June 9, 2010).

²⁴ *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁵ *Id.* at § 10.436.

procedures.²⁶ The supporting financial information of record documents assets in the amount of \$115,595.00. 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 of recovery of the overpayment on the basis of defeating the purpose of FECA.²⁸

Counsel contends on appeal that OWCP's hearing representative did not properly consider reported expenses. However, as noted above, OWCP need not address whether appellant's monthly expenses exceeded her monthly income as her assets exceed the resource base of \$4,800.00.²⁹ Moreover, the guidelines for determining ordinary and necessary expenses are set forth in OWCP's procedures, and the Board finds that the hearing representative properly calculated such expenses in this case.³⁰

As appellant failed 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.³¹

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.³²

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.³³

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$950.00 per compensation period, *i.e.*, every 28 days, and finds that OWCP's

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See K.K.*, Docket No. 09-0207 (issued October 2, 2009).

²⁹ *Supra* note 17.

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

³¹ *G.K.*, *supra* note 11.

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

³³ *Id.*

hearing representative did not abuse his discretion in setting appellant's monthly expenses at \$1,411.00 per month.

The record indicates that appellant's monthly income exceeds her reported monthly expenses. OWCP therefore did not abuse its discretion in finding that appellant should repay the overpayment at the rate of \$950.00 per 28 days from her continuing compensation.³⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$120,114.57, and that OWCP properly denied waiver of recovery of the overpayment. OWCP also properly required recovery of the overpayment by deducting \$950.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 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

³⁴ N.S., Docket No. 14-2081 (issued February 12, 2015).