

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

E.B., Appellant)	
)	
and)	Docket No. 19-1443
)	Issued: December 12, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
North Massapequa, NY, Employer)	
)	

Appearances:
Erik B. Blowers, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 24, 2019 appellant, through counsel, filed a timely appeal from a June 10, 2019 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.³

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.*

³ The Board notes that following the June 10, 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.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$28,268.65 for the period May 1, 2017 through March 2, 2019 because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 6, 2001 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging lower back and leg injuries on that date when lifting a mail tray while in the performance of duty. He stopped work on the date of the claimed injury. OWCP accepted appellant's claim for lumbago and paid him wage-loss compensation for total disability on the daily rolls commencing July 22, 2001, and then on the periodic rolls commencing June 16, 2002.

On February 19, 2019 OWCP received a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form completed by an SSA official on February 11, 2019. It indicated that appellant received age-related SSA benefits that were attributable to federal service beginning May 1, 2017 and continuing through the present time. The form also advised that he received retirement benefits subject to a FERS/SSA offset from May 1, 2017 through the present time delineating the specific amounts of age-related SSA retirement benefits that were attributable to federal service and provided the SSA payment rates, with FERS and without FERS, for specific periods commencing on May 1, 2017 and continuing.⁴

In a March 21, 2019 letter, OWCP advised appellant that, effective the same date, his compensation benefits would be offset by his SSA benefits attributable to his federal service.

In a March 21, 2019 FERS offset calculation worksheet, OWCP referenced the SSA documentation which provided SSA payment rates (both with FERS and without FERS) for specific periods. It calculated that, for the period May 1, 2017 through March 2, 2019, appellant received an overpayment of compensation in the amount of \$28,268.65.⁵

In an April 9, 2019 notice, OWCP advised appellant of its preliminary determination that he received a \$28,268.65 overpayment of compensation for the period May 1, 2017 through March 2, 2019 because he received SSA age-related retirement benefits attributable to his federal service, without an offset being made, while he received FECA compensation benefits. It also made a preliminary determination that appellant was without fault in the creation of the overpayment. OWCP advised him that he could submit evidence challenging the fact or amount of the overpayment, and could request waiver of recovery of the overpayment. It informed

⁴ SSA's documentation provided applicable rates effective the following dates: May 1 to December 1, 2017, and December 1, 2018.

⁵ OWCP determined that appellant received an \$8,860.31 overpayment of compensation for the period May 1 through November 30, 2017, a \$15,414.23 overpayment of compensation for the period December 1, 2017 through November 30, 2018, and a \$3,994.11 overpayment of compensation for the period December 1, 2018 through March 2, 2019.

appellant that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written preliminary notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

Appellant completed and submitted a Form OWCP-20, signed on April 22, 2018, in which he reported he had monthly income of \$4,660.60, monthly expenses of \$4,761.10, and assets of \$49,030.00 (comprised of an individual retirement account and checking/savings account balances).⁶ In an overpayment action request form, signed on April 30, 2019, he checked a box indicating that he was requesting waiver of recovery of the overpayment because he was found to have been without fault in its creation. Counsel argued, in a May 1, 2010 letter, that recovery of the overpayment would cause appellant undue burden and hardship.

By decision dated June 10, 2019, OWCP determined that appellant received a \$28,268.65 overpayment of compensation for the period May 1, 2017 through March 2, 2019 because he received SSA age-related retirement benefits attributable to his federal service, without an appropriate offset being made, while he received FECA compensation benefits. It provided an overpayment calculation based on his SSA payment rates with FERS and without FERS for specific periods beginning May 1, 2017. OWCP further found that appellant was without fault in the creation of the overpayment, but that the overpayment was not subject to waiver. In reaching this determination, it noted that he had not provided adequate documentation of his monthly expenses and indicated that his assets of \$49,030.00 exceeded the applicable allowable resource base. OWCP required repayment of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

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.⁷ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁸

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.⁹ 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

⁶ Appellant indicated on the Form OWCP-20 that he was responsible for the support of his wife. On June 1, 2018 he had completed a Form EN1032 in which he indicated in the portion of the form entitled, "Dependents," that he was married, but was not claiming compensation on account of a child.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$28,268.65 for the period May 1, 2017 through March 2, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

Beginning June 16, 2002, OWCP paid appellant wage-loss compensation on the periodic rolls for total disability due to his accepted injury. Beginning May 1, 2017, SSA paid him age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹¹ The information provided by SSA indicated that a portion of appellant's age-related SSA benefits were attributable to his federal service. As OWCP neglected to appropriately offset his FECA benefits for the period May 1, 2017 through March 2, 2019, appellant received an overpayment of wage-loss compensation.¹²

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific amounts of age-related SSA retirement benefits that were attributable to federal service. SSA provided appellant's SSA payment rates with FERS and without FERS for specific periods beginning May 1, 2017.¹³ OWCP provided calculations of the amounts that should have been offset for each relevant period based on the SSA documentation. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$28,268.65, creating an overpayment of compensation in that amount.¹⁴

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.¹⁵ Section 8129 of FECA provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁶ Thus, a finding that appellant was without fault does not

¹⁰ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹¹ *Supra* notes 9 and 10; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹² *Id.*

¹³ *A.C.*, *supra* note 11.

¹⁴ *See A.S.*, Docket No. 19-0171 (issued June 12, 2019).

¹⁵ *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁶ 5 U.S.C. § 8129(b); *A.C.*, *supra* note 11; *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁷

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁸ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401 (k)), jewelry, and artwork.¹⁹

According to 20 C.F.R. § 10.437 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.²⁰ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²¹

ANALYSIS -- ISSUE 2

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

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The evidence of record reveals that he has assets of \$49,030.00, a figure above the allowable resource base of \$10,300.00 for an individual with a spouse.²² Because appellant's assets exceed the allowable resource base, he has not met the second prong of the two-prong test

¹⁷ See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹⁸ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹⁹ *Id.* at Chapter 6.400.4b(3)(a), (b).

²⁰ 20 C.F.R. § 10.437(a), (b).

²¹ *Id.* at § 10.437(b)(1).

²² See *supra* note 20.

of whether recovery of the overpayment would defeat the purpose of FECA.²³ Therefore, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet ordinary and necessary living expenses.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²⁴

On appeal counsel generally argues that recovery of the overpayment would defeat the purpose of FECA and be against equity and good conscience by causing severe financial hardship in attempting to repay the debt. However, he does not provide any explanation for this argument and the Board has explained why recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.

Because appellant failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he did not demonstrate that OWCP improperly denied waiver of recovery of the overpayment.

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.²⁵ Section 10.441 of OWCP's regulations provides in pertinent part:

“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 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.”²⁶

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

²³ *See id.*

²⁴ *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁵ *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁶ 20 C.F.R. § 10.441(a).

The record supports that, in requiring repayment of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.²⁷ Therefore, OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$28,268.65 for the period May 1, 2017 through March 2, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$150.00 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

²⁷ See *id.*