

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

A.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer

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**Docket No. 18-1550
Issued: February 21, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On July 30, 2018 appellant filed a timely appeal from a February 1, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from February 1, 2018, the date of OWCP's last decision, was July 31, 2018. Since using August 6, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 30, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 1, 2018 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 \$57,721.53 for the period June 1, 2003 through October 14, 2017; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

OWCP accepted that on January 15, 1990 appellant, then a 51-year-old employee, sustained a sprain of the lumbosacral joint in the performance of duty. It paid her wage-loss compensation for partial disability based on its wage-earning capacity determination, effective January 29, 1996.

In a form dated October 3, 2017, the Social Security Administration (SSA) advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) beginning June 2003. It provided the amount that she had received in retirement benefits, including the amount earned through FERS and the hypothetical amount that she would have received without FERS. Including FERS, appellant was entitled to a monthly SSA rate of \$838.60 effective June 2003, \$856.20 effective December 2003, \$879.30 effective December 2004, \$915.30 effective December 2005, \$945.50 effective December 2006, \$967.20 effective December 2007, \$976.10 effective January 2008, \$1,032.70 effective December 2008, \$1,084.10 effective January 2010, \$1,123.10 effective December 2011, \$1,142.10 effective December 2012, \$1,159.90 effective December 2013, \$1,179.90 effective December 2015, and \$1,182.40 effective December 2016.

SSA further advised that, without FERS, appellant would have been entitled to a monthly SSA rate of \$591.20 effective June 2003, \$603.60 effective December 2003, \$619.80 effective December 2004, \$645.20 effective December 2005, \$666.40 effective December 2006, \$681.70 effective December 2007, \$721.20 effective December 2008, \$747.10 effective December 2011, \$759.80 effective December 2012, \$771.10 effective December 2013, \$784.20 effective December 2014, and \$786.50 effective December 2016.

OWCP, in an October 25, 2017 letter, adjusted appellant's compensation to offset the portion of her SSA retirement benefits attributable to her federal service. It informed her that she would receive net compensation of \$1,004.37 every 28 days.

OWCP completed a FERS offset calculation form on November 27, 2017. It determined the 28-day FERS offset amount for the days in each period, which it added to find a total overpayment of \$57,721.53.

In a preliminary determination dated November 27, 2017, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$57,721.53 because it had failed to reduce her wage-loss compensation benefits for the period June 1, 2003 through October 14, 2017 by the portion of her SSA benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for each period and adding these amounts to find a total overpayment of

\$57,721.53. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant 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 prerecoupment hearing.

Appellant, on December 15, 2017, requested a telephone conference with OWCP and requested waiver of recovery of the overpayment. In an accompanying overpayment recovery questionnaire (Form OWCP-20), she advised that she had monthly income of \$4,362.00 and monthly expenses of \$3,545.00. Appellant related that she had assets of \$900.00. She provided evidence documenting her expenses.

At the telephone conference, held on January 10, 2018, OWCP verified that appellant had total monthly income of \$4,362.00 and total monthly expenses of \$3,045.00. Appellant's expenses consisted of \$210.00 for housing, \$800.00 for food, \$60.00 for charity, \$345.00 for utilities, \$580.00 for medical and dental care, \$150.00 for gasoline, \$190.00 for car insurance, \$210.00 for a vehicle loan, and \$500.00 as a minimum monthly payment on two credit cards.

By decision dated February 1, 2018, OWCP found that appellant had received an overpayment of wage-loss compensation in the amount of \$57,721.53 for the period June 1, 2003 through October 14, 2017 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 \$200.00, every 28 days, from appellant's continuing compensation payments.

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 duty.⁴ 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.⁵

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁶ FECA Bulletin No. 97-09 states 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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

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

is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

Section 404.310 of SSA regulations provides that entitlement to SSA benefits begins at 62 years of age.⁸ Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$57,721.53 for the period June 1, 2003 through October 14, 2017.

OWCP accepted that appellant sustained a sprain of the lumbosacral joint due to a January 15, 1990 employment injury. It paid her wage-loss compensation for partial disability based on a wage-earning capacity determination, effective January 29, 1996. Beginning June 1, 2003, appellant also received age-related retirement benefits from SSA. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to her federal service from June 1, 2003 through October 14, 2017 and thus she received an overpayment of wage-loss compensation.¹¹

OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. The SSA provided her SSA rate with FERS and without FERS for specific periods from June 1, 2003 through December 1, 2016. The difference between these amounts must be deduced from appellant's FECA benefits.¹² OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received dual benefits totaling \$57,721.53, creating an overpayment of compensation in that amount.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁴ 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

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ 20 C.F.R. § 404.310.

⁹ *Id.* at § 404.409.

¹⁰ *See supra* note 6; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹¹ *Id.*

¹² *Supra* note 5.

¹³ *See E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹⁴ 5 U.S.C. § 8129(1)-(b); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

would defeat the purpose of FECA or would be against equity and good conscience.” Thus, a finding that appellant was without fault does not 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.¹⁵

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.¹⁶ An individual’s liquid assets include, but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹⁷ 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, and furnishings and supplies.¹⁸

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.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$57,721.53 overpayment of wage-loss compensation.

OWCP determined that appellant was without fault in the creation of the overpayment. It may, therefore, only require recovery of the overpayment if it would not defeat the purpose of FECA or be against equity and good conscience.²¹

The Board finds that OWCP properly determined that appellant did not require substantially all of her income to meet ordinary living expenses. Appellant indicated that she had monthly expenses of \$3,045.00 and monthly income of \$4,362.00. As her monthly income

¹⁵ See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹⁶ 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 20 C.F.R. § 10.437.

²⁰ *Id.* at § 10.437(b)(1).

²¹ See *supra* note 13; see also *S.M.*, *supra* note 6.

exceeded her ordinary and necessary living expenses by more than \$50.00, she did not need substantially all of her income for ordinary and necessary living expenses.²²

Additionally, the evidence of record does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has submitted no evidence that she had relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.²³ Consequently, OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant requests waiver, asserting that she would experience financial hardship repaying the debt. She also contends that the overpayment occurred due to OWCP's error. As discussed, however, appellant's financial information fails to support waiver of recovery of the overpayment.²⁴ Further, the fact that OWCP may have been negligent in issuing the compensation checks does not mitigate the fault determination.²⁵

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.²⁶

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 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 hardship.²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the financial information appellant submitted as well as the factors set forth in section 10.441. As her monthly income exceeded her ordinary and necessary expenses by more than \$1,000.00, OWCP did not abuse its discretion in requiring recovery by deducting \$200.00 every 28 days from each of her continuing compensation

²² See *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²³ 20 C.F.R. § 10.437; see also *supra* note 15.

²⁴ See *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

²⁵ See *G.C.*, Docket No. 18-1062 (issued December 4, 2018).

²⁶ *N.B.*, *supra* note 7.

²⁷ 20 C.F.R. § 10.441(a).

payments.²⁸ The Board finds that OWCP properly determined recovery of the overpayment in this case.²⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$57,721.53 for the period June 1, 2003 through October 14, 2017. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$200.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2019
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

²⁸ *Supra* note 25.

²⁹ *See supra* note 22.