

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

_____)	
M.P., Appellant)	
)	
and)	Docket No. 17-1703
)	Issued: June 26, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer)	
_____)	

Appearances:
Frank Pullano, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 2, 2017 appellant, through her representative, filed a timely appeal from a June 16, 2017 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.

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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$49,073.13 for the periods June 13 through October 31, 2009 and July 1, 2010 through November 30, 2015; (2) whether OWCP properly found that she was at fault in the creation of the overpayment from June 13 through August 5, 2009 and July 21, 2011 through November 30, 2015; (3) whether OWCP properly denied waiver of recovery of the overpayment from August 6, 2009 to July 20, 2011; and (4) whether it properly found that it would recover the overpayment by deducting \$360.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On May 7, 2009 appellant, then a 67-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on April 27, 2009 she sustained bilateral knee contusions and cervical strain when she tripped and fell while in the performance of duty. She stopped work on April 27, 2009. OWCP accepted the claim, assigned OWCP File No. xxxxxx739, for neck sprain, bilateral knee contusions, and bilateral knee and leg sprains.³

On June 26, 2009 appellant submitted a claim for compensation (Form CA-7) requesting wage-loss compensation from April 27 to July 11, 2009. On the form, she indicated that she had not applied for and did not receive a payment under federal retirement or disability law. The employing establishment advised that appellant's retirement system was the Federal Employees Retirement System (FERS). On July 13, 2009 OWCP paid appellant wage-loss compensation for total disability from June 13 through July 11, 2009.

Appellant, on July 17, 2009, filed a CA-7 form requesting wage-loss compensation from July 12 to August 7, 2009. She again indicated that she had not applied for or received payments under federal retirement or disability law. On July 23, 2009 OWCP paid appellant wage-loss compensation from July 12 through August 1, 2009. By letter dated August 3, 2009, it notified her that she would receive wage-loss compensation for disability on the periodic rolls effective August 2, 2009. OWCP advised appellant to report any retirement income received from any federal agency.

Appellant notified OWCP by telephone on August 6, 2009 that she was receiving benefits from the Social Security Administration (SSA).

The employing establishment, on May 24, 2010, related that on October 31, 2010 appellant received a separation incentive of \$10,000.00 to voluntarily retire early. She received a second payment of \$5,000.00 on October 29, 2010.

³ OWCP previously accepted appellant's December 1994 occupational disease claim, assigned OWCP File No. xxxxxx062, for bilateral carpal tunnel syndrome, bilateral epicondylitis, bilateral trigger thumbs, and bilateral shoulder impingement syndrome. It granted her a schedule award for 36 percent permanent impairment of each upper extremity under OWCP File No. xxxxxx062.

On July 15, 2010 appellant signed a Form EN1032 covering the period April 15, 2009 to July 15, 2010. She provided on the form that the Office of Personnel Management (OPM) had assigned her a Civil Service Annuity (CSA) number and that she received a regular retirement check. Appellant, in a handwritten note, related that she telephoned SSA about her benefits and was told that she “was supposed to receive them.” She advised on the form that she did not receive benefits from SSA as part of an annuity due to federal service.

Appellant signed EN1032 forms on July 21, 2011, August 27, 2012, July 27, 2013, September 21, 2014, and August 17, 2015. She indicated on the forms that she did not receive benefits from SSA as part of an annuity for federal service. In the August 17, 2015 EN1032, appellant provided that she received retirement benefits from OPM, but advised that she did not receive benefits from SSA as part of an annuity for federal service.

OWCP, on September 1, 2015, requested that SSA complete a FERS/SSA Dual Benefit Calculation Form. In a November 2, 2015 response, SSA provided appellant’s SSA rate with FERS and her SSA rate without FERS from May 2006 through December 2014. With FERS, appellant’s SSA rate was \$887.30 effective December 2008, \$934.30 effective December 2009, \$963.90 effective December 2010, \$1,003.00 effective December 2011, \$1,020.00 effective December 2012, \$1,035.30 effective December 2013, and \$1,052.90 effective December 2014. Without FERS, her SSA rate was \$334.60 effective December 2008 through December 2010, \$346.60 effective December 2011, \$352.40 effective December 2012, \$357.60 effective December 2013, and \$363.60 effective December 2014.

By letter dated February 4, 2016, OWCP advised appellant that she had received age-related SSA benefits beginning May 1, 2006 and that a portion of the benefits were due to her federal service and needed to be offset from her FECA benefits. It notified her that it was adjusting her compensation to reflect the offset. OWCP informed appellant that it would provide a separate finding regarding any overpayment of compensation. In a February 2, 2016 payment plate, it adjusted her compensation to reflect the offset for SSA benefits due to federal service effective January 10, 2016.

On an EN1032 form signed August 22, 2016 and received by OWCP on August 31, 2016, appellant indicated that she received benefits from SSA as part of an annuity for federal service.

OWCP calculated the amount of wage-loss compensation appellant should have received from June 1, 2009 through November 30, 2015 with a FERS offset to find an overpayment amount of \$50,944.87.

On January 23, 2017 OWCP advised appellant of its preliminary determination that she received an overpayment of wage-loss compensation in the amount of \$50,944.87 for the period June 13, 2009 to January 9, 2016 because it failed to deduce the portion of the SSA benefits that she received due to her federal service from her workers’ compensation benefits.⁴ It further advised her of its preliminary determination that she was at fault in the creation of the overpayment as she made an incorrect statement as to a material fact and failed to provide information that she

⁴ The January 23, 2017 preliminary notice of overpayment superseded a December 16, 2016 preliminary notice of overpayment finding that appellant was without fault in the creation of the overpayment.

knew or should have known to be material. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified her 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 prerecoument hearing.

Appellant, on February 12, 2017, requested a prerecoument hearing before an OWCP hearing representative. She maintained that she was without fault in creating the overpayment. Appellant related that she was already receiving SSA benefits before she began receiving workers' compensation benefits and that the employing establishment was aware of her receipt of SSA benefits. In an accompanying overpayment recovery questionnaire, she listed monthly income of \$3,918.24 and provided monthly expenses, noting that the total amount differed each month. Appellant indicated that she had assets of \$10.00.

On April 4, 2017 OWCP noted that it was deducing health benefits under an inaccurate plan as appellant had no dependents. It indicated that she had an underpayment of \$15,293.03 as it failed to properly adjust her health benefits.

Appellant's representative, on April 25, 2017, submitted information regarding SSA annuities. He further provided a list of her monthly expenses totaling \$4,703.05 per month. Appellant listed expenses of \$1,428.13 for her mortgage, \$172.02 for Dish television, \$145.01 for car insurance, \$54.28 every three months for water, \$47.16 for her home telephone, \$116.00 for lawn care, \$559.95 for a car payment, \$54.00 for garbage collection, \$304.76 in credit card expenses, \$40.00 for a mobile telephone, \$300.00 for household goods, \$69.42 for gas utility, which she indicated was high in winter, for a shot, \$71.68 for electricity, which was higher in summer, \$100.00 for medication, \$700.00 for food necessary for a special diet, \$100.00 for gasoline, \$280.00 for a shot, and \$60.00 for dog food plus other yearly pet expenses. Appellant also noted that she paid \$70.00 every three months for oil changes, \$150.00 yearly for furnace inspections, \$150.00 yearly for an air conditioner inspection, \$20.00 for air conditioner filters, and \$20.00 every three months for filters for her automobile. She attached supporting financial documentation.

At the hearing, held on May 8, 2017, appellant's representative noted that appellant began receiving benefits from SSA in August 2007. Appellant received wage-loss compensation from OWCP beginning June 13, 2009 after an April 27, 2009 employment injury. The representative asserted that she had not retired and thus accurately answered the question on the June 26, 2009 claim for compensation and the EN1032 forms regarding whether she received a retirement check. He advised that on the forms appellant related that she did not receive benefits as part of an annuity which he contended differed from indicating that she did not receive any SSA benefits. The representative noted that on the July 15, 2010 EN1032 form appellant acknowledged that she received benefits from SSA. He maintained that OWCP obtained information regarding her earnings on July 19, 2010 and July 7, 2011 showing that she received SSA benefits. Appellant's representative indicated that her dog had died. Appellant began working in federal employment in 1993.

By decision dated June 16, 2017, OWCP's hearing representative modified the preliminary overpayment determination to reflect that appellant received an overpayment of compensation in the amount of \$49,073.13 for the period June 13 to October 31, 2009 and February 10, 2010

through November 30, 2015. He noted that OWCP had calculated the overpayment from June 13, 2009 until November 2, 2015, but mistakenly indicated in its preliminary overpayment determination that the period of overpayment was from June 13, 2009 through January 9, 2016 rather than through the correct date of November 30, 2015. The hearing representative adjusted the ending date of the overpayment accordingly. He further found that appellant was not entitled to compensation for wage loss from October 31, 2009 through July 1, 2010 due to her receipt of a separation incentive from the employing establishment. The hearing representative subtracted the amount of the offset for the period October 31, 2009 through July 1, 2010 from the overpayment of \$50,944.87 to find a new overpayment amount of \$49,073.13. He affirmed the finding that she was at fault from June 13 to August 25, 2009 as she did not report her receipt of SSA benefits on June 26 and July 17, 2009 CA-7 forms and from July 21, 2011 through November 30, 2015 because she did not report her receipt of SSA benefits on EN1032 forms. The hearing representative found, however, that appellant was without fault for the overpayment created from August 6, 2009 to July 20, 2011, noting that her telephone call to OWCP on August 6, 2009 and her disclosure on her July 15, 2011 EN1032 provided sufficient notice to OWCP of her receipt of SSA retirement benefits. He determined that appellant was not entitled to waiver of recovery of the overpayment after finding that the expenses for lawn care, Dish television, and an unexplained shot were not reasonable and noting that she no longer had pet expenses. The hearing representative found that, after removing the items that were not reasonable or necessary, her monthly expenses totaled \$3,992.21 and her monthly income totaled \$4,454.82, and that she was thus not entitled to waiver of recovery of the overpayment. He determined that the overpayment should be recovered by deducting \$390.00 per month from continuing compensation, every 28 days. The hearing representative instructed OWCP, upon return of the case record, to adjudicate whether appellant was entitled to compensation based on its over deduction of her health care premiums, to address any overpayment of compensation that occurred from December 1, 2015 through January 9, 2016, and to determine whether she received an overpayment due to her receipt of severance pay for the period October 31, 2009 through February 1, 2010.

On appeal appellant relates that she disclosed her receipt of SSA benefits on her original EN1032 form. She also asserts that OWCP's hearing representative erred in discounting her pet expenses as she immediately got another dog after the death of her prior dog. Appellant maintains that the hearing representative also did not consider that her utility payments varied depending on the weather, and that she had to pay lawn care expenses as she was unable to mow her lawn due to her injury.

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 his duty.⁵ 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

⁵ 5 U.S.C. § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁶

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.⁷ If an employee receives SSA benefits based on federal service, his compensation benefits shall be reduced by the amount of SSA benefits attributable to his federal service.

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.⁸ 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. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without 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 the overpayment.⁹

ANALYSIS -- ISSUE 1

OWCP’s hearing representative determined that appellant received an overpayment of compensation in the amount of \$49,073.13 for the period June 13 to October 31, 2009 and February 2, 2010 through November 30, 2015 because she received wage-loss compensation for total disability while also receiving SSA retirement benefits attributable to her federal service without the appropriate offset.¹⁰ He modified the amount of the overpayment to exclude the period October 31, 2009 to February 1, 2010.¹¹ As noted, the portion of the SSA benefits she earned as part of her FERS retirement package and the receipt of benefits under FECA concurrently

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(d); *see also N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); Chapter 2.1000.4(e)(2) (January 1997); Chapter 2.1000.11 (January 1997); OWCP does not require an election between FECA benefits and SSA benefits except when they are attributable to the employee’s federal service. *See R.C.*, Docket No. 09-2131 (issued April 2, 2010).

⁹ *See L.B.*, Docket No. 11-2076 (issued August 29, 2012).

¹⁰ The hearing representative found that appellant was not entitled to compensation from October 31, 2009 through February 1, 2010 as she was receiving a separation incentive from the employing establishment. He instructed OWCP to calculate the overpayment created during this period.

¹¹ The hearing representative determined the amount of time that appellant would have been ineligible for compensation based on the receipt of her separation incentive. He then calculated the amount of the offset included in the overpayment for the period October 31, 2009 to February 1, 2010 (part of a day), to find \$1,871.74. The hearing representative subtracted \$1,871.74 from \$50,944.87 to find an overpayment of \$49,073.13.

constituted a prohibited dual benefit.¹² Appellant, consequently, received an overpayment of compensation.

SSA provided appellant's SSA rate with FERS and her hypothetical SSA rate without FERS. The difference between the amounts must be deducted from FECA benefits. Based on the information provided by SSA, OWCP's hearing representative determined that she received an overpayment of compensation in the amount of \$49,073.13 for the period June 13 to October 31, 2009 and February 1, 2010 to November 30, 2015. The Board has reviewed OWCP's calculations of the dual benefits that appellant received and finds that it properly determined that she received a \$49,073.13 overpayment of compensation.¹³

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁴ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹⁵ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁶

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in creating the overpayment as she made an incorrect statement regarding a material fact and failed to provide material information.

OWCP's hearing representative found that the appellant was at fault in the creation of the overpayment from June 13 through August 5, 2009 and July 21, 2011 through November 30, 2015. He found that she did not disclose her receipt of federal retirement benefits on CA-7 forms dated June 26 and July 17, 2009. The hearing representative further found that

¹² See *H.H.*, Docket No. 16-1063 (issued September 15, 2016).

¹³ See *L.M.*, Docket No. 16-1035 (issued November 27, 2017).

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.435(a).

¹⁶ *Id.* at § 433(a); see *Kenneth E. Rush*, 51 ECAB 116 (1999).

appellant completed EN1032 forms dated July 21, 2011 to August 22, 2016 advising that she did not receive retirement benefits from SSA due to an annuity for federal service.

The Board finds that appellant was at fault in creating the overpayment from July 13 through August 5, 2009 and from July 21, 2011 through August 17, 2015 because she made an incorrect statement as to a material fact which she knew or should have known to be incorrect. The Board further finds, however, that she was without fault in the creation of the overpayment from August 18 through November 30, 2015.

Appellant signed EN1032 forms on July 15, 2010, July 21, 2011, August 27, 2012, July 27, 2013, September 21, 2014, and August 17, 2015. The EN1032 forms cover the period commencing 15 months prior to the signing of the form,¹⁷ and thus include the period April 15, 2009 to August 17, 2015. On these forms, appellant advised that she did not receive benefits from SSA as part of an annuity for federal service. While appellant indicated on the July 15, 2010 EN1032 that she received a regular retirement check, and wrote that she was supposed to receive SSA benefits, she answered “no” to the question of whether she received benefits from SSA due to an annuity for federal employment. The Board has held that when a claimant incorrectly states on an EN1032 form that she did not have any SSA benefits attributable to federal service, OWCP may properly find her at fault for the period covered.¹⁸ Based on the clear language of the forms, appellant failed to provide information which she knew or should have known to be incorrect.¹⁹ The Board thus finds that she was at fault in the creation of an overpayment of compensation from July 13 through August 5, 2009 and from July 21, 2011 through August 17, 2015.

The Board finds, however, that appellant is without fault in the creation of the overpayment from August 17 to November 30, 2015. In an August 22, 2016 EN1032, she disclosed her receipt of SSA benefits based on part on her federal service. Appellant, therefore, did not make an incorrect statement as to a material fact on the EN1032 covering the period after the last EN1032 form dated August 17, 2015 through August 22, 2016. As OWCP premised its finding of fault on her failure to report SSA benefits on EN1032 forms for this period, the Board finds that she was not at fault in the creation of the overpayment during this period.²⁰

The case, consequently, will be remanded to OWCP to consider whether the overpayment created during this period, August 17 to November 30, 2015 should be waived. In view of the Board’s disposition of fault, it is premature to address the issues of waiver and recovery of the overpayment.

On appeal appellant maintains that she disclosed her receipt of SSA benefits on her initial EN1032 form. As noted by the Board, however, while she indicated on the July 15, 2010 EN1032 that she received a regular retirement check and provided a handwritten notation that she received SSA benefits, she specifically responded on the form that she did not receive the SSA benefits as

¹⁷ See *M.J.*, Docket No. 17-0661 (issued December 14, 2017).

¹⁸ See *P.P.*, Docket No. 14-2048 (issued May 13, 2015); *B.L.*, Docket No. 13-1422 (issued June 2, 2014).

¹⁹ See *A.S.*, Docket No. 17-0606 (issued December 21, 2017).

²⁰ See *supra* note 17.

part of an annuity for federal service. As she failed to properly complete the form and provide information which she knew or should have known to be material, she is not without fault in creating the overpayment.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$49,073.13 for the periods June 13 to October 31, 2009 and July 1, 2010 through November 30, 2015. The Board further finds that OWCP properly found that she was at fault in the creation of the overpayment from June 13 through August 5, 2009 and July 21, 2011 through August 17, 2015, but improperly found that she was at fault from August 17 through November 30, 2015. The case will be remanded for OWCP to consider waiver and recovery of the overpayment for the appropriate periods.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings in accordance with this decision of the Board.

Issued: June 26, 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

²¹ *Id.*