

recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 30, 1994 appellant, then a 43-year-old veterinary medical officer, filed an occupational disease claim (Form CA-2) alleging that he developed mental illness due to mental abuse by employing establishment personnel. He first became aware of his condition and of its relationship to factors of his federal employment on August 18, 1993. OWCP initially accepted the claim for major depressive disorder. On November 10, 1997 it subsequently expanded acceptance of appellant's claim to include the additional condition of major depressive disorder, recurrent. OWCP paid him wage-loss compensation for total disability.²

On November 23, 2018 OWCP, as part of its periodic review of appellant's claim, requested that the SSA provide information about regarding dual benefits he may have received. On December 31, 2018 the SSA submitted a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form which indicated that beginning in May 2018 appellant's SSA rate with FERS was \$1,450.50 and without FERS was \$674.60 and beginning in December 2018 his SSA rate with FERS was \$1,491.10 and without FERS was \$693.40.

In a letter dated January 16, 2019, OWCP informed appellant that he had been receiving a prohibited dual benefit. It noted that the portion of SSA benefits earned as a federal employee was part of his retirement and that the receipt of wage-loss compensation under FECA and federal retirement simultaneously was prohibited. OWCP adjusted appellant's FECA benefits to account for his SSA offset of \$736.34, which along with his health benefits of \$536.42 reduced his FECA wage-loss compensation payments from the gross amount of \$3,224.00 to \$1,951.24 every 28 days.

OWCP, in a notice dated January 28, 2019, advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$6,420.65 because his wage-loss compensation benefits had not been properly reduced for the period May 1, 2018 through January 5, 2019, by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period and adding these amounts to find a total overpayment of \$6,420.65. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It explained that, if he was unable to pay the full overpayment amount, he should complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, so that it could determine a fair repayment method. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precouplement hearing.

In a letter dated January 25, 2019, received by OWCP on January 29, 2019, appellant indicated that he was not receiving monthly FERS disability retirement benefits. He noted that,

² By decision dated June 3, 2003, OWCP reduced appellant's wage-loss compensation, effective February 23, 2002, as his actual earnings as a customer service representative fairly and reasonably represented his wage-earning capacity.

while he had been approved to receive such benefits, he had elected to receive FECA benefits years ago. Appellant believed that the SSA retirements benefits he currently received were based on his private sector employment.

On February 13, 2019 appellant requested a decision based on the written evidence. He disagreed that the overpayment had occurred. Appellant requested waiver of recovery of the overpayment, reiterating that he was not currently receiving FERS benefits. On a completed Form OWCP-20, he listed his total monthly income of \$6,699.15 (\$5,254.15, monthly income and \$1,445.00, SSA benefits), total monthly expenses of \$6,539.33 (\$1,807.00, rent or mortgage; \$159.83, food; \$566.10, utilities; \$785.98, other expenses, and \$3,220.42, other debts), and total assets of \$1,035.36 (\$10.00, cash on hand; \$330.40, checking; and \$694.96, savings). Appellant submitted detailed lists of his claimed monthly income and monthly expenses. He listed additional expenses which included \$200.00 for an investment savings contribution, totaling \$6,699.16. Appellant submitted financial documentation supporting his claimed income and expenses.

By decision dated March 11, 2019, OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$6,420.65 for the period from May 1, 2018 through January 5, 2019 because his compensation payments were not offset by the portion of his age-related SSA retirement benefits that were attributable to his federal service. It determined that he was without fault in the creation of the overpayment and denied waiver of recovery of the overpayment because his monthly income of \$6,699.15 exceeded his allowable monthly expenses by “about \$200.00.” OWCP reviewed appellant’s financial documents and disallowed \$200.00 for an investment savings contribution as it did not constitute an ordinary and necessary living expense. It calculated \$6,499.16 in allowable monthly expenses. OWCP directed recovery of the overpayment by deducting \$150.00 every 28 days from appellant’s continuing compensation payments.

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.³ However, section 8116 also 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.⁴

Section 10.421(d) of OWCP’s implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁵ 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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,420.65 for the period May 1, 2018 through January 5, 2019, for which he was not at fault.

OWCP found that an overpayment of compensation had been created in the amount of \$6,420.65 for the period May 1, 2018 through January 5, 2019. The overpayment was based on the evidence received from SSA on December 31, 2019 regarding benefits paid to appellant. The record indicates that while appellant was receiving compensation for partial disability under FECA he concurrently received SSA age-related retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.⁷

OWCP received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to appellant's federal service. It properly explained that no deduction for SSA age-related retirement benefits had been recorded for the period May 1, 2018 through January 5, 2019. Therefore, an overpayment was created during this period. OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet. Appellant has not contested the amount of the \$6,420.65 overpayment and no contrary evidence has been provided to establish that OWCP's calculations were incorrect.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period May 1, 2018 through January 5, 2019 and finds that an overpayment of compensation in the amount of \$6,420.65 was created.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁹ 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁷ *See supra* notes 4 and 5.

⁸ *See L.D.*, Docket No. 19-0606 (issued November 21, 2019); *M.B.*, Docket No. 19-0425 (issued October 3, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

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

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.¹⁰

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.¹¹ 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.¹²

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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.¹⁵

OWCP determined that appellant was not at 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.¹⁶

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. Appellant indicated that he had monthly income of \$6,699.15 and monthly expenses of \$6,699.16. OWCP disallowed \$200.00 for an investment savings contribution, finding that it was not an ordinary and necessary living expense. The Board finds that OWCP properly disallowed this expense as it is appellant's burden

¹⁰ See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹¹ 20 C.F.R. § 10.436. OWCP's procedures provide that 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.400.4.a(2) (September 2018).

¹² *Id.*

¹³ 20 C.F.R. § 10.437(a), (b).

¹⁴ *Id.* at § 10.437(b)(1).

¹⁵ See *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹⁶ *Id.*

of proof to establish that the expense is ordinary and necessary.¹⁷ It determined that he had \$6,499.16 in monthly expenses. As appellant's current income of \$6,699.15 exceeds his ordinary and necessary living expenses of \$6,499.16 by more than \$50.00, he does not need substantially all of his income for ordinary and necessary living expenses.¹⁸

Additionally, the evidence of record does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has submitted no evidence that he had relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt.¹⁹ Consequently, OWCP properly denied waiver of recovery of the overpayment.

Appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Thus, the Board finds that he has failed to establish that OWCP abused its discretion by refusing to waive recovery of the \$6,420.65 overpayment.

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.²⁰

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 any hardship."²¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

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 his ordinary and necessary expenses by more than \$50.00, the Board finds that OWCP has not abused its discretion in requiring recovery of the overpayment by deducting \$150.00 every 28 days from each of his

¹⁷ *Supra* note 11 at Chapter 6.400.4(b)(2) (September 2018); *see also Janice E. Toledo*, Docket No. 04-0106 (issued March 4, 2004).

¹⁸ *See A.C.*, *supra* note 15; *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

¹⁹ 20 C.F.R. § 10.437; *see also A.C.*, *supra* note 15; *V.T.*, *supra* note 10.

²⁰ *See N.B.*, *supra* note 6; *A.C.*, *supra* note 15; *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²¹ 20 C.F.R. § 10.441(a); *see A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

continuing compensation payments.²² The Board finds that OWCP properly determined recovery of the overpayment in this case.²³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,420.65 for the period May 1, 2018 through January 5, 2019, for which he was not at fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$150.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²² See A.C., *supra* note 15; G.C., Docket No. 18-1062 (issued December 4, 2018).

²³ See A.C., *supra* note 15; N.B., *supra* note 6.