

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

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R.B., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS AFFAIRS CENTRAL )  
CALIFORNIA HEALTH CARE SYSTEM, )  
Fresno, CA, Employer )

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**Docket No. 19-0571**  
**Issued: June 12, 2020**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 9, 2019 appellant filed a timely appeal from a July 18, 2018 merit decision of the Office of Workers' Compensation Programs.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> 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> 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 July 18, 2018, the date of OWCP's last decision, was January 14, 2019. Because using January 16, 2019, 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 January 9, 2019, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the July 18, 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 OWCP properly found that appellant received an overpayment of compensation in the amount of \$37,928.23, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period March 1, 2016 through April 28, 2018; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$431.71 every 28 days from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On October 9, 1998 appellant, then a 48-year-old health science specialist, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower jaw and right elbow when he tripped and fell over a bench while in the performance of duty. OWCP accepted cervical and right elbow sprains and contusion of the right elbow and forearm. It subsequently expanded acceptance of the claim to include degenerative disc disease of the cervical and lumbar spine.

Appellant did not initially stop work and continued full-time employment. He retired on disability effective September 1, 2009. On May 14, 2012 appellant elected FECA benefits in preference to retirement benefits provided by the Office of Personnel Management Retirement, effective September 1, 2009. OWCP subsequently paid retroactive wage-loss compensation and placed him on the periodic rolls effective June 30, 2013. Appellant remains on the periodic rolls.

In a letter dated July 10, 2013, OWCP explained appellant's compensation benefits and responsibilities. In an accompanying Form 1049, it advised him that, since he was covered under the Federal Employees Retirement System (FERS), OWCP must deduct at least part of his SSA retirement benefit to which he would be entitled based on age, explaining that a portion of a FERS benefit was included in SSA retirement benefits. Appellant was therefore advised to notify OWCP immediately after filing for or receiving SSA retirement benefits.

On EN1032 forms signed by appellant on April 9, 2016, April 4, 2017, and March 26, 2018, he indicated that he was receiving SSA benefits as part of an annuity for federal service.

On May 2, 2018 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. This was received by OWCP on May 8, 2018 and indicated that appellant received SSA retirement benefits beginning in March 2016 when his SSA rate with FERS was \$1,537.70 and without FERS \$87.90, that, beginning in December 2016, his SSA rate with FERS was \$1,542.30 and without FERS \$88.10, and that, beginning in December 2017, his SSA rate with FERS was \$1,573.10 and without FERS \$89.80.

In a letter dated May 22, 2018, OWCP notified appellant that, based on information provided by SSA regarding the amount his SSA benefit was attributable to federal service, his FECA wage-loss compensation had been adjusted. It prepared a FERS offset calculation worksheet verifying its calculations.

On June 4, 2018 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$37,928.23 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that he received from March 1, 2016 through April 28, 2018 was based on credits earned while working in the Federal Government,

and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him not at fault and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide supporting documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed. OWCP afforded him 30 days to respond.

On an overpayment action request form dated June 28, 2018, appellant requested a telephone conference. He disagreed with the fact and amount of the overpayment and requested waiver of recovery of the overpayment since the overpayment occurred through no fault of his own. On an attached overpayment recovery questionnaire, appellant noted monthly income of \$4,612.00 in FECA benefits and \$1,152.00 from SSA, for a total monthly income of \$5,764.00, and monthly expenses of \$4,663.00 with assets totaling \$6,658.00. He attached a copy of his 2017 federal tax return.

A telephone conference was held on July 17, 2018. Appellant explained that the total monthly income as noted on the Form OWCP-20 was accurate and indicated that he had approximately \$100,000.00 in a Thrift Savings Plan (TSP) account.

By decision dated July 18, 2018, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$37,928.33. It determined that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP found that, after its review of the documents of record, appellant had total current monthly income of \$5,353.55 and total monthly expenses of \$4,463.00, which left of \$890.55 of disposable income with which to repay the debt. It required recovery of the overpayment by deducting \$431.71 every 28 days from his continuing FECA compensation.

### **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>4</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>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of SSA benefits that are attributable to the federal service of the employee.<sup>6</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

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see B.B.*, Docket No. 19-0822 (issued February 18, 2020); *B.F.*, Docket No. 18-1345 (issued February 6, 2019).

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

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,928.23.

In its July 18, 2018 decision, OWCP found that an overpayment of compensation was created for the period March 1, 2016 through April 28, 2018. The overpayment was based on the evidence received from SSA with respect to 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>8</sup> The information provided by SSA indicated that appellant received age-based SSA retirement benefits that were attributable to federal service during the period March 1, 2016 through April 28, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS and without FERS for specific periods commencing March 1, 2016 through April 28, 2018. On a FERS offset calculation worksheet, OWCP provided its calculations for each relevant period based on the SSA information. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2016 through April 28, 2018 and finds that an overpayment of compensation in the amount of \$37,928.33 was created.<sup>9</sup>

### **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."<sup>10</sup> Section 10.438 of OWCP's 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 on 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.<sup>11</sup>

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<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also M.D.*, Docket No. 19-1500 (issued February 24, 2020); *G.K.*, Docket No. 18-0243 (issued August 17, 2018).

<sup>8</sup> *Supra* note 6; *see M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>9</sup> *See D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> 20 C.F.R. § 10.438.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.<sup>12</sup> Section 10.436 provides that 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 expense, 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.<sup>13</sup> For waiver of recovery of the overpayment under the "defeat the purpose of FECA standard," appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.<sup>14</sup> An individual is deemed to need substantially all or his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>15</sup>

OWCP's procedures in effect at the time of the July 18, 2018 decision provided that the 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.<sup>16</sup> An individual's liquid assets include, but are not limited, to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> OWCP procedures provide that, 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.<sup>20</sup> Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.<sup>21</sup> An individual must show that he or she

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<sup>12</sup> *Id.* at §§ 10.434-10.437.

<sup>13</sup> *Id.* at § 10.436.

<sup>14</sup> *Id.*

<sup>15</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 20 C.F.R. § 10.437.

<sup>20</sup> *Supra* note 15 at Chapter 2.600.b(3) (June 2009).

<sup>21</sup> 20 C.F.R. § 10.437(b)(1) (2011); *see R.E.*, Docket No. 17-1625 (issued July 18, 2018).

made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

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

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.<sup>23</sup>

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the documents of record, he had total current monthly income of \$5,353.55 and total monthly expenses of \$4,463.00, which left \$890.55 of disposable income with which to repay the debt. It set repayment at \$431.71 every 28 days from appellant's continuing FECA compensation. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.<sup>24</sup>

Additionally, the evidence of record did not demonstrate that recovery of the overpayment would be against equity and good conscience because appellant has not shown 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. Therefore, the Board finds that OWCP properly denied waiver of recovery with regard to the \$38,928.33 overpayment.<sup>25</sup>

### **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.<sup>26</sup>

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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.<sup>27</sup>

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<sup>22</sup> *Id.* at § 10.437(b)(2) (2011); *see G.K.*, *supra* note 7.

<sup>23</sup> *Id.* at § 10.436.

<sup>24</sup> *See M.C.*, Docket No. 19-0699 (issued February 12, 2020).

<sup>25</sup> *Id.*

<sup>26</sup> 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>27</sup> *Id.*

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$431.71 per compensation period.

The record indicates that appellant's monthly income of \$5,353.55 exceeds his current and ordinary monthly expenses of \$4,463.00 by approximately \$890.00 per month. OWCP therefore did not abuse its discretion in finding that he should repay the overpayment at the rate of \$431.71 every 28 days from his continuing compensation.<sup>28</sup>

The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$431.71 every 28 days.

### **CONCLUSION**

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$37,928.23, for which he was not at fault, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period March 1, 2016 through April 28, 2018. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$431.71 every 28 days from his continuing compensation payments.

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<sup>28</sup> See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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