

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$19,666.27 for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016 because he concurrently received FECA benefits and retirement benefits from the Social Security Administration (SSA) without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$550.00 per month from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On July 2, 1991 appellant, then a 42-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury on June 28, 1991 when he was cutting a piece of Plexiglas while in the performance of duty. He stated that the Plexiglas whipped out from the table and cut his left hand, arm, and stomach. Appellant further indicated that he was knocked backwards during the incident and fell on his back. OWCP accepted the claim for laceration of the left hand, lumbar strain, and herniated disc. Appellant returned to work on August 19, 1991. On September 1, 1992 he underwent surgery to remove a cyst from the dorsum left index finger and became totally disabled until he returned to light duty on September 16, 1992. Appellant filed a claim for a schedule award (Form CA-7). OWCP granted him a schedule award for 20 percent permanent impairment of the left hand by decision dated January 12, 1994. It later expanded the acceptance of appellant's claim to include chronic progressive multiple sclerosis and placed him on the periodic compensation rolls effective June 25, 1995.

In a form dated April 12, 2016, SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016. SSA provided the amount that appellant received in retirement benefits including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including FERS, it indicated that appellant was entitled to a monthly payment of \$1,007.80 effective March 2011, \$1,044.10 effective December 2011, \$1,061.80 effective December 2012, \$1,077.70 effective December 2013, \$1,453.30 effective February 2015, and \$1,453.30 effective December 2015. Without FERS, appellant was entitled to a monthly payment of \$721.40 effective March 2011, \$747.30 effective December 2011, \$760.00 effective December 2012, \$771.40 effective December 2013, \$837.90 effective February 2015, and \$837.90 effective December 2015.

In a May 13, 2016 letter, OWCP adjusted appellant's compensation to offset the portion of his SSA retirement benefits attributable to his federal service. It indicated that he would receive net compensation of \$2,018.76 every 28 days.

In a preliminary determination dated July 15, 2016, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$19,666.27 because it had failed to reduce his compensation benefits for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016 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. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$19,666.27. It further made a preliminary determination that appellant was without fault in the creation of the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it 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 prerecoumment hearing.

On August 1, 2016 appellant, through counsel, requested a prerecoumment hearing by a hearing representative of OWCP's Branch of Hearings and Review. He requested a waiver of recovery asserting that he was unaware of the offset when receiving Social Security benefits and retirement benefits. Appellant further submitted an overpayment recovery questionnaire which listed monthly income of \$1,452.90 for himself, \$511.00 for his spouse, and \$2,018.76 for FECA benefits, for total monthly income of \$3,982.66. He also listed expenses of \$3,246.85, which included in part \$800.00 for rent or mortgage, \$400.00 for food, \$45.00 for clothing, \$1,676.85 for utilities and other household expenses, and \$325.00 in debts. Appellant noted that he had assets of \$1,415.67.

A telephonic prerecoumment hearing was held on November 9, 2016. Appellant reiterated his request for waiver and the hearing representative held the case record open for 30 days for the submission of additional evidence.

On November 16, 2016 counsel submitted additional financial statements and documentation. Appellant submitted an updated list of expenses for \$800.00 of rent, \$386.00 of Cigna medical copays, \$170.00 of electric utility, \$65.00 of fuel oil, \$46.00 of telephone services, \$30.00 of cable television and internet services, \$286.00 of car payment, \$27.00 of renter's insurance, \$59.00 of auto insurance, \$53.00 of NRA term life insurance, \$64.00 of Nationwide life insurance, \$15.00 of newspapers, \$10.00 of ambulance/medic fees, \$25.00 of Chambersburg Hospital fees, \$19.00 of prescription copays, \$293.00 of medical copays, \$12.00 of AAA membership, \$11.00 of AAA accident insurance premiums, \$28.00 of AAA Mutual Omaha and high insurance accident premiums, \$500.00 of groceries, \$120.00 of gasoline, \$40.00 of clothing, \$550.00 of dental bills, and \$2,140.00 of medical supplies, for a total of \$5,749.00.

By decision dated December 19, 2016, OWCP found an overpayment of compensation in the amount of \$19,666.27 for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016 because it had failed to offset appellant's compensation payments for the portion of his SSA retirement benefits that were attributable to his federal service. It found that he was not at fault in creating the overpayment, but denied waiver of recovery as his income exceeded his expenses. OWCP noted that appellant had included expenses for cable television and internet services in the amount of \$30.00, which were not considered ordinary or necessary living expenses. It further found that the Nationwide life insurance premiums of \$64.00 and AAA accident insurance premiums totaling \$28.00 were duplicative of NRA and AAA premiums which were already accounted for. OWCP noted that appellant had one outstanding dental bill for \$286.00 and one outstanding medical bill for \$663.00 and divided them by 12 to

calculate monthly amounts of \$24.00 and \$55.00, respectively.³ It calculated that appellant's monthly income was \$3,982.00 and his monthly expenses totaled \$3,016.00, which yielded a monthly surplus amount of \$966.00. OWCP determined that it would recover the overpayment by deducting \$550.00 per month from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8129(a) of FECA provides that, in pertinent part, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee received SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits attributable to his or her federal service.⁶

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply. In disability cases, FECA benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee's federal service.⁷ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: Where a claimant had received SSA benefits, OWCP will obtain information from the SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. It will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of overpayment.⁸

³ In its December 19, 2016 decision, OWCP incorrectly noted that the dental bill was \$286.00 when dividing it by 12 to obtain a monthly amount of \$24.00. However, the Board finds that OWCP committed harmless error as it had previously indicated the correct amount of \$266.00 and the difference of \$2.00 per month will not change the outcome of this appeal.

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(d); *see also Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997); Chapter 2.1000.11(a)(b) (February 1995).

⁸ *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a laceration of the left hand, lumbar strain, and herniated disc while at work on June 28, 1991 and awarded him a schedule award for 20 percent permanent impairment of the left hand. It later expanded the acceptance of the claim to include chronic progressive multiple sclerosis and placed appellant on the periodic compensation rolls effective June 25, 1995.

In a form dated April 12, 2016, SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the FERS for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016. Appellant cannot receive both wage-loss compensation and federal retirement benefits concurrently.⁹ Consequently, he received an overpayment of compensation.

OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$19,666.27. The record includes an overpayment worksheet explaining the overpayment calculation. There is no contrary evidence of record and the Board, accordingly, finds an overpayment of compensation in the amount of \$19,666.27.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA 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.”¹⁰ Thus, a finding that appellant was without fault does not automatically result in waiver of recovery 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.¹¹

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.¹² An individual’s liquid assets

⁹ 5 U.S.C. § 8116(d). *See J.W.*, Docket No. 16-1355 (issued January 10, 2017); *see also* FECA Bulletin No. 97-09 (issued February 3, 1997).

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *See L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436. 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).

include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.¹³ 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, vehicle(s) (*i.e.*, any vehicles above the two allowed per immediate family), jewelry, and artwork.¹⁴

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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by OWCP's procedures.¹⁷

OWCP determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. Appellant asserted that he had a monthly income of \$3,982.00 and monthly expenses of \$5,749.00. OWCP excluded appellant's expenses for cable television and internet services of \$30.00 because they are not considered ordinary or necessary living expenses.¹⁸ It further excluded Nationwide life insurance premiums of \$64.00 and AAA accident insurance premiums of \$28.00 as they were duplicative of NRA and AAA premiums which were already accounted for.¹⁹ OWCP also divided outstanding dental and medical bills by 12 to obtain monthly amounts of \$24.00 and \$55.00, respectively. It determined that appellant's monthly expenses totaled \$3,016.00.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.437.

¹⁶ *Id.* at § 10.437(b)(1).

¹⁷ *Id.* at § 10.436.

¹⁸ *See S.W.*, Docket No. 11-1687 (issued July 23, 2012).

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (June 2009); *see also J.W.*, *supra* note 9.

OWCP found that appellant's monthly income of \$3,982.00 and his monthly expenses of \$3,016.00 yielded a monthly surplus amount of \$966.00. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²⁰ As appellant's current income exceeds his ordinary and necessary living expenses by \$966.00, he does not need substantially all of his income for ordinary and necessary living expenses.²¹

Additionally, the evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt.²² Consequently, OWCP properly denied waiver of recovery of the overpayment.

Appellant maintained that he was not at fault in creating the overpayment and repayment would cause financial hardship. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.²³ Further, as found by the Board, the evidence does not demonstrate that appellant would experience financial hardship repaying the 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.²⁴

Section 10.441(a) of the 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 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.²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information provided by appellant. Appellant's monthly household income totaled \$3,982.00 and his expenses totaled \$3,016.00, equaling a monthly surplus amount of \$966.00 per month. The Board finds that

²⁰ *Id.* at Chapter 6.200.6(a)(1); *see also Desiderio Martinez*, 55 ECAB 336 (2004).

²¹ As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether his assets exceed the allowable resource base. *See J.W.*, *supra* note 9.

²² 20 C.F.R. § 10.437.

²³ *Id.* at § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

²⁴ *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁵ 20 C.F.R. § 10.441(a).

OWCP properly determined that the rate of recovery should be \$550.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$19,666.27 for the periods March 1, 2011 to January 1, 2014 and February 1, 2015 to April 30, 2016 because he concurrently received FECA benefits and retirement benefits from the SSA without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly determined that it would recover the overpayment by deducting \$550.00 per month from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2018
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