

FACTUAL HISTORY

On October 19, 2016 appellant, then a 65-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 29, 2016 she felt a pop and tearing/burning sensation in her right shoulder when unloading heavy parcels from her vehicle onto the loading dock while in the performance of duty. She continued to work following the injury. The claim form indicated that appellant's retirement coverage was Federal Employees Retirement System (FERS). OWCP accepted the claim for right shoulder rotator cuff tear. It authorized right rotator cuff repair surgery, which occurred on December 20, 2016. OWCP paid appellant wage-loss compensation on the supplemental rolls from December 20, 2016 through January 7, 2017 and began receiving payments on the periodic rolls beginning January 8, 2017.

In an EN1032 form dated September 29, 2017, appellant indicated that she received SSA age-related benefits as part of an annuity for federal service in the amount of \$1,701.00 monthly. In an EN1032 form dated September 7, 2018, she indicated that she received regular age-related SSA checks in the amount of \$1,735.00 monthly.

On September 18, 2018 OWCP provided SSA with a FERS/SSA dual benefits calculation form.

On October 2, 2018 appellant elected FECA benefits in preference to retirement benefits provided by the Office of Personnel Management (OPM), effective October 16, 2018.

On March 4, 2019 OWCP received a notification of personnel action (Form SF50) noting that appellant retired from the employing establishment effective July 31, 2018. Appellant's retirement coverage was listed as FERS.

On April 17, 2019 SSA completed the dual benefits calculation form which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from May 2017 through January 2019. Beginning May 2017, the SSA rate with FERS was \$1,701.80 and without FERS was \$242.10. Beginning December 2017, the SSA rate with FERS was \$1,735.80 and without FERS was \$246.90. Beginning December 2018, the SSA rate with FERS was \$1,784.40 and without FERS was \$253.80. Beginning January 2019, the SSA rate with FERS was \$1,785.40 and without FERS was \$258.30. SSA noted the date of eligibility as May 2017.

On June 3, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from May 1, 2017 through May 25, 2019. The total overpayment was determined to be \$37,099.61.

In a letter dated June 7, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount her age-related retirement benefit was partially attributable to federal service, her FECA wage-loss compensation had been adjusted.

On June 7, 2019 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$37,099.61 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from May 1, 2017 through May 25, 2019 were partially 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 not at

fault in the creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide supporting documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed. OWCP afforded her 30 days to respond.

On June 24, 2019 appellant requested a decision based upon the written evidence regarding possible waiver of recovery of her overpayment.

In a June 24, 2019 Form OWCP-20, appellant indicated that her total monthly income included \$2,737.80 from OWCP, \$2,657.00 in SSA benefits for both herself and her husband, and \$1,146.00 in other benefits her husband receives, resulting in a total monthly income of \$6,530.80. She listed her husband as a dependent and indicated that her total monthly expenses included \$229.20 for rent or mortgage. Her bi-monthly expenses included \$1,884.09 for groceries, \$713.07 for restaurants, \$374.63 for clothing, \$418.07 for Lowes, \$2,136.96 for utilities, and miscellaneous expenses of \$5,180.15. The total for monthly and bi-monthly expenses totaled \$10,936.17. Other monthly debts included \$905.21 for a car loan, \$766.57 for a tractor loan, and \$235.55 for a mower, resulting in a total of \$2,162.30. Appellant indicated that her funds included \$75.00 cash on hand, a balance of \$37,057.55 in a checking account, a balance of \$1,090.50 in a savings account, and retirement funds of \$351,268.79, resulting in total funds of \$389,491.84. She attached financial documentation of her expenses and income.

By decision dated July 11, 2019, OWCP finalized the June 7, 2019 preliminary determination that appellant had received an overpayment of compensation in the amount of \$37,099.61 for the period May 1, 2017 through May 25, 2019 because it had failed to offset her compensation payments by the portion of her SSA benefits that were attributable to federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP noted that appellant's liquid assets exceeded both the allowable resource base of \$10,300.00 for a household of two people and the total amount of the overpayment. It found that it would recover the overpayment by deducting \$684.45 every 28 days from her 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.² 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.³

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116.

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 employee.⁴ 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.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,099.61, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period May 1, 2017 through May 25, 2019.

The record indicates that, while appellant was receiving compensation for disability under FECA, she was also receiving SSA age-related retirement benefits during the period at issue. A claimant cannot receive both compensation for wage-loss and SSA age-related benefits attributable to federal service for the same period.⁶ Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS and without FERS for specific periods commencing May 1, 2017 through May 25, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its June 7, 2019 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period May 1, 2017 through May 25, 2019 and finds that an overpayment of compensation in the amount of \$37,099.61 was created.⁷ Appellant did not challenge the fact or amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides: "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

⁴ 20 C.F.R. § 10.421(d); *see B.B.*, Docket No. 19-0822 (issued February 18, 2020); *B.F.*, Docket No. 18-1345 (issued February 6, 2019).

⁵ FECA Bulletin No. 97-09 (February 3, 1997); *see also M.D.*, Docket No. 19-1500 (issued February 24, 2020); *G.K.*, Docket No. 18-0243 (issued August 17, 2018).

⁶ *See D.C.*, Docket No. 19-0118 (issued January 15, 2020).

⁷ *See L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁸

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary’s assets do not exceed a specified amount as determined by OWCP.⁹ 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 \$50.00.¹⁰ Also, 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.¹¹ 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.¹²

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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹³

OWCP regulations provide 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁴

ANALYSIS -- ISSUE 2

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

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

¹⁰ *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹¹ *See supra* note 9 at Chapter 6.400.4(a)(2) (September 2018).

¹² *Id.* at Chapter 6.400.4(b)(3).

¹³ *Id.* at § 10.437(a)(b).

¹⁴ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

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.¹⁵ It considered appellant's financial information to determine if recovery of the overpayment would defeat the purpose of FECA. Appellant provided her current monthly income and expenses in a Form OWCP-20 on June 24, 2019, as well as a summary of her liquid assets. OWCP properly determined that appellant listed available assets of \$389,491.84 which included \$37,057.55 in a checking account, \$1,090.55 in a savings account, and retirement savings in the amount of \$351,268.79. The evidence of record therefore established that appellant's assets exceeded the base asset amount of \$10,300.00 for individuals with a spouse or dependent.¹⁶ It was therefore unnecessary for OWCP to consider whether her monthly income exceeded her monthly ordinary and necessary expenses by more than \$50.00.¹⁷

Appellant also has not established that recovery of the overpayment would be against equity and good conscience. She has not submitted evidence to substantiate that she would experience severe financial hardship in attempting to repay the debt, or that in reliance on the overpayment she gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.¹⁸

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.¹⁹

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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.²⁰

¹⁵ *Id.* at § 10.436.

¹⁶ *Supra* note 9.

¹⁷ *Id.*

¹⁸ *See supra* note 13.

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

²⁰ *Id.*

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$684.45 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$684.45 every 28 days, OWCP explained that the factors set forth at 20 C.F.R. § 10.441(a) had been considered to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.²¹ As noted, appellant submitted a Form OWCP-20 on June 24, 2019 showing that she had assets including \$37,057.55 as a checking account balance, \$1,090.50 as a saving account balance, and retirement savings in the amount of \$351,268.79. Thus, OWCP did not abuse its discretion in setting the rate of recovery.²² The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$684.45 every 28 days.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$37,099.61, for which she was not at fault, as she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period May 1, 2017 through May 25, 2019. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$684.45 every 28 days from her continuing compensation payments.

²¹ See *R.D.*, Docket No. 19-0159 (issued April 17, 2020); *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

²² See *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

ORDER

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

Issued: July 27, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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