

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

E.M., Appellant	)	
	)	
and	)	Docket No. 19-0857
	)	Issued: December 31, 2019
U.S. POSTAL SERVICE, POST OFFICE, EPC NORTH, San Francisco, CA, 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 March 14, 2019 appellant filed a timely appeal from a January 15, 2019 merit decision and a March 1, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$29,665.95 for the period October 1, 2016 through April 28, 2018, for which she was not at fault, as she concurrently received Social Security Administration (SSA) age-related benefits

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the March 1, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

while receiving FECA wage-loss benefits; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$289.35 from appellant's continuing compensation benefits, every 28 days; and (4) whether OWCP's Branch of Hearings and Review properly denied appellant's February 14, 2019 request for a hearing.

### **FACTUAL HISTORY**

On March 9, 1993 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that day, she was struck on the back on the head by a fence while delivering mail in the performance of duty. OWCP accepted the claim for a concussion with brief loss of consciousness, face and neck contusions, cervical and lumbar strains, and major depression consequential to the effects of the injury. Appellant stopped work on March 10, 1993 and returned to limited duty, working four hours a day, on June 7, 1993. She had intermittent work stoppages and her last day in pay status was August 2, 2007. OWCP paid appellant wage-loss compensation benefits on the periodic rolls as of June 16, 2002.

In a November 10, 2016 EN1032 form, appellant denied receipt of age-related SSA retirement benefits. On subsequent EN1032 forms, she reported receipt of SSA benefits as part of an annuity for federal service and indicated the monthly amount of her benefits.

On May 14, 2018 OWCP received SSA's FERS/SSA dual benefit calculation worksheet setting forth appellant's SSA rate with FERS and the rate without FERS from October 2016 through December 2017. The SSA rate with FERS/without FERS was reported as: \$1,587.80/\$35.10 for October 2016; \$1592.50/\$35.10 for December 2016; and \$1,624.30/\$35.70 for December 2017.

In a May 21, 2018 FERS offset calculation worksheet, OWCP found an overpayment amount of \$3,122.46 for the period October 1 through November 30, 2016; \$18,740.14 for the period December 1, 2016 through November 30, 2017; and \$7,803.34 for the period December 1, 2017 through April 28, 2018, for a total overpayment of \$29,665.95 for the period October 1, 2016 through April 28, 2018.

Effective April 29, 2018, OWCP adjusted appellant's compensation benefits to reflect FERS/SSA offset.

In a May 22, 2018 letter, OWCP notified appellant that she had been receiving SSA age-related benefits since October 1, 2016 and that the SSA had confirmed that a portion of her SSA benefits were attributed to her years of federal service. It indicated that, effective April 29, 2018, her compensation benefits were adjusted to offset the portion of her SSA retirement benefits attributable to her federal service on account of age.

On November 9, 2018 OWCP issued a preliminary determination that appellant was overpaid in the amount of \$29,665.95 for the period October 1, 2016 through April 28, 2018 because her FECA benefits were not reduced by the FERS portion of her SSA retirement benefits. It found that she was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form

OWCP-20). Additionally, it 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 precoupment hearing.

Appellant, in a November 28, 2018 overpayment action request form, requested that OWCP make a decision based on the written record. She also requested waiver of recovery of the overpayment. In an accompanying Form OWCP-20 dated November 28, 2018, appellant indicated that she had total monthly income of \$2,659.08,<sup>3</sup> total monthly expenses of \$2,365.51,<sup>4</sup> and \$1,200.00 in funds. She indicated that she was in no position to repay this compensation error which had occurred through no fault of her own. No evidence documenting her expenses was provided.

By decision dated January 15, 2019, OWCP finalized its preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$29,665.95 for the period October 1, 2016 through April 28, 2018, because it failed to offset her compensation payments by the portion of her SSA age-related benefits that were attributable to her federal service. It determined that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment of compensation based on the financial information provided. OWCP found that it would recover the overpayment by deducting \$289.35, every 28 days, from appellant's continuing compensation payments.

On February 22, 2019 OWCP received an overpayment action request form, dated February 14, 2019, in which appellant requested a precoupment hearing. Appellant submitted financial evidence which she asserted demonstrated the "unfairness of the decision to deduct almost \$300.00 a month" from her continuing compensation payments. She also attached her November 28, 2018 overpayment action request form requesting waiver and OWCP-20 form.

By decision dated March 1, 2019, OWCP's Branch of Hearings and Review denied appellant's request for a precoupment hearing, finding that she had not timely requested a hearing on the preliminary overpayment determination, and that the final overpayment determination was not subject to a hearing pursuant to 5 U.S.C. § 8124(b).

### **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 or her duty.<sup>5</sup> Section 8116 limits the right of an employee to receive

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<sup>3</sup> This included social security benefits of \$1,490.00 and FECA benefits of \$1,169.08.

<sup>4</sup> Appellant indicated a rent or mortgage of \$1,152.51, \$300.00 for food, \$80.00 for clothing, \$415.00 for utilities (electricity, water, telephone, cable, trash), \$180.00 for car insurance and gas, and \$238.00 for health insurance.

<sup>5</sup> 5 U.S.C. § 8102(a).

compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.<sup>7</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

### *ANALYSIS -- ISSUE 1*

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,665.95 for the period October 1, 2016 through April 28, 2018 because she concurrently received FECA wage-loss compensation and SSA age-related benefits.

In its January 15, 2019 decision, OWCP found that an overpayment of compensation was created for the period October 1, 2016 through April 28, 2018. The overpayment was based on the evidence received from SSA with respect to age-related benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA indicated that appellant received age-related SSA benefits that were attributable to federal service during the period October 1, 2016 through April 28, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing October 1, 2016 through December 2017. OWCP provided its calculations for each relevant period based on an SSA worksheet and in its November 9, 2018 preliminary overpayment determination. No contrary evidence was provided and appellant has not contested that an overpayment occurred.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2016 through April 28, 2018 and finds that an overpayment of compensation in the amount of \$29,665.95 was created.

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<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>9</sup> 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>10</sup> 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.<sup>11</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>12</sup> Additionally, 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, gives up a valuable right or changes his or her position for the worse.<sup>13</sup>

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. The information is also used to determine the repayment schedule, if necessary.<sup>14</sup> Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>15</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

The fact that OWCP may have been negligent in the creation of the overpayment does not entitle appellant to waiver of recovery of the overpayment.<sup>16</sup> As OWCP found appellant without

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<sup>10</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019).

<sup>11</sup> *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>12</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

<sup>13</sup> *Id.* at § 10.437(a)(b).

<sup>14</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>15</sup> *Id.* at § 10.438(b).

<sup>16</sup> *See L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>17</sup> Appellant, however, did not provide the requisite financial documentation to OWCP.<sup>18</sup>

In its preliminary determination dated November 9, 2018, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. While appellant submitted a completed overpayment recovery questionnaire, she did not provide the necessary financial documentation supporting her 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. OWCP was, therefore, required to deny waiver of recovery of the overpayment.<sup>19</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP's regulations provides 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 the error is discovered 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 any hardship.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$289.35 every 28 days from appellant's continuing compensation payments.

OWCP provided appellant an overpayment recovery questionnaire (Form OWCP-20) with the November 9, 2018 preliminary determination. Appellant completed the overpayment recovery questionnaire, but did not provide the necessary financial information to support her income and expenses prior to the final January 15, 2019 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>21</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>22</sup> As appellant

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<sup>17</sup> 5 U.S.C. § 8129.

<sup>18</sup> 20 C.F.R. § 10.438.

<sup>19</sup> *Id.* at § 10.438; *see L.D., supra* note 16.

<sup>20</sup> *Id.* at § 10.441(a); *see A.F., supra* note 10; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>21</sup> 20 C.F.R. § 10.438.

<sup>22</sup> *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Artors*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.2 (September 2018).

did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in directing recovery of the \$29,665.95 overpayment at the rate of \$289.35 every 28 days from appellant's continuing compensation payments.<sup>23</sup>

#### **LEGAL PRECEDENT -- ISSUE 4**

OWCP's regulations provide that a claimant may request a preresoupment hearing with respect to an overpayment.<sup>24</sup> Failure to request the preresoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>25</sup> The only right to a review of a final overpayment decision is with the Board.<sup>26</sup> The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.<sup>27</sup>

#### **ANALYSIS -- ISSUE 4**

The Board finds that OWCP's Branch of Hearings and Review properly denied appellant's February 14, 2019 request for a hearing.

OWCP's November 9, 2018 preliminary determination of overpayment provided appellant with a right to request a preresoupment hearing within 30 days. The record indicates that OWCP properly mailed its November 9, 2018 preliminary determination to appellant's last known address of record. Appellant requested that OWCP make a decision based on the written evidence regarding possible waiver of recovery of the overpayment. She did not request a preresoupment hearing within 30 days of November 9, 2018. Therefore, by decision dated January 15, 2019, OWCP properly finalized its preliminary overpayment determination.

On February 22, 2019 OWCP received an overpayment action request form dated February 14, 2019 from appellant contesting the denial of waiver of recovery of the overpayment and the repayment amount, and addressed it to OWCP's Branch of Hearings and Review.

The Board finds that as appellant's request form was mailed to OWCP's Branch of Hearings and Review, it was properly treated as a request for a hearing. OWCP's regulations, however, provide that when a final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a request. The only right to appeal is with the Board.<sup>28</sup> As appellant's February 14, 2019 request for a hearing

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<sup>23</sup> See *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

<sup>24</sup> 20 C.F.R. § 10.432. See *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *E.M.*, Docket No. 17-1502 (issued February 22, 2019).

<sup>25</sup> *Id.*

<sup>26</sup> 20 C.F.R. § 10.440(b).

<sup>27</sup> 5 U.S.C. § 8124(b). See *G.I.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>28</sup> 20 C.F.R. § 10.440(b).

was made after the final overpayment determination the Board finds that OWCP's Branch of Hearings and Review properly denied appellant's February 14, 2019 request for a hearing.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$29,665.95 for the period October 1, 2016 through April 28, 2018. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$289.35 every 28 days from appellant's continuing compensation payments. Additionally, OWCP's Branch of Hearings and Review properly denied appellant's February 14, 2019 request for a hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 1 and January 15, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 31, 2019  
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