

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

M.M., claiming as widow of J.M., Appellant)	
)	
and)	Docket No. 17-0560
)	Issued: August 23, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Tulsa, OK, Employer)	
)	

Appearances:
Gregory Calvert, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 13, 2017 appellant, through counsel, filed a timely appeal from an August 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 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 \$75,214.65 for the period November 1, 2013 through May 13, 2016; (2) whether

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly deducted \$605.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

OWCP accepted that, on October 31, 2013, the employee, then a 40-year-old letter carrier, died in a motor vehicle accident when another vehicle struck his delivery vehicle while in the performance of duty. Appellant, the employee's widow, filed a claim for survivor benefits (Form CA-5) on November 22, 2013. She provided her marriage certificate, the employee's death certificate, and the birth certificates of their minor children, M.M. and P.M. OWCP paid survivor benefits for appellant and the two minor children beginning November 1, 2013 on the supplemental rolls, and later on the periodic rolls effective January 12, 2014.

On October 27, 2014 and October 5, 2015 appellant completed a claim for continuance of compensation (Form CA-12). She checked a box marked "yes" to Question 6, which inquired whether any of her dependents received a pension or allowance from any other federal agency due to the employee's death. Appellant listed both her minor children as compensationers and specified in section 14 of the form that they all received survivor benefits from the Social Security Administration (SSA). She noted her annual salary of \$35,000.00 a year as a public school teacher.

On October 29, 2015 OWCP requested that SSA specify the amount of monthly benefits paid to appellant, M.M., and P.M., with and without the Federal Employees Retirement System (FERS) offset attributable to the employee's federal service. The SSA responded on December 10, 2015. It verified that appellant had received a \$255.00 lump-sum death benefit, and was receiving the following amount for each of the employee's two minor children: beginning October 2013, \$1,581.00 with FERS and \$377.30 without; as of December 2013, \$1,605.30 with FERS and \$382.50 without; as of December 2014, \$1,632.50 with FERS and \$389.40 without.

On April 5, 2016 appellant completed a Long Form Statement of Recovery (Form CA-1108) related to a third-party settlement of \$100,000.00 against the driver of the vehicle that struck the employee's postal vehicle. She repaid OWCP \$25,123.60.

In an October 20, 2016 memorandum, OWCP requested that SSA clarify its December 10, 2015 figures. SSA responded on March 29, 2016 that the deceased employee was not entitled to benefits, and that appellant had not received any SSA benefits. The December 10, 2015 figures for the two minor children remained the same, except for modifying the December 2013 and December 2014 rates with FERS from \$1,605.30 and \$1,632.50 respectively to \$1,605.00 and \$1,632.00 respectively.

Beginning June 1, 2016, OWCP offset appellant's SSA benefits from her survivor benefits under FECA, adjusting payments every 28 days from \$4,404.75 to \$2,110.71.

In a June 2, 2016 worksheet, OWCP calculated that appellant had been overpaid \$76,444.80 from November 1, 2013 through May 31, 2016 as OWCP had failed to offset SSA survivor benefits from ongoing FECA benefits to appellant's minor children. On June 28, 2016

OWCP completed an identical worksheet, but calculated a \$77,674.96 overpayment of compensation.

By notice dated July 11, 2016, OWCP advised appellant of its preliminary determination of an overpayment of compensation in the amount of \$77,674.96 for the period November 1, 2013 through May 14, 2016 as SSA survivor benefits had not deducted from FECA death benefits to the employee's minor children. In the July 11, 2016 file memorandum explaining the calculation, OWCP listed the overpayment amount as \$77,674.96 and \$75,214.65. It requested that she provide information regarding her income, assets, and expenses.

Appellant completed an overpayment recovery questionnaire (Form OWCP-20) on August 10, 2016. She listed \$7,574.00 in monthly income and \$7,792.50 in monthly expenses, and provided supporting documentation. Appellant also listed \$348,000.00 in bank accounts, stocks, and bonds. She asserted that she could not repay the debt due to financial hardship.

By decision dated August 23, 2016, OWCP finalized the July 11, 2016 preliminary determination, finding an overpayment of compensation in the amount of \$75,214.65 for the period November 1, 2013 through May 14, 2016. Appellant was found to be without fault in the creation of the overpayment, that waiver of recovery of the overpayment was not warranted, and that appellant was to repay the overpayment by a deduction of \$605.00 from each of the continuing compensation payments to the two minor children until payment was made in full.

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.³ Section 8129(a) of FECA provides, 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.”⁴

Section 8116(d)(2) of FECA⁵ 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 --”

* * *

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(d)(2).

“(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 [f]ederal 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...”⁶

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation for the period November 1, 2013 through May 14, 2016. The employee’s minor children were paid FECA death benefits attributable to the employee’s federal service concurrently with SSA survivor payments, a prohibited dual benefit.⁸ However, the case is not in posture for a decision regarding the amount of the overpayment.

SSA offered two slightly different sets of offset figures, one on December 10, 2015 and the other on March 29, 2016. Additionally, OWCP offered three sets of overpayment calculations, each with a different result. On June 2, 2016 it noted a \$76,444.80 overpayment for the period November 1, 2013 through May 14, 2016. However, on June 28, 2016, OWCP found a \$77,674.96 overpayment of compensation for the same period. A third calculation, included with a July 11, 2016 file memorandum accompanying the preliminary overpayment finding determined a \$75,214.65 overpayment for the same period. OWCP primarily utilized the \$77,674.96 figure in its July 11, 2016 preliminary overpayment determination. However, the August 23, 2016 decision used the \$75,214.65 figure as the finalized overpayment amount. OWCP did not explain the differing amounts or state why the preliminary determination differed from the final decision. The Board has held that, in an overpayment situation, it must explain the basis for its finding of overpayment and how the amount of overpayment was calculated.⁹ As OWCP used differing amounts for the overpayment without a clear explanation of the discrepancies, the Board finds that OWCP has not established the amount of the overpayment in question. Therefore, the case will be remanded to OWCP for such further development as deemed necessary, together with a recalculation of the overpayment, to be followed by a *de novo* decision regarding the overpayment.

⁶ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e)(2) (February 1995) (the portion of SSA benefits earned as a federal employee as part of a FERS retirement package and the receipt of FECA benefits concurrently is a prohibited dual benefit). *B.L.*, Docket No. 13-1422 (issued June 2, 2014); *A.H.*, Docket No. 12-1402 (issued December 13, 2012).

⁷ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a). See also *P.M.*, Docket No. 14-1832 (issued January 20, 2015).

⁸ 5 U.S.C. § 8116(d)(2).

⁹ *R.H.*, Docket No. 08-2025 (issued July 20, 2009).

On appeal counsel contests the fact of overpayment, contending that OWCP provided insufficient proof that she was not entitled to all benefits received both under FECA and SSA. As found above, OWCP properly determined an overpayment of compensation. Counsel also contends that OWCP provided insufficient evidence justifying the \$77,444.80 amount. As further found above, the case will be remanded for OWCP to clarify the amount of the overpayment.

ISSUES 2 & 3

As the case is not in posture for a decision regarding the amount of overpayment, it is premature for the Board to address the subsequent issues of waiver and rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined fact of overpayment of compensation. However, the case is not in posture for a decision regarding the amount of the overpayment. The case will be remanded to OWCP for recalculation of the overpayment. The issues of waiver of recovery and rate of recovery are moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2016 is affirmed in part regarding the fact of overpayment, and set aside in part regarding the amount of overpayment, and the issues of waiver and recovery of the overpayment.

Issued: August 23, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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