

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

N.R., Appellant)

and)

DEPARTMENT OF THE NAVY, MILITARY)
SEALIFT COMMAND, MILITARY OCEAN)
TERMINAL, Bayonne, NJ, Employer)

**Docket No. 12-1853
Issued: June 10, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2012 appellant filed a timely appeal of a July 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$22,362.72 because he received both retirement benefits from the Social Security Administration (SSA) and compensation benefits under FECA from October 1, 2005 through June 2, 2012; (2) whether OWCP properly found that the overpayment was not subject to waiver;

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a desire for an oral argument in Washington, DC. No written confirmation was received. The Board, in its discretion, will decide the appeal as submitted on the record. The Board further notes that appellant submitted new evidence on appeal. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued its final merit decision in the case. *See* 20 C.F.R. § 501.2(c)(1).

and (3) whether OWCP properly required repayment of the overpayment by deducting \$455.00 each period from his continuing compensation payments.

On appeal, appellant asked for waiver of recovery of the overpayment and noted that the overpayment was not his fault.

FACTUAL HISTORY

On January 29, 1990 appellant, then a 49-year-old fireman/water tender, filed a traumatic injury claim alleging burns to his right arm and the right side of his face and neck. OWCP accepted his claim for a first-degree burn of the eye and other parts of the face, a second degree burn of the eye with other parts of face; and a burn of unspecified degree of the upper limb. It paid compensation and medical benefits.

On May 18, 2012, in response to a request from OWCP, the SSA listed appellant's compensation rate commencing October 2005 both counting benefits paid under the Federal Employees' Retirement System (FERS) and without counting government employment. With the government service counted, appellant was entitled to a rate of \$936.40 effective October 1, 2005; \$974.70 effective December 1, 2005; \$1,006.80 effective December 1, 2006; \$1,029.90 effective December 1, 2007; \$1,089.60 effective December 1, 2008; and \$1,128.80 effective December 1, 2011. Without government earnings, appellant was entitled to \$688.10 effective October 1, 2005; \$716.30 effective December 1, 2005; \$739.90 effective December 1, 2006; \$756.90 effective December 1, 2007; \$800.80 effective December 1, 2008; and \$829.60 effective December 1, 2011. OWCP calculated the amount that appellant would have been paid counting federal employment and the amount paid without counting federal employment, and determined that he received an overpayment of \$22,364.40.³

On May 25, 2012 OWCP issued a preliminary determination that appellant received an overpayment in the amount of \$22,362.72 as he received both retirement benefits and compensation benefits for the period October 1, 2005 through June 2, 2012. It noted that compensation benefits had to be reduced by the amount of social security benefits attributable to his federal service and retroactive to October 1, 2005, when he first received both benefits. Appellant was found without fault in the creation of the overpayment. OWCP sent appellant financial forms to complete and a form to request a waiver of the overpayment.

On June 13, 2012 appellant requested a telephone conference on the possible waiver of recovery of the overpayment by checking the appropriate line on the Overpayment Action Request. He indicated that he had submitted a completed OWCP-20 and supporting financial documents. Appellant contended that, if his benefits were reduced, it would cause great economic hardship as he was on disability.

³ For the period October 4 through November 30, 2005, OWCP determined that appellant was overpaid \$499.33; 28-day offset of \$229.20. For the period December 1, 2005 through November 30, 2006, appellant was overpaid \$3,109.32; 28-day offset of \$238.52. For the period December 1, 2006 through November 30, 2007 appellant was overpaid \$3,211.60; 28-day offset of \$246.37. For the period December 1, 2007 through November 30, 2008 appellant was overpaid \$3,294.00; 28-day offset of \$252.00. For the period December 1, 2008 through November 30, 2011 appellant was overpaid \$10,425.36 (or \$3,475.12 per year); 28-day offset of \$266.58 for each year. For the period December 1, 2011 through June 2, 2012, appellant was overpaid \$1,824.79; 28-day offset of \$276.18. The total amount is \$22,364.40.

By letter dated June 14, 2012, appellant contended that he was not at fault in the creation of the overpayment because he was never informed by the Office of Personnel Management that his compensation benefits would be reduced because of social security. He noted that he was not aware that he was under FERS.

On June 14, 2012 appellant completed an overpayment recovery questionnaire. He listed his monthly income as \$2,870.46 which came from two sources, SSA benefits of \$1,128.80 and FECA benefits of \$1,741.66. Appellant listed his wife as a dependent. He listed monthly expenses as: \$460.43 for rent or mortgage; \$500.00 for food; \$100.00 for clothing; \$200.00 for utilities; and \$800.00 for other expenses. Appellant also listed monthly payments of \$501.76 for Banco Popular and \$282.00 for Cooperative de Rincon. He also submitted a statement of assets and liabilities as of July 9, 2012. Appellant noted \$151,976.00 in assets and total liabilities of \$83,211.00. He submitted a new income and expense statement, and submitted an adjusted income statement which included his wife's social security benefits for a total monthly income of \$3,374.00. Appellant also listed expenses of \$1,628.00 and loan payments of \$1,959.00 and noted that he had a monthly net surplus of \$331.00.

By letter dated June 25, 2012, OWCP informed appellant that, prior to holding a telephone conference, it required documents supporting his financial income and expenses. It noted that supporting documentation included, but was not limited to, current tax returns, all benefits statements, payment receipts and copies of current credit card bills. OWCP gave appellant 15 days to submit the documentation.

By decision dated July 30, 2012, OWCP affirmed the overpayment of compensation in the amount of \$22,362.72. It noted that as he had failed to submit financial documents in support of his financial statement, waiver of recovery of the overpayment was denied. OWCP determined that the sum of \$455.00 would be withheld from his continuing compensation payments starting August 26, 2012 to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

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. If an employee receives 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.⁴

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 SSA benefits paid on the basis of age and attributable to the employee's federal service.⁵ The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits.

⁴ *Id.* at § 8116(d). See *D.S.*, Docket No. 12-689 (issued October 10, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits* Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.4(e)(2) (February 1995); Chapter 2.1000.11 (February 1995); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee's federal service. See also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA 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 compensation payable.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant received SSA benefits attributable to his federal employment and disability compensation from October 1, 2005 through June 2, 2012. This constituted a prohibited dual payment. The record contains documents from SSA delineating the offset figures that OWCP used to calculate the overpayment. It found that the \$22,364.40 overpayment was comprised of \$499.33 for the period October 4 through November 30, 2005 (SSA 28-day-offset amount of \$229.20); \$3,109.32 for the period December 1, 2005 through November 30, 2006 (28-day-offset amount of \$238.52); \$3,211.60 for the period December 1, 2006 through November 30, 2007 (28-day-offset amount of \$246.37); \$3,294.00 for the period December 1, 2007 through November 30, 2008 (28-day-offset amount of \$252.00); \$10,425.36 (or \$3,475.12 per year) for the pay period December 1, 2008 through November 30, 2011 (28-day-offset amount of \$266.58); and \$1,824.79 for the period December 1, 2011 through June 2, 2012 (28-day-offset amount of \$276.18). The Board will affirm the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of 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.⁷ Section 10.438 of 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.⁸

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997). Retirement benefits paid by OPM or SSA can be paid concurrently with a schedule award without any deduction from FECA benefits.

⁷ 5 U.S.C. § 8129.

⁸ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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. 20 C.F.R. § 10.437. OWCP procedures provide that the 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); see *W.F.*, 57 ECAB 705 (2006).

Failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁹

ANALYSIS -- ISSUE 2

OWCP found appellant without fault in the creation of the overpayment. Waiver may 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.¹⁰ Appellant, however, had the responsibility to provide adequate documentation to support the financial information he provided to OWCP.¹¹ He failed to do so.

In its May 25, 2012 preliminary determination, OWCP clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if he failed to furnish the supporting financial documentation within 30 days. It gave additional notice to appellant of his responsibility to submit further financial documentation in a letter dated June 25, 2012. While he submitted a completed overpayment questionnaire, he did not submit supporting documents of his claimed income and expenses. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. As appellant did not submit adequate financial information as required under section 10.438 of the implementing federal regulations, OWCP properly denied waiver of recovery of the overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP regulations provide 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 hardship.¹²

ANALYSIS -- ISSUE 3

OWCP determined that \$455.00 a month would be withheld from appellant's continuing compensation until the overpayment was recovered. Because appellant failed to submit the requested financial documentation, the Board finds that OWCP did not abuse its discretion in directing recovery by withholding \$455.00 a month from his continuing compensation benefits. The Board will affirm OWCP's July 30, 2012 decision on the rate of recovery.

⁹ 20 C.F.R. § 10.438(b).

¹⁰ *Id.*

¹¹ *Id.* at 10.438; *see also K.P.*, Docket No. 12-1450 (issued April 4, 2013).

¹² The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004); *see also J.M.*, Docket No. 10-1913 (issued July 11, 2011).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$22,362.72 because he received retirement benefits from the SSA and compensation benefits from October 1, 2005 through June 2, 2012. The Board further finds that OWCP properly found that, as appellant was not eligible for waiver and properly required repayment of the overpayment by deducting \$455.00 each period from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2012 is affirmed.

Issued: June 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board