

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

C.C., Appellant	)	
	)	
and	)	<b>Docket No. 18-0079</b>
	)	<b>Issued: May 2, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Akron, OH, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq.,* for the appellant<sup>1</sup>  
*Office of Solicitor,* for the Director

**ORDER REMANDING CASE**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

On October 13, 2017 appellant, through counsel, filed a timely appeal from a September 21, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP), which found appellant at fault in the creation of an overpayment of compensation in the amount of \$21,256.31. The overpayment, which covered the period August 1, 2013 through May 30, 2015, was due to OWCP's failure to deduct the portion of appellant's Social Security Administration (SSA) benefit attributable to her federal employment from her the Federal Employees' Compensation Act<sup>2</sup> wage-loss compensation. The appeal was docketed as No. 18-0079.

In a preliminary notice of overpayment dated June 15, 2015, OWCP found that an overpayment of compensation in the amount of \$32,044.89 had occurred. It explained that the

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

overpayment occurred because a portion of appellant's SSA benefits, that she received from August 1, 2013 to May 30, 2015, was based on credits earned while working in the federal government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found appellant at fault because she should have reasonably been aware that her SSA benefits required offset based on the language of EN1032 forms and OWCP letters dated February 19 and November 5, 2010.

By decision dated January 21, 2016, an OWCP hearing representative finalized the June 15, 2015 preliminary overpayment decision, as modified. She found that OWCP had miscalculated that portion of the overpayment for that period December 1, 2014 through May 30, 2015, finding that the overpayment for that period was \$5,846.49, for a new overpayment of compensation total of \$21,256.31. The hearing representative further found appellant at fault in the creation of the overpayment and noted that appellant's monthly income exceed her FECA compensation by over \$200.00 monthly, and that she had assets of approximately \$137,000.00. She ordered that recovery in the amount of \$200.00 was to be deducted from appellant's continuing compensation every 28-day period.

By decision dated May 12, 2017, the Board set aside the January 21, 2016 decision and remanded the case to OWCP. The Board ordered that, on remand, OWCP obtain additional information from SSA. This should include verification of the date FERS offset began with an explanation as to why this date was chosen and include references to appropriate SSA policies. SSA should then provide appellant's SSA rate with and without any offset from FERS. Following this and such further development deemed necessary, OWCP was to issue an appropriate decision.<sup>3</sup>

On June 1, 2017 OWCP requested that SSA explain why August 1, 2013 was used to determine the beginning period of a prohibited dual payment. It sent a second request on August 23, 2017. SSA did not respond.

On September 21, 2017 OWCP issued a *de novo* final overpayment decision. It found that appellant received an overpayment of compensation in the amount of \$21,256.31 for the period August 1, 2013 through May 30, 2015 and found her at fault in the creation of the overpayment. OWCP noted that the current balance of the overpayment was \$16,856.31 and that SSA did not respond to its two inquiries for further information. It indicated that it had completely reviewed the evidence of record, and that beginning August 1, 2013, her previous SSA disability income was converted to regular retirement, either based on her election to receive retirement benefits or because she reached retirement age.<sup>4</sup> OWCP concluded that, as appellant had not provided sufficient information to refute the amount of the overpayment or the finding of fault, the evidence of record supported a final decision of overpayment with fault. Recovery was set at \$200.00 each continuing compensation period.

The Board finds that OWCP failed to follow the instructions in the May 12, 2017 Board decision by prematurely issuing a *de novo* final overpayment decision prior to receiving an

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<sup>3</sup> Docket No. 16-1190 (issued May 12, 2017).

<sup>4</sup> OWCP noted that appellant could elect SSA retirement benefits at any time after she reached the age of 62 on December 31, 2010.

explanation from SSA as to why August 1, 2013 was selected as the date appellant began receiving SSA retirement benefits. Moreover, OWCP's regulations provide that before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.<sup>5</sup> It must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, and the right to request a waiver of recovery of the overpayment.<sup>6</sup> OWCP must clearly identify the reason that the overpayment occurred and the basis for any fault finding.<sup>7</sup>

The Board has held that a preliminary notice of findings is essential in overpayment cases because OWCP regulations limit further review of a final decision concerning overpayment to the Board. A claimant is prohibited from requesting a hearing, or reconsideration, following a final overpayment decision.<sup>8</sup> The claimant is, therefore, precluded from introducing new evidence to rebut findings made in a final overpayment decision.

As OWCP did not obtain clarifying information from SSA prior to issuing its September 11, 2017 decision, and as it did not issue a new preliminary overpayment determination, the case must again be remanded to OWCP. Until appropriate information is received from SSA, the fact and amount of the overpayment and whether appellant was at fault cannot be determined. Moreover, appellant has not had the opportunity to submit new financial information. Thus, OWCP did not have adequate information to evaluate her current financial situation.<sup>9</sup>

On remand OWCP should obtain the clarifying information described above regarding its selection of the date offset of appellant's SSA benefit began. If it finds that an overpayment of compensation was created, it should then issue a new preliminary overpayment determination with an appropriate overpayment action request and overpayment questionnaire (Form CA-20) and instructions for appellant to provide supporting financial information. After such further development, OWCP shall issue an appropriate final overpayment decision on the issues of fact, amount, fault, waiver, and recovery of the overpayment.

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<sup>5</sup> 20 C.F.R. § 10.431(a).

<sup>6</sup> *Id.* at § 10.431(d).

<sup>7</sup> *Id.*

<sup>8</sup> *See* 20 C.F.R. §§ 10.431, 10.432; *K.G.*, Docket No. 17-0517 (issued September 8, 2017).

<sup>9</sup> *See J.R.*, Docket No. 12-986 (issued November 13, 2012).

**IT IS HEREBY ORDERED THAT** the September 21, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: May 2, 2018  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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