

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

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| R.D., for the Estate of M.D., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1647 |
| |) | Issued: July 31, 2020 |
| DEPARTMENT OF THE AIR FORCE, |) | |
| FORT SAM HOUSTON, San Antonio, TX, |) | |
| Employer |) | |
| _____ |) | |

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| <i>Appearances:</i> <i>Mary Lou De Hoyos, for the appellant¹</i> <i>Office of Solicitor, for the Director</i> | <i>Case Submitted on the Record</i> |
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DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 29, 2019 appellant, through her representative, filed a timely appeal from an April 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).

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.

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

ISSUES

The issues are: (1) whether OWCP properly determined that the employee received an overpayment of compensation in the amount of \$76,390.05 for which he was not at fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits while receiving FECA wage-loss compensation for the period August 1, 2010 through October 30, 2018 without appropriate offset; and (2) whether it properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 20, 2005 the employee, then a 58-year-old air conditioning equipment mechanic, filed a notice of traumatic injury (Form CA-1) alleging that on July 14, 2005 he sustained injuries when pulling a motor assembly to the roof of a building with a rope while in the performance of duty. OWCP accepted the claim for lumbar intervertebral disc disorder with myelopathy, thoracic/lumbosacral neuritis/radiculitis, closed dislocation lumbar vertebra, pain in thoracic spine, closed dislocation thoracic vertebra, muscle spasm, sprain of nasal septum, and sprain/strain of her back, thoracic region. The employee stopped work on July 14, 2005. OWCP paid the employee wage-loss compensation on the periodic rolls as of November 27, 2005.

On August 1, 2010 the employee began receiving SSA age-related retirement benefits. On August 28, 2018 OWCP sent SSA a FERS/SSA Dual Benefits Calculation worksheet for its completion. The employee continued to receive FECA wage-loss compensation payments.

On December 6, 2018 OWCP advised the employee that it had determined that he had been receiving FECA wage-loss compensation concurrently with SSA age-related retirement benefits, therefore his FECA benefits would be adjusted based on the Federal Employees Retirement System (FERS) portion of SSA benefits attributable to federal service. The employee was advised that after the SSA offset he would receive \$1,212.32 in FECA benefits every 28 days.

That same date, OWCP completed a Manual/Fiscal Payment Worksheet dated December 6, 2018, which identified an overpayment of compensation in the amount of \$77,424.02 for the period August 1, 2010 to December 8, 2018 as FERS offset was needed. Attached was a listing of the employee's SSA rates with and without FERS, as well as a worksheet detailing the overpayment calculation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence to OWCP following the April 2, 2019 decision. 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.*

On December 11, 2018 the employee's sister called to notify OWCP that the employee had died on October 30, 2018. She advised that the employee's widow did not speak, read, or understand English.

In a December 11, 2018 letter addressed to the employee's estate, OWCP provided a compensation due at death questionnaire for further information regarding the employee's estate. The form advised that the questionnaire should be completed by the administrator of the estate, if one had been appointed, or the next of kin.

On December 24, 2018 OWCP received the questionnaire, completed by the employee's sister, noting that the employee had a surviving spouse and two children, and that he had died intestate. The section regarding whether an administrator or executor had been appointed was left blank.⁴ Attached to the completed questionnaire was a copy of the employee's death certificate which lists the cause of death as "complications of injuries sustained in a fall with hypertensive cardiovascular disease and diabetes mellitus."

A February 22, 2019 FERS offset calculation worksheet indicated that: effective August 1, 2010 the employee's SSA rate with FERS was \$1,468.10 and without FERS was \$745.30 which resulted in an overpayment of \$2,907.09 for the period August 1 through November 30, 2010; effective December 1, 2010, the SSA rate with FERS was \$1,468.10 and without FERS was \$745.30 which resulted in an overpayment of \$8,697.43 for the period December 1, 2010 through November 30, 2011; effective December 1, 2011 the SSA rate with FERS was \$1,520.90 and without FERS was \$772.10 which resulted in an overpayment of \$9,034.97 for the period December 1, 2011 through November 30, 2012; effective December 1, 2012 the SSA rate with FERS was \$1,546.70 and without FERS was \$785.20 which resulted in an overpayment of \$9,163.10 for the period December 1, 2012 through November 30, 2013; effective December 1, 2013 the SSA rate with FERS was \$1,569.90 and without FERS was \$796.90 which resulted in an overpayment of \$9,301.48 for the period December 1, 2013 through November 30, 2014; effective December 1, 2014 the SSA rate with FERS was \$1,596.50 and without FERS was \$810.40 which resulted in an overpayment of \$9,459.12 for the period December 1, 2014 through November 30, 2015; effective December 1, 2015 the SSA rate with FERS was \$1,596.50 and without FERS was \$810.40 which resulted in an overpayment of \$9,485.03 for the period December 1, 2015 through November 30, 2016; effective December 1, 2016 the SSA rate with FERS was \$1,601.20 and without FERS was \$812.80 which resulted in an overpayment of \$9,486.79 for the period December 1, 2016 through November 30, 2017; and effective December 1, 2017 the SSA rate with FERS was \$1,633.20 and without FERS was \$829.00 which resulted in an overpayment of \$8,855.04 for the period December 1, 2017 through October 30, 2018, for a total overpayment of \$76,390.05.

By notice dated February 25, 2019, OWCP issued a preliminary overpayment determination, addressed to the employee's estate, finding that an overpayment of compensation in the amount of \$76,390.05 had been created for the period August 1, 2010 through October 30, 2018 because a portion of the employee's SSA benefits were based on credits he earned while working in the Federal Government and that this portion of his SSA benefits was a prohibited dual

⁴ The final FECA wage-loss payment made to the employee's estate was deposited on January 14, 2019.

benefit. It found the employee was not at fault in the creation of the overpayment. OWCP advised the employee's estate that it could submit evidence challenging the fact and amount of the overpayment, and request waiver of recovery of the overpayment. It also directed the employee's estate to complete an overpayment recovery questionnaire (Form OWCP-20) and advised it of its appeal rights. OWCP provided a copy of the employee's compensation payment history along with its FERS offset calculation. The employee's estate did not respond within the 30 days' allotted time.

On April 2, 2019 OWCP contacted the Office of Personnel Management (OPM) to determine whether any OPM benefits were payable to the employee's estate.

That same date, OWCP issued a decision, addressed to the employee's estate, which finalized the preliminary determination of a \$76,390.05 overpayment of compensation. It determined that, while the employee was without fault in the creation of the overpayment, the employee's estate had not requested waiver of recovery of the overpayment and directed that the overpayment be paid in full. Copies of the employee's compensation payment history along with its FERS offset calculation were provided by OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ 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.⁶

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides that FECA compensation 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.⁸

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see R.D.*, Docket No. 19-1598 (issued April 17, 2020; *see R.R.*, Docket No. 19-0104 (issued March 9, 2020).

If OWCP finds that an overpayment exists and the employee has recently passed away OWCP's procedures require that steps be taken to offset the overpayment prior to recovery from the estate.⁹ These procedures provide as follows:

“e. *If the claimant recently passed away*, the OWCP should refer the debt to FMA [Financial Management System] for offset of the deceased claimant's last Federal tax refund under the Treasury's Offset Program (TOP). 31 § CFR 285.2. The OWCP has a special profile with FMS under TOP for the collection of these specific estate debts. The CE [claims examiner] should follow the referral procedures set forth in PM 6-0500.12, including sending the complete referral package to the National Office for final review and forwarding to the FMS.

“f. *Upon learning that a claimant with an existing overpayment has died*, the District Office shall immediately contact the OPM to determine the availability of any OPM benefits payable at the time of death that may be administratively offset, e.g., basic employee death benefits, survivor annuity benefits, or lump sum refund of the deceased employee's retirement contributions (5 CFR § 831.1805). If such OPM benefits are available for offset, the District Office should refer to procedures set forth in PM 6-0500.10.”

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP was required to follow certain procedures to protect appellant in overpayment cases wherein it has knowledge that a beneficiary with an existing overpayment has died.¹⁰ In this case, the evidence of record does not substantiate the actions OWCP has taken to recover the overpayment debt through an offset from OPM benefits or through the TOP, prior to taking overpayment actions against the estate. While OWCP contacted OPM on April 2, 2019, no response was received from OPM prior to the issuance of the April 2, 2019 decision.¹¹ The case shall therefore be remanded for OWCP to follow its procedures as outlined in Chapter 6.500.15 of

⁹ *J.P.*, Docket No. 18-1194 (issued April 28, 2020); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Recovery of an Existing Debt from a Deceased Debtor's Estate*, Chapter 6.500.15(e-f) (September 2018).

¹⁰ See *J.P.*, *id.*

¹¹ See *S.B.*, Docket No. 18-1420 (issued June 20, 2019).

its procedures.¹² Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings.

Issued: July 31, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹² *Supra* note 9; *see also S.B., id.*