



concurrently received FECA benefits and age-related retirement benefits from the Social Security Administration (SSA) without appropriate offset, for which she was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$757.94 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On September 21, 2000 appellant, then a 54-year-old real estate staff appraiser, filed an occupational disease claim (Form CA-2) alleging that she developed severe emotional mental and physical stress in the course of her federal employment. She stopped work on September 19, 2000. On April 18, 2002 the Office of Personnel Management approved appellant's application for disability retirement effective January 5, 2001 under the Federal Employees Retirement System (FERS). On January 4, 2008 OWCP accepted her claim for depressive disorder and generalized anxiety disorder.

In an April 21, 2008 letter, OWCP informed appellant that she could elect to receive FECA wage-loss benefits, however, FECA benefits could not be paid concurrently with SSA age-related retirement benefits attributable to federal service without appropriate offset. On April 24, 2008 appellant elected to receive FECA benefits effective January 5, 2001. On October 14, 2008 she completed an EN1032 form and reported that she had received benefits from SSA as part of an annuity for federal service. On August 15, 2009 appellant completed a similar EN1032 form indicating that she had received benefits from SSA.

In a letter dated August 24, 2009, OWCP requested that appellant provide the date that she began receiving benefits from SSA and the monthly amount. It afforded 30 days for a response.

On August 28, 2010 appellant completed an EN1032 form indicating that she received benefits from SSA as part of an annuity for federal service. She completed similar EN1032 forms on August 12, 2011, August 12, 2012, August 24, 2013, and October 3, 2014. On October 3, 2014 appellant indicated on an EN1032 form that she received \$1,873.00 per month from SSA. She completed similar forms on August 30, 2015 and August 30, 2016, indicating that she was receiving \$1,904.00 per month from SSA. Appellant completed an EN1032 form on September 5, 2017 and indicated that she received \$1,910.00 per month from SSA. On August 17, 2018 she completed an EN1032 form indicating that she received \$1,948.00 per month from SSA.

On October 23, 2018 OWCP requested a FERS SSA dual benefits calculation from SSA. It requested the computation from September 13, 2000 to the present. On November 6, 2018 OWCP received response from SSA wherein it provided the rates for SSA benefits with and without FERS from August 2012 through December 2017. It indicated that, effective August 2012, appellant was entitled to an SSA monthly amount of \$1,814.60 with FERS and \$840.00 without FERS. Effective December 2012, appellant was entitled to \$1,845.40 with FERS

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<sup>3</sup> Docket No. 14-1461 (issued November 19, 2015).

and \$854.20 without FERS. Effective December 2013, she was entitled to \$1,873.00 in SSA benefits with FERS and \$867.00 without FERS. Effective December 2014 and December 2015, appellant was entitled to \$1,904.80 with FERS and \$881.70 without FERS. Effective December 2016, she was entitled to \$1,910.50 with FERS and \$884.30 without FERS. Effective December 2017, appellant was entitled to \$1,948.70 with FERS and \$901.90 without FERS.

On November 14, 2018 OWCP reviewed these rates and determined that she had received an overpayment of compensation in the amount of \$76,861.79.

In a letter dated November 14, 2018, OWCP informed appellant that she had been receiving SSA benefits since August 1, 2012 due to age, and that a portion of her SSA benefits were attributed to her years of federal service under the FERS retirement program. It determined that her monthly SSA age-related retirement benefit was \$1,948.70 and that \$1,046.80 was attributed to federal service and must be offset against her compensation benefits. Appellant was entitled to \$901.90 which was the remainder of her SSA age-related retirement benefits. The monthly offset was adjusted to a 28-day payment cycle of \$966.28 and resulted in a new net compensation payment of \$3,005.02.

In a November 30, 2018 preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation for the period August 1, 2012 through November 10, 2018 in the amount of \$76,861.79 because she received benefits from OWCP and SSA with no offset. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$76,861.79. It further made a preliminary determination that appellant was without fault in the creation of the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant 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 precoupment hearing.

On December 26, 2018 appellant requested waiver of recovery of the overpayment. She provided a completed Form OWCP-20 listing her total monthly income as \$7,852.02 and her total monthly expenses as \$6,643.47. Appellant indicated that she had additional assets totaling \$73,124.24. She provided financial documentation in support of her Form OWCP-20.

By decision dated January 17, 2019, OWCP found an overpayment of compensation in the amount \$76,861.79 for the period August 1, 2012 through November 10, 2018 as OWCP had failed to offset appellant's compensation payments for the portion of her age-related SSA benefits that were attributable to her federal service. It further found that she was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment finding that her monthly income exceeded her monthly expenses by more than \$1,208.00 and that there was no evidence that denying waiver would defeat the purpose of FECA or be against equity and good conscience. OWCP determined that it would recover the overpayment by deducting \$757.94 every 28 days from appellant's continuing compensation payments as this amount represented 25 percent of her net income from OWCP on a 28-day basis.

### 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>4</sup> 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.<sup>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the federal service of the employee.<sup>6</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 SSA benefits 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>7</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$76,861.79 for the period August 1, 2012 through November 10, 2018 because she concurrently received FECA benefits and age-related retirement benefits from SSA without appropriate offset.

As noted, a claimant cannot receive concurrent FECA compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.<sup>8</sup> The information provided by SSA accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to her federal service from August 1, 2012 and continuing. Thus, the record establishes that she received an overpayment of FECA wage-loss compensation.<sup>9</sup>

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 Board also finds that OWCP properly determined the amount of the overpayment. OWCP received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. It properly explained that no deduction for SSA age-related retirement benefits had been recorded for the period appellant received FECA wage-loss benefits, August 1, 2012 through November 10, 2018. Therefore, an overpayment of compensation was created during this period. OWCP provided its

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *Supra* note 6; *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>9</sup> *Id.*

calculations of the amount that it should have offset for the relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$76,861.79, thus creating an overpayment of compensation in that amount, for the period August 1, 2012 through November 10, 2018.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in 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>10</sup>

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.<sup>11</sup> According to 20 C.F.R. § 10.437, 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.<sup>12</sup> 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.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

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

Evidence in the case record shows that appellant had assets totaling \$73,124.24. The Board notes that it has not been established that recovery of the \$76,861.79 overpayment would defeat the purpose of FECA because these assets exceed the allowable resource base of \$6,200.00 for an individual.<sup>14</sup> Because the second prong of the two-prong test of whether recovery of the

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<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2), (3) (September 2018).

<sup>12</sup> *Id.* at § 10.437(a), (b).

<sup>13</sup> *Id.* at § 10.437(b)(1).

<sup>14</sup> *L.A.*, Docket No. 19-0708 (issued August 21, 2019).

overpayment would defeat the purpose of FECA has not been met, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether all of current income was substantially needed to meet ordinary and necessary living expenses.

It also has not been established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that severe financial hardship would be experienced in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance on the payment, which created the overpayment.<sup>15</sup> Therefore, OWCP properly denied waiver of recovery of the overpayment.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by refusing to waive the recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP's regulations provides in pertinent part: 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.<sup>16</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly requested recovery of the overpayment by deducting \$757.94 from appellant's continuing compensation payments every 28 days.

In determining that appellant could repay the overpayment through \$757.94 deductions from continuing compensation payments, OWCP took into account her financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion.<sup>17</sup> The Board finds that OWCP gave due regard to the financial information provided by her and noted that appellant's assets exceeded the allowable resource base. OWCP further applied its procedures which require an appropriate payment amount

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<sup>15</sup> *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>16</sup> 20 C.F.R. § 10.441(a); *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>17</sup> *See L.F.*, Docket No. 15-0489 (issued May 11, 2015) (where the Board affirmed an OWCP hearing representative's decision that a claimant was not entitled to waiver of recovery of an overpayment because he and his spouse had over \$17,000.00 in their savings account, and the hearing representative determined that his assets exceeded the specified resource base).

should be deducted in order to recover the overpayment within three years.<sup>18</sup> Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$757.94 from appellant's compensation payments every 28 days.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$76,861.79 for the period August 1, 2012 through November 10, 2018 because she concurrently received FECA benefits and age-related retirement benefits from SSA without appropriate offset, for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$757.94 every 28 days from her continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> *Supra* note 11 at Chapter 6.0500.8.c (September 2018). These procedures further note that if *no* response to the preliminary overpayment determination is received, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full (emphasis added) Chapter 6.0500.8.c(1).