

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

<b>M.I., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 19-0035</b>
	)	<b>Issued: November 4, 2019</b>
<b>U.S. POSTAL SERVICE, OKEMOS POST OFFICE, Okemos, MI, Employer</b>	)	
	)	

*Appearances:*  
*Benjamin W. Ide*, for the appellant<sup>1</sup>  
*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 October 4, 2018 appellant, through her representative, filed a timely appeal from an April 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. 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 has received an overpayment of compensation in the amount of \$27,998.65 because she concurrently received Social Security Administration (SSA) benefits while also receiving FECA benefits for the period February 1, 2014 through April 29, 2017; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to 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**

On August 31, 1995 appellant, then a 47-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 1995 she experienced emotional distress when her supervisor told her that a threat on her life had been made by a coworker who had previously physically assaulted her. She stopped work on August 23, 1995. OWCP accepted the claim for post-traumatic stress disorder, adjustment reaction, and depression, single episode in remission. It paid appellant wage-loss compensation on the periodic rolls for temporary total disability beginning October 13, 1996.

On EN1032 forms signed by appellant on February 21, 2014, February 28, 2015, February 26, 2016, and March 7, 2017, she indicated that she was not receiving SSA benefits as part of an annuity for federal service.<sup>4</sup>

On March 29, 2017 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. The form indicated that beginning in February 2014 appellant's SSA rate with FERS was \$1,226.70 and without FERS was \$518.60, beginning in December 2014 her SSA rate with FERS was \$1,247.50 and without FERS was \$527.40, beginning in December 2015 her SSA rate with FERS was \$1,247.50 and without FERS was \$527.40, and beginning in December 2016 her SSA rate with FERS was \$1,251.20 and without FERS was \$528.90. It noted that she was entitled to SSA age-based benefits beginning in February 2014.

On September 28, 2017 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$27,998.65 had been created. It explained that the overpayment occurred because a portion of appellant's age-based SSA benefits that she received from February 1, 2014 through April 29, 2017 was based on credits earned while working in the Federal Government, and this portion of her SSA was a prohibited dual benefit. OWCP found her at fault in the creation of the overpayment and provided an overpayment action request form and an

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<sup>4</sup> The EN1032 forms signed by appellant provided: "Report any benefits received from the SSA which you receive as part of an annuity under the Federal Employees' Retirement System (FERS). DO NOT report any benefits received from the SSA on account of employment in the private sector." On an EN1032 form signed on February 25, 2018 she related that she was receiving SSA retirement benefits as part of an annuity under the FERS.

overpayment recovery questionnaire (Form OWCP-20) for her completion.<sup>5</sup> It informed appellant of the actions she could take and allotted 30 days for her to respond.

On October 25, 2017 OWCP appellant requested a prerecoupment hearing regarding the issues of fault and possible waiver of the overpayment. Appellant attached an income and expense summary, with some financial documentation.

A telephonic hearing was held on March 9, 2018.

By decision dated April 13, 2018, OWCP finalized the preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$27,998.65 had been created for the period February 1, 2014 through April 29, 2017 because appellant received FECA benefits and age-based benefits from SSA without appropriate offset. It further found her at fault because she failed to provide information in her EN1032 forms which she knew or should have known to be material. The hearing representative evaluated appellant's income and expenses and found that she had \$436.70 available in monthly discretionary income. She set recovery at the rate of \$200.00 every 28 days from appellant's continuing FECA 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</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>9</sup>

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<sup>5</sup> OWCP also requested that appellant submit supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expense listed.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>9</sup> FECA Bulletin No. 97-09 (February 3, 1997).

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.<sup>10</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>11</sup>

OWCP's procedures provide that, once an overpayment is identified, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.<sup>12</sup> These procedures note that, if the claimant is determined to be with fault, a Form CA-2201 (preliminary finding notice) must be released (along with a Form OWCP-20) within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of with fault must be clearly stated. A CA-2201 form informs the claimant of the right to submit evidence and the right to a preresoupment hearing on the issue of: (a) fact and amount of overpayment; and (b) waiver. Along with the CA-2201 form, OWCP should provide a clearly written statement explaining how the overpayment was created.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$27,998.65 for the period February 1, 2014 through April 29, 2017.

In its April 13, 2018 decision, OWCP found that an overpayment of compensation had been created based on the evidence received from SSA with respect to age-based benefits paid to appellant. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.<sup>14</sup> The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service for the period February 1, 2014 to April 29, 2017 in the amount of \$27,998.65.

The Board finds however that OWCP failed to follow its procedures in issuing the April 13, 2018 overpayment decision.<sup>15</sup> As noted, OWCP procedures provide that a CA-2201 form (preliminary finding notice) must be released along with an OWCP-20 within 30 days of the date the overpayment is identified.<sup>16</sup>

In this case, OWCP was first formally placed on notice that appellant was receiving SSA age-based benefits in a form received by OWCP on March 29, 2017, wherein SSA advised OWCP

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<sup>10</sup> 20 C.F.R. § 404.310.

<sup>11</sup> *Id.* at § 404.409.

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

<sup>13</sup> *See P.H.*, Docket No. 18-1539 (issued August 2, 2019).

<sup>14</sup> *Supra* notes 8 and 9; *see M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Supra* note 12.

that she had concurrently received FECA and SSA age-based benefits based on FERS contributions as of February 2014. However, it did not issue a preliminary notice regarding the overpayment until September 28, 2017. This preliminary notice was therefore not issued within 30 days after the overpayment was identified.

The Board thus finds that OWCP did not follow its own procedures and did not issue a preliminary notice of overpayment within 30 days of identifying an overpayment based upon appellant's receipt of SSA age-based benefits.<sup>17</sup>

### **CONCLUSION**

The Board finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$27,998.65 during the period February 1, 2014 through April 29, 2017.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 13, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 4, 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

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<sup>17</sup> Based on the Board's disposition of whether an overpayment of compensation was created, the issues of waiver and recovery are moot. *See C.C.*, Docket No. 16-1190 (issued May 12, 2017).