

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
J.H., claiming as the widow of D.H., Appellant)
and)
U.S. POSTAL SERVICE, POST OFFICE,)
Federal Way, WA, Employer)
_____)

**Docket No. 07-2044
Issued: February 26, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 28, 2007 decision, finding that she had received an overpayment of compensation in the amount of \$12,143.80 and denying waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,143.80 because she concurrently received Social Security Administration (SSA) death benefits attributable to Federal Employees' Retirement System (FERS) and benefits under the Federal Employees' Compensation Act for the period June 26, 2000 through March 17, 2007; and, if so, (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

Appellant's husband died in the performance of duty on June 26, 2000 when he was electrocuted. At the time of his death, the employee was covered by FERS. On August 16, 2000

appellant filed a claim for death benefits under the Act on behalf of herself and her minor daughter. At the time of her application, appellant informed the Office that she and her daughter were also in receipt of social security death benefits.¹ The Office paid compensation to appellant and her daughter effective August 26, 2000. However, no adjustments were made for social security benefits attributable to FERS.

In a March 7, 2007 memorandum to the file, a claims examiner stated that appellant and her daughter had received an overpayment of compensation in the amount of \$12,143.80, for the period June 26, 2000 through March 17, 2007, due to the Office's failure to include a FERS offset. The record contains a document entitled "FERS Offset Calculation," which ostensibly calculated the total amount overpaid to appellant and her daughter for the period in question. The document showed a breakdown for both appellant and her daughter as follows:

SSA rate with FERS: Appellant -- \$18,042.45; Daughter -- \$7,850.70

SSA rate [w/o] FERS: Appellant -- \$16,187.30; Daughter -- \$7,150.00

Difference: Appellant -- \$1,855.15; Daughter -- \$700.70

Extension: Appellant - \$5,084.80; Daughter - \$7,059.00

Total FERS offset due for Appellant: \$5,084.80

Total FERS offset due for daughter - \$7,059.00

Total due for Appellant and child - \$12,143.80.

On April 9, 2007 the Office issued a preliminary finding that an overpayment of \$12,143.80 occurred for the period June 26, 2000 through March 17, 2007 because appellant and her daughter concurrently received SSA death benefits and compensation benefits under the Act, without offset for the amount of SSA death benefits attributable to FERS. The Office further found that appellant was at fault in creating the overpayment because she knew or should have reasonably known that she was accepting compensation to which she was not entitled. The Office advised that, if appellant disagreed with the fact or amount of overpayment, she could submit supporting evidence or arguments and request a precoupment hearing within 30 days. The Office provided FERS overpayment calculation worksheets which showed the SSA rate with FERS and the SSA rate without FERS for relevant time periods. The Office stated, "The difference is what would have been offset or reduced from your FECA benefits."

On April 25, 2007 appellant contested the overpayment and requested waiver. Stating that she had fully disclosed her receipt of Social Security Death benefits, and had been advised by the Office to apply for benefits under the Act, she contended that she was not at fault in the creation of any overpayment. She further indicated that repayment of the overpayment would create a hardship. Appellant also submitted a completed overpayment recovery questionnaire dated April 27, 2007, in which she requested a telephone conference. Appellant reported that her

¹ The record reflects that, in subsequent requests for continued compensation benefits, appellant indicated that she and her daughter were in receipt of social security death benefits.

monthly income was \$3,740.00, and that her expenses were \$3,535.00 to \$3,635.00. She reported assets in the amount of \$359,814.00. Appellant stated that the Office had not provided evidence that she received FERS benefits in addition to her monthly benefits under the Act.

During the June 6, 2007 telephone conference, appellant reiterated her contention that she should not be found to be at fault in the creation of the overpayment, as the benefits received resulted from the advice of the Office and the employing establishment. The claims examiner informed appellant that he found her to be without fault in creating the overpayment, but would issue a separate decision as to waiver.

By decision dated June 28, 2007, the Office finalized the overpayment of compensation in the amount of \$12,143.80 for the period June 26, 2000 through March 17, 2007. The Office found that appellant was not at fault in the creation of the overpayment, but that she was not entitled to waiver, due to her ability to repay the overpayment amount. Appellant was instructed to forward the entire amount of the overpayment to the Office immediately.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that --”

* * *

“(2) in the case of benefits received on account of age or death under [T]itle [2] of the [SSA,] compensation payable under this subchapter based on the federal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”²

FECA Bulletin No. 97-9 states: FECA benefits have to be adjusted for the FERS portion of SSA benefits. The portion of the SSA benefit earned as a [f]ederal [e]mployee is part of the FERS retirement package and the receipt of FECA benefits and [f]ederal retirement concurrently is a prohibited dual benefit.³

² 5 U.S.C. § 8116(d)(2); *see also* 20 C.F.R. § 10.421(d); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 11(a)-(b) (February 1995); FECA Bulletin No. 97-9 (issued February 3, 1997).

³ FECA Bulletin No. 97-9 (issued February 3, 1997).

A final decision of the Office shall contain findings of fact and a statement of reasons.⁴ With respect to overpayment decisions, the Office must provide clear reasoning showing how the overpayment was calculated.⁵

ANALYSIS -- ISSUE 1

The evidence supports that at the time of his death, the employee was a participant in FERS. The record reflects that appellant and her daughter received full compensation benefits, together with SSA death benefits from June 26, 2000 through March 17, 2007, without an offset for social security benefits attributable to FERS. The portion of the SSA benefits attributable to an employee's federal service is part of the FERS retirement package, and the receipt of benefits under the Act and federal retirement benefits concurrently is a prohibited dual benefit.⁶ Because appellant concurrently received compensation under the Act and SSA death benefits, which were not adjusted for FERS, during the period June 26, 2000 through March 17, 2007, the Board finds that she erroneously received a dual benefit during that period of time. Therefore, the Board affirms the fact of overpayment.

The Board finds that the Office has not adequately explained how it calculated the amount of overpayment. The record includes a document entitled "FERS Offset Calculation," which ostensibly reflects the total amount overpaid to appellant and her daughter for the period in question. The document indicates: the SSA rate with FERS for appellant and her daughter for the period in question was \$25,893.15 (\$18,042.45 and \$7,850.70, respectively); the SSA rate without FERS was \$23,337.30 (\$16,187.30 and \$7,150.00, respectively), reflecting a difference of \$2,555.85 (\$1,855.15 and \$700.70, respectively). The Office informed appellant that the difference between the SSA rates with and without FERS was the amount that would have been reduced from her benefits under the Act. The document further indicates that, by "Extension," the total FERS offset due for appellant and her daughter is \$12,143.80 (\$5,084.80 and \$7,059.00, respectively). However, the Office did not explain how it arrived at the "extension" figure, which is identical to the alleged overpayment amount. The Board notes that multiplying \$2,555.85 by the number of months involved in the period of the overpayment does not yield \$12,143.80. As noted above, the Office is required to provide clear reasoning showing how the overpayment was calculated.⁷ In this case, the Board is not able to determine from the information and evidence submitted by the Office, the correct amount of overpayment. Therefore, the case will be remanded to the Office for further development regarding the amount of overpayment. The Office should fully explain its rationale and provide adequate documentation to support its explanation. After such further development, the Office should issue an appropriate decision.

⁴ 20 C.F.R. § 10.126 (1999).

⁵ *James Tackett*, 54 ECAB 611 (2003); *Sandra K. Neil*, 40 ECAB 924 (1989).

⁶ FECA Bulletin No. 97-9 (issued February 3, 1997).

⁷ *James Tackett*, *supra* note 5; *Sandra K. Neil*, *supra* note 5.

CONCLUSION

The Board finds that appellant received an overpayment in compensation from June 26, 2000 through March 17, 2007, due to the concurrent receipt of social security death benefits and workers' compensation benefits, without offset for FERS. The Board finds, however, that the case is not in posture for a decision regarding the amount of overpayment, and the case must be remanded for further development on that issue. Therefore, it is premature to address appellant's eligibility for waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2007 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of overpayment, and set aside with respect to the amount of overpayment and remanded to the Office for further action consistent with this decision of the Board.

Issued: February 26, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board