

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

P.T., Appellant)	
)	
and)	Docket No. 16-1574
)	Issued: March 16, 2018
DEPARTMENT OF THE TREASURY,)	
BUREAU OF ENGRAVING & PRINTING,)	
Fort Worth, TX, Employer)	
)	

Appearances:
Appellant, pro se
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 July 29, 2016 appellant filed a timely appeal from a February 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$22,574.53 for the period August 1, 2010 through May 30, 2015; (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided the Board includes evidence received after OWCP issued its February 2, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly withheld \$310.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ Appellant, a 69-year-old former secretary, filed a claim for a traumatic injury (Form CA-1) alleging that she sustained injury as a result of a flu shot she received in the employee health unit on October 16, 2007. In a December 11, 2009 decision, the Board found the case was not in posture for decision and remanded the case for further development. The facts and circumstances as set forth in the prior appeal decision are incorporated herein by reference. OWCP accepted the claim for necrotizing fasciitis, left, septic shock, acute renal failure with unspecified pathological lesions in kidney, other respiratory abnormality, traumatic unilateral amputation of right foot (complete) (partial), without complications, and gangrene on the right, scar conditions and fibrosis of the skin, and subluxations of the lumbosacral and sacroiliac joints/spine. It placed appellant on the periodic rolls in March 2008 for her total disability from work due to her work injury.

Appellant was born in August 1948. When she turned 62 in 2010, appellant was eligible to receive age-related social security retirement benefits. The record indicated that she was covered under the Federal Employees Retirement System (FERS) and was subject to Federal Insurance Contributions Act (FICA) withholding. A notation on appellant's February 2, 2010 Form CA-7 claim for leave without pay commencing from March 30, 2008 and indefinitely, revealed that appellant retired under FERS with a monthly payment amount of \$969.40 on March 29, 2008.⁴

In a letter dated March 15, 2010, OWCP advised appellant that it was informed that she was receiving or may be entitled to benefits from the Office of Personnel Management (OPM) under the Civil Service Retirement Act (CSRS) or FERS. It explained that any benefits paid by OPM (including any lump-sum payment made as part of an alternative annuity under CSRS and benefits for wage loss paid by OWCP were not payable for the same period of time. OWCP explained that individuals entitled to both OWCP and OPM benefits must elect which benefit to receive. It noted that the election was not irrevocable and could be changed should appellant decide that the benefits of the other plan were more advantageous. OWCP also explained that if appellant elected FECA she could concurrently receive benefits from the Thrift Savings Fund and benefits provided by the Social Security Act (SSA). However, the SSA benefits had restrictions that they be reduced by the compensation payable and FECA benefits would be reduced by the SSA benefits paid on the basis of age and attributable to federal service.

On May 5, 2015 the Social Security Administration provided the rates of appellant's SSA payments, attributable both with and without appellant's FERS, from August 1, 2010 to December 1, 2014. The Social Security Administration advised that appellant's current SSA benefits without FERS was \$1,420.40 and SSA benefits with FERS was \$916.10.

³ Docket No. 09-0728 (issued December 11, 2009).

⁴ Appellant's December 14, 2007 Form CA-1 similarly notes that her retirement coverage was under FERS.

In a letter dated June 2, 2015, OWCP notified appellant that it found that she was dual receipt of benefits under FERS and SSA. It explained that the portion of the SSA benefits earned as a federal employee was part of the FERS retirement package and that she was not entitled to receive both FERS and SSA concurrently as it was a prohibited dual benefit. OWCP explained that her SSA benefits would be adjusted from the FERS portion of the SSA benefits. It further explained that they would begin offsetting appellant's workers' compensation, as required on May 31, 2015. OWCP calculated the FERS offset by subtracting the SSA rate without FERS from the SSA rate with FERS to get the monthly FERS offset, and then took the monthly FERS offset amount and multiplied it by 12 and divided it by 13 to get the FERS offset for the 28-day compensation cycle. Therefore, it determined that the monthly offset was \$1,420.40 minus $\$916.10 \times 12$ divided by 13 = \$465.51, which it began offsetting from appellant's monthly workers' compensation beginning May 31, 2015. ($\$3,578.00 - \$465.71 = \$3,112.49$).

On June 4, 2015 OWCP notified appellant that a preliminary determination had been made finding that she was without fault in creating an overpayment of compensation in the amount of \$22,574.53 for the period August 1, 2010 to May 30, 2015. It explained that the overpayment occurred because section 8116(d)(2) of FECA required that compensation benefits be reduced by the portion of SSA retirement benefits that are attributable to federal service. OWCP further explained that since appellant received SSA benefits based on federal service, her compensation benefits must be reduced by the amount of SSA benefits attributable to her federal service, and must be reduced (offset) retroactive to the date when she first received the SSA retirement benefits and OWCP benefits for the same period. It found that appellant was without fault in the creation of the overpayment, because she could not have reasonably been aware that her compensation was paid incorrectly. OWCP explained that, if she was unable to repay the full amount now, she should submit a completed OWCP-20 form (enclosed) to assist with determining a fair repayment method. It acknowledged that appellant advised *via* her yearly EN1032 forms, since 2011, she received SSA benefits attributable to her federal service, but OWCP did not make the proper offset until May 31, 2015, resulting in the overpayment. OWCP calculated the overpayment by multiplying the applicable monthly FERS offset by the 4,518 days overpaid from August 1, 2010 to May 30, 2015, and then dividing by 28, the days in the compensation payment cycle, to determine the \$22,574.53 overpayment. A printout of the payments for the aforementioned period was also provided. It revealed that for the period: August 1 to November 30, 2010, the overpayment amount was \$1,910.84; for the period December 1, 2010 to November 30, 2011, the overpayment amount was \$5,715.55; for the period December 1, 2011 to November 30, 2012, the overpayment was \$5,938.85; for the period December 1, 2012 to June 30, 2013, the overpayment was \$3,498.70; for the period July 1 to November 30, 2014, the overpayment was \$2,501.30; and from December 1, 2014 to May 30, 2015, the overpayment was \$3,009.17. The total overpayment for the FERS offset deduction was determined to be \$22,574.53.

In a letter dated June 30, 2015, OWCP advised appellant of the new amount that she would be receiving after the offset. It noted that prior to the offset she was receiving \$3,578.00, but, with the subtraction of the offset for the SSA deduction of \$465.71, her new four-week amount would be \$3,112.49.

On July 1, 2015 counsel requested a prerecoopment hearing regarding the preliminary overpayment determination. A prerecoopment hearing was held before a hearing representative

on December 16, 2015. During the hearing, counsel argued that they did not disagree with the overpayment or the amount of the overpayment, only that it occurred through no fault of appellant. Furthermore, appellant was incapable of repaying it and they were requesting a waiver as she needed all of her income to meet her ordinary and necessary living expenses, and it would be against equity and good conscience to repay the overpayment as it would cause a severe hardship. Counsel argued that appellant submitted the appropriate forms and apprised OWCP of all payments she received and never evaded her reporting requirements. She explained that appellant's life was changed forever by her October 15, 2007 employment injury from the flu shot that went wrong and her bills were increasing due to the injury. Counsel referenced appellant's broken ankle, but explained that they had not received the bills and were unsure of how much appellant would have to pay with regard to her out of pocket expenses. She noted that appellant had to pay \$1,500.00 out of pocket for a brace for her ankle, which was not a regular monthly expense, but showed how her situation constantly changed. When asked if the overpayment was correct, appellant testified that, if they calculated what she was actually drawing from 2010 to 2015, they should have retired her at age 62 with full retirement with her disability and no penalty for drawing a salary from workers' compensation, but they did not do that. Appellant was advised at the hearing that if she had concerns with the amount she received from SSA, she would need to contact that agency. Counsel explained that the majority of appellant's financial hardship was her medical bills, prescriptions, upcoming medical bills, and her living expenses. Furthermore, appellant's husband was supposed to be retired but his job was on the line because of his having to deal with her medical issues. Counsel argued that attempting to repay the overpayment would cause severe financial hardship based on their current living expenses and income. She noted that they made month-to-month payments and lived in a small house and that any attempt to repay the overpayment would literally wipe them out. Counsel argued that for equity and good conscience under the provisions, they wanted to ensure that appellant was not placed in a detrimental position, as a result of SSA's failure to properly compute what is due.

Appellant testified that she had no dependents other than her spouse. Regarding whether appellant had any assets over the \$8,000.00 resource base, counsel noted a timeshare that was purchased for \$9,000.00 or \$10,000.00, but despite being on the market for many years, they were unable to find a buyer. Regarding other assets, counsel noted that appellant has money set aside in savings, in the event her spouse lost his job, or if she was dropped (from workers' compensation), or if there was a major life issue. It was for emergency situations. Counsel argued that the work injury affected every aspect of her life and caused her to be diagnosed with Celiac disease and she now had to eat a gluten-free diet. She explained that she would provide documentation of appellant's expenses. However, counsel only provided proof of two water bill payments. When asked if appellant was capable of paying back any amount on a monthly basis, counsel responded only if they could get the time share sold, but they could not get rid of it, and it was a burden.

On December 16, 2015 counsel submitted an unsigned and undated OWCP-20 Form on behalf of appellant, along with photographs of appellant's injury. On January 15, 2016 she again requested that appellant's overpayment be waived or reduced by half, as repayment would cause appellant a substantial burden. Counsel submitted financial documentation to include: a credit report from Credit Karma; appellant's 2014 federal income tax return; a statement dated from Randolph Brooks Federal Credit Union (RBFCU) for October 2015, which revealed a loan in the

amount of \$18,862.36 with a monthly car payment of \$217.95 and which appeared to reveal a second car loan for a Dodge Caravan in the amount of \$4,805.94 with a monthly payment of \$293.00; appellant's spouse's federal earning and leave statement for pay period 20 of 2015; and his October 2015 retirement statement, reflecting a net monthly income of \$1,878.30; an October 2015 Mazda Capitol Credit auto loan statement for \$503.83; a Wells Fargo mortgage statement for October 2015 which revealed a monthly payment of \$793.65; and Fort Worth Community Credit Union (FWCCU) banking statements for September through October 2015.

The Credit Karma report revealed a monthly auto loan payment of \$471.00 with RBFCU, a monthly auto loan with JP Morgan Chase Bank of \$503.00, and a Discover credit card with the last monthly payment of \$45.00. The RBFCU checking account statement revealed a balance of \$1,750.35 and the RBFCU savings account revealed a zero balance and monthly payments for a 2014 Hyundai of \$217.95 and \$293.00 for a 2010 Dodge. Appellant's spouse's earning and leave statement revealed his net two-week pay was \$1,432.13, and his net monthly Air Force retirement pay was \$1,878.30. The Wells Fargo mortgage was \$793.65. The FWCCU statement revealed direct deposits from the Treasury Department for \$133.17 in September and October, with the ending October balance for the share draft account of \$5,187.64 and an ending balance of \$2,658.65 in the share account. The FWCCU statement shows two City of Arlington water bill payments of \$114.24 and \$119.24. The total balance of the RBFCU and FWCCU statements was equal to \$9,596.64.

The unsigned/undated OWCP-20 form listed appellant's total monthly income in the amount of \$7,638.55, and total monthly expenses in the amount of \$4,889.73.⁵ The expenses included a monthly rent of \$1,000.00, food in the amount of \$750.00, clothing in the amount of \$200.00 per month, utilities in the amount of \$700.00 and other expenses to include medical expenses in the amount of \$1,300.00. Additionally, two creditors were listed as Mazda Capital services for a \$17,174.57 loan, with a monthly payment of \$503.83. The other creditor was listed as RBFCU in the amount of \$18,862.36, with a monthly payment of \$435.90. Appellant listed her assets as her \$9,900.00 timeshare and \$22,000.00 in checking and savings accounts.

By decision dated February 2, 2016, OWCP's hearing representative finalized OWCP's preliminary determination regarding the fact and amount of the overpayment in the amount of \$22,574.53, as well as its findings that appellant was not at fault in the creation of the overpayment because she was not aware, nor could she reasonably have been expected to know, that OWCP had paid compensation incorrectly. Regarding appellant's request for waiver of recovery, the hearing representative noted that appellant had assets in excess of \$8,000.00. Furthermore, despite the lack of evidence to support expenses claimed, the OWCP-20 form revealed monthly income of \$7,638.55 and ordinary and necessary expenses of \$4,889.73. OWCP noted that this was in excess of \$50.00. It also noted that appellant continued to receive FECA wage-loss compensation and had a reasonable ability to repay \$310.00 every 28 days from her continuing compensation payments.

⁵ Appellant's spouse was listed as retired from the military.

LEGAL PRECEDENT -- ISSUE 1

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of SSA benefits attributable to the employee's federal (FERS-based) service.⁷ However, an offset is not required where the employee-beneficiary is covered under the CSRS and/or her SSA age-related benefits are attributable to private sector employment.⁸

ANALYSIS -- ISSUE 1

The record establishes that appellant received wage-loss compensation under FECA. The record also established that she received age-related benefits under SSA for the period August 1, 2010 to May 30, 2015. The portion of the SSA benefits appellant received as a federal employee as part of her FERS retirement package concurrently with the benefits she received under FECA is a prohibited dual benefit.⁹ OWCP received information from SSA regarding appellant's applicable SSA rates and their effective dates. Based on information provided by SSA, it calculated a required monthly offset for the period August 1, 2010 to May 30, 2015, which it properly declared an overpayment.

The Board has reviewed OWCP's calculations of benefits appellant received for the period August 1, 2010 to May 30, 2015 and finds that appellant received an overpayment of compensation in the amount of \$22,574.53. Appellant did not dispute that she received the overpayment in question, nor does she dispute the amount of the overpayment, with the exception of arguing about how SSA, should have retired her at age 62.¹⁰ OWCP explained how the overpayment occurred and provided these calculations to appellant with the preliminary determination of overpayment. The Board finds that OWCP properly determined fact and amount of the overpayment that covered the period August 1, 2010 to May 30, 2015.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹¹ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to

⁶ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁷ 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9c (May 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e(2) (January 1997).

⁹ See *P.G.*, Docket No. 13-589 (issued July 9, 2013).

¹⁰ Appellant was advised to contact SSA regarding how the calculations of the amount she received from SSA.

¹¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹² When a claimant is found to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹³ provide that 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.¹⁴ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁵

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.¹⁶

Section 10.438 of the 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

As appellant was found to be without fault in the creation of the overpayment, OWCP considered whether waiver of recovery of the overpayment was warranted.

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.436.

¹⁴ An individual’s assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual’s assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁵ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁶ 20 C.F.R. § 10.437.

¹⁷ *Id.* at § 10.438.

In support of waiver, counsel provided an overpayment recovery questionnaire (OWCP-20), which revealed monthly income of \$7,638.55 and ordinary and necessary expenses of \$4,889.73, or a surplus of \$2,748.82. The Board notes that this was in excess of \$50.00, and therefore, waiver of recovery was not appropriate. OWCP also determined that appellant had assets in excess of \$8,000.00, which included \$22,000.00 in a checking account, along with a time share valued around \$9,000.00, which further affected her ability to have the overpayment waived. Thus, appellant has not shown that recovery of the overpayment would defeat the purpose of FECA.

Furthermore, appellant has not shown 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.¹⁸ She submitted no evidence to show that she gave up a valuable right or changed her position for the worse in reliance upon anticipated compensation payments. Thus, appellant has not shown that, if required to repay the overpayment, she would be in a worse position after repayment than if she had never received the overpayment at all. OWCP properly found that she was not entitled to waiver because recovery would not be against equity and good conscience.

As appellant failed to establish that recovery of the overpayment in compensation would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.

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.¹⁹ Section 10.441(a) of the regulations²⁰ provides:

“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.”²¹

¹⁸ 20 C.F.R. § 10.437(a), (b).

¹⁹ *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²⁰ 20 C.F.R. § 10.441(a).

²¹ *Id.*

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$310.00 every compensation period. The record indicates that appellant's monthly income exceeds her reported monthly expenses by \$2,748.82 per month. OWCP therefore did not abuse its discretion in calculation of a recoupment amount.

The Board finds that OWCP's hearing representative properly imposed a repayment schedule of \$310.00 every 28 days to be withheld from appellant's ongoing FECA wage-loss compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$22,574.53 for the period August 1, 2010 through May 30, 2015. Although she was not at fault in creating the overpayment, appellant is not entitled to waiver of recovery. Moreover, OWCP properly withheld \$310.00 every 28 days from her continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 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