

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

E.S., Appellant)	
)	
and)	Docket No. 18-1293
)	Issued: January 28, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Dallas, 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 June 15, 2018 appellant filed a timely appeal from a June 7, 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 The record also contains an April 27, 2018 decision suspending appellant's wage-loss compensation under 5 U.S.C. § 8123(d) as she failed to fully cooperate with a scheduled medical examination. Appellant has not appealed this decision and thus it is not before the Board at this time. 20 C.F.R. § 501.2(c). Additionally, she has requested an oral hearing on the April 27, 2018 decision before an OWCP hearing representative and thus the issue is in an interlocutory posture. *See T.C.*, Docket No. 18-0435 (issued July 10, 2018); *see also* 20 C.F.R. § 501.2(c)(2).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 7, 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 issue are: (1) whether appellant received a \$54,852.63 overpayment of wage-loss compensation for the period August 1, 2012 to April 29, 2018; and (2) whether OWCP properly determined that she was not entitled to waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.⁴ The relevant facts are as follows.

On June 19, 2001 appellant, then a 54-year-old licensed vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2001 she sustained injuries while helping a falling patient. OWCP accepted her claim, assigned File No. xxxxxx680, for strains of the cervical, thoracic, and lumbar spine; displacement of a lumbar intervertebral disc without myelopathy; and thoracic or lumbosacral neuritis or radiculitis. After sustaining intermittent periods of disability, appellant stopped work on March 23, 2003 and did not return. OWCP paid her wage-loss compensation for total disability on the periodic rolls beginning March 2008.⁵

OWCP also accepted appellant's July 14, 2004 occupational disease claim (Form CA-2) for displacement of a lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis under File No. xxxxxx140. It combined the claims into File No. xxxxxx680, which serves as the master file number.⁶

On March 8, 2018 the Social Security Administration (SSA) provided appellant's SSA rate with FERS and her rate without FERS from August 2012 through December 2017. With FERS, appellant's SSA rate was \$1,365.30 effective August 2012, \$1,388.50 effective December 2012, \$1,409.30 effective December 2013, \$1,433.20 effective December 2014 and 2015, \$1,437.40 effective December 2016, and \$1,466.10 effective December 2017. Without FERS, her SSA rate was \$602.80 effective August 2012, \$613.00 effective December 2012, \$622.10 effective December 2013, \$632.60 effective December 2014 and 2015, \$634.40 effective December 2016, and \$647.00 effective December 2017.

By decision dated April 27, 2018, OWCP suspended appellant's wage-loss compensation and authorization for medical benefits under 5 U.S.C. § 8123(d) effective April 29, 2018 for

⁴ Docket No. 08-1500 (issued December 5, 2008); Docket No. 05-0477 (issued July 25, 2005).

⁵ An April 16, 2003 claim for compensation (Form CA-7) indicated that appellant had retirement coverage under the Federal Employees Retirement System (FERS).

⁶ By decision dated April 18, 2016, OWCP terminated appellant's wage-loss compensation and authorization for medical benefits effective April 18, 2016. By decision dated May 24, 2016, an OWCP hearing representative reversed the April 18, 2016. OWCP again terminated appellant's wage-loss compensation and medical benefits in a March 1, 2017 decision; however, by decision dated November 30, 2017, an OWCP hearing representative reversed the March 1, 2017 decision.

obstructing a scheduled medical examination.⁷ It advised that it would reinstate her compensation if she fully cooperated with the examination.

OWCP completed a FERS offset calculation form on April 30, 2018. It calculated the amount that it should have offset from appellant's wage-loss compensation from August 1, 2012 through April 28, 2018. OWCP found: effective August 1, 2012, the monthly offset was \$762.50 (\$1,365.30-\$602.80), or \$703.85 every 28 days; effective December 1, 2012, the monthly offset was \$775.50 (\$1,388.50-\$613.00), or \$715.85 every 28 days; effective December 1, 2013, the monthly offset was \$787.20 (\$1,409.30-\$622.10) or \$726.65 every 28 days; effective December 1, 2014, the monthly offset was \$800.70 (\$1,433.30-\$632.60), or \$739.11 every 28 days; effective December 1, 2016, the monthly offset was \$803.00 (\$1,437.40-\$634.40) or \$741.23 every 28 days; and, effective December 1, 2017, the monthly offset was \$819.10 (\$1,466.10-\$647.00) or \$756.09 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period August 1, 2012 to December 1, 2017 to calculate the amount that it overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset \$54,852.63 from her wage-loss compensation.

Appellant, on April 30, 2018, requested an oral hearing before a hearing representative of OWCP's Branch of Hearings and Review regarding the April 27, 2018 decision.

On May 2, 2018 OWCP advised appellant of its preliminary determination that she had received an overpayment of wage-loss compensation in the amount of \$54,852.63 for the period August 1, 2012 through April 29, 2018 because it had failed to offset her FECA compensation benefits by the portion of her age-related SSA benefits attributable to her federal service. It set forth its calculations of the overpayment, indicating that it had obtained the daily amount to be offset during each period and had multiplied this amount by the number of days in each period to obtain the overpayment of compensation. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment of wage-loss compensation, noting that it had not informed her of the possibility that she might receive dual benefits. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents so that it could determine whether she was entitled to waiver of recovery of the overpayment. 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 precoupment hearing.

In a May 7, 2018 overpayment recovery questionnaire (OWCP-20), appellant related that she had assets of \$1,685.70. She provided monthly income of \$2,509.50 in SSA benefits and monthly expenses of \$2,543.34, including \$146.34 for her mortgage, \$300.00 for food, \$200.00 for clothing, \$800.00 for utilities, and \$1,000.00 in other expenses. Appellant requested waiver of recovery of the overpayment, noting that she would experience severe hardship trying to repay the debt. She indicated that her husband required treatments for cancer and that the expenses for the treatment were not fully covered by insurance.

By decision dated June 7, 2018, OWCP found that appellant had received an overpayment of wage-loss compensation in the amount of \$54,852.63 from August 1, 2012 to April 29, 2018

⁷ OWCP noted that appellant attended the scheduled examination with the impartial medical examiner, but provided the physician with a letter advising that she would sue him if he agreed with the second opinion physician.

because she received wage-loss compensation from OWCP and benefits from SSA without the appropriate offset. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that appellant had not fully disclosed her income as she had FECA benefits that could be reinstated if she ceased obstructing an OWCP directed medical examination. It further found that she had not provided her spouse's income or submitted documentation to support her claimed recurring monthly expenses. OWCP determined that appellant should submit \$475.00 monthly as repayment of the overpayment.

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.⁸ 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.⁹

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.¹⁰ 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.¹¹

Section 404.310 of SSA regulations provides that entitlement to SSA benefits begins at 62 years.¹² Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$54,852.63 for the period August 1, 2012 to April 29, 2018.

OWCP accepted strains of the cervical, thoracic, and lumbar spine, displacement of a lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis due to a June 13, 2001 work injury. It paid her wage-loss compensation for total disability on the periodic rolls as of April 13, 2008. Beginning August 1, 2012, appellant also received age-related retirement benefits from SSA. As noted, a claimant cannot receive concurrent compensation for

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8116.

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

¹¹ FECA Bulletin No. 97-09 (February 3, 1997); *see also G.K.*, Docket No. 18-0243 (issued August 17, 2018).

¹² 20 C.F.R. § 404.310.

¹³ *Id.* at § 404.409.

wage loss and SSA retirement benefits attributable to federal service for the same period.¹⁴ The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to her federal service from August 1, 2012 to April 29, 2018, and thus she received an overpayment of wage-loss compensation.¹⁵

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 commencing August 1, 2012 to April 29, 2018. The difference between these amounts must be deducted from appellant's FECA benefits. 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 \$54,852.63, creating an overpayment of compensation in that amount.¹⁶

LEGAL PRECEDENT -- ISSUE 2

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."¹⁷ Section 10.438 of OWCP regulations provides 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.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$54,852.63 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹ Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.²⁰

¹⁴ See *S.M.*, Docket No. 17-1802 (issued August 20, 2018); *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹⁵ *Id.*

¹⁶ See *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *L.M.*, Docket No. 16-1035 (issued November 27, 2017).

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

¹⁸ 20 C.F.R. § 10.438.

¹⁹ *Supra* note 18.

²⁰ *Supra* note 19; see also *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

In its May 2, 2018 preliminary overpayment determination, OWCP clearly explained the importance of providing a completed overpayment questionnaire and financial information, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days.

Appellant's May 7, 2018 overpayment recovery questionnaire (OWCP-20) listed monthly income of \$2,509.50, and \$2,543.34 in monthly expenses, which represented a monthly deficit of \$33.84. However, as OWCP's hearing representative correctly noted she had not provided financial documentation in support of her claimed monthly expenses. As appellant failed to submit complete financial information, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²¹ In requesting waiver, the overpaid individual has the responsibility for submitting financial information.²² Because appellant failed to furnish documentation regarding her claimed expenses, as required by 20 C.F.R. § 10.438, she was not entitled to waiver.²³ The Board, consequently, finds that OWCP properly denied waiver of recovery of the overpayment.²⁴

CONCLUSION

The Board finds that appellant received a \$54,852.63 overpayment of wage-loss compensation for the period August 1, 2012 to April 29, 2018. The Board further finds that OWCP properly determined that she was not entitled to waiver of recovery of the overpayment.

²¹ See *supra* note 19; see also *S.C.*, Docket No. 17-0762 (issued March 19, 2018).

²² *Id.*; see also *R.O.*, Docket No. 18-0076 (issued August 3, 2018).

²³ *Id.*; see also *H.T.*, Docket No. 17-1805 (issued March 6, 2018).

²⁴ See *L.J.*, Docket No. 17-1591 (issued November 16, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 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