

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

_____)	
B.C., Appellant)	
)	
and)	Docket No. 19-0629
)	Issued: June 2, 2020
U.S. POSTAL SERVICE, MEDWAY POST OFFICE, Medway, MA, Employer)	
_____)	

Appearances:
Sara Kincaid, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 22, 2019 appellant filed a timely appeal from an August 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the August 13, 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 \$50,438.34 for the period March 1, 2014 to May 26, 2018, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits while in receipt of FECA compensation benefits; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On June 26, 2006 appellant, then a 58-year-old full-time regular clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained a shoulder injury when throwing packages into a hamper while in the performance of duty. OWCP accepted her claim for sprains of the right shoulder (acromioclavicular region), right upper arm, and neck. Appellant stopped work on the date of injury and did not return. OWCP paid her wage-loss compensation for disability from work on the supplemental rolls commencing August 11, 2006, and on the periodic rolls commencing October 1, 2006.

In a March 3, 2014 letter, SSA informed appellant that it was changing the type of benefits she was entitled to receive effective March 1, 2014 because she was entitled to retirement benefits. It advised that she was no longer entitled to disability benefits because she had reached full retirement age.

On May 21, 2018 OWCP received a May 16, 2018 FERS SSA Dual Benefit Calculation form from SSA which advised that appellant began receiving SSA benefits effective March 1, 2014 and it provided figures for both appellant's SSA rate with Federal Employees Retirement System (FERS) and her SSA rate without FERS on several effective dates. The respective rates for the delineated effective dates were reported as follows: March 1, 2014 (\$1,693.20 and \$721.70), December 1, 2014 (\$1,721.90 and \$733.90), December 1, 2015 (\$1,721.90 and \$733.90), December 1, 2016 (\$1,727.00 and \$736.10), and December 1, 2017 (\$1,761.50 and \$750.80).

In a letter dated May 31, 2018, OWCP informed appellant it had recently been found that she had been receiving SSA age-related retirement benefits since 2014 and it advised her that the portion of SSA benefits attributable to federal service as an employee under FERS necessitated an offset of FECA compensation benefits. It described the FERS/SSA offset it made to her FECA compensation benefits effective May 27, 2018.

On June 11, 2018 a calculation worksheet dated May 31, 2018 was added to the case record. An OWCP official provided calculations of the FERS/SSA offset for the period March 1, 2014 through May 26, 2018 based on the figures for appellant's SSA rates with FERS and her SSA rates without FERS as delineated in SSA's May 16, 2018 document. The amount of the overpayment created as a result of the failure to apply the FERS/SSA offset was calculated to be \$50,438.34.

By preliminary determination dated June 14, 2018, OWCP advised appellant that an overpayment of compensation in the amount of \$50,438.34 had been created because she received

SSA age-related retirement benefits at the same time she received FECA compensation benefits from March 1, 2014 to May 26, 2018 without a proper FERS/SSA offset. It informed appellant that, because she was a FERS employee, SSA age-related retirement benefits were considered part of a FERS retirement and the portion of the SSA benefits attributable to her FERS employment required an offset adjustment. OWCP also made a preliminary determination that appellant was without fault in the creation of the overpayment. It explained that the overpayment was calculated using figures provided by SSA for her SSA rate with FERS and her SSA rate without FERS on a series of effective dates for the period March 1, 2014 through May 26, 2018. The difference between the amount of FECA compensation owed and the amount paid was \$50,438.34. OWCP advised appellant that she could request waiver of recovery of the overpayment and requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) for consideration on the question of waiver and determine a reasonable method for collection. It provided appellant with appeal rights and afforded her 30 days to respond.

Appellant submitted an overpayment action request form, dated June 23, 2018, in which she requested waiver of recovery of the overpayment, noting her belief that she was without fault in its creation. She advised that the amount of her FECA compensation had changed and asserted that she could not afford to repay the overpayment. Appellant also submitted a Form OWCP-20, signed on June 23, 2018, in which she reported total monthly income of \$1,863.00 in SSA benefits.⁴ She also submitted documentation which showed \$3,125.00 in monthly expenses, including \$1,862.00 for rent/water, \$70.00 for electricity, \$24.00 for homeowner's insurance, \$328.00 for automobile leasing, \$110.00 for automobile insurance, \$50.00 for clothing, \$40.00 for furniture, \$126.00 for medical alert service, \$2.00 medical oxygen, \$313.00 for cable service, \$51.00 for minimum payment of credit card debt, and \$149.00 for minimum payment of a second credit card.⁵ Appellant noted other expenses for which she did not submit documentation, including \$350.00 for food, \$50.00 for medication, \$389.00 for utilities (not otherwise specified), and \$418.00 for "other expenses." She reported assets of \$50.00 in cash on hand, \$100.00 in her checking account, and \$43,000.00 in her savings account. Appellant further noted that a portion of her savings is in her children's names "in case of emergency.

By decision dated August 13, 2018, OWCP determined that appellant received an overpayment of compensation in the amount of \$50,438.34 as she was in receipt of FERS and SSA dual benefits for the period March 1, 2014 to May 26, 2018 without a proper FERS/SSA offset. It noted that the portion of SSA benefits earned as a federal employee was part of the FERS retirement, and that the receipt of FECA benefits and federal retirement benefits concurrently was a prohibited dual benefit. OWCP found that appellant was without fault in the creation of the overpayment, but that her financial circumstances did not warrant waiver of recovery of the overpayment. It indicated that appellant had \$4,831.00 in monthly income (comprised of \$1,863.00 in SSA benefits and \$2,968.00 in FECA benefits) and \$3,125.00 in documented monthly expenses, and that she had reported \$43,150.00 in assets. OWCP determined that appellant's financial circumstances showed that the overpayment could be recovered by deducting \$300.00 every 28 days from her continuing compensation benefits.

⁴ Documentation in the case record reveals that appellant also was receiving \$2,968.00 in FECA compensation benefits every 28 days at the time she completed the Form OWCP-20.

⁵ The monthly expense figures provided by appellant have been rounded to the nearest dollar.

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 his or her duty.⁶ 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.⁷ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁸

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁹ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of SSA age-related retirement benefits 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$50,438.34 for the period March 1, 2014 to May 26, 2018, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits while in receipt of FECA compensation benefits.

Commencing August 11, 2006, OWCP paid appellant wage-loss compensation for total disability due to her accepted injury. Commencing March 1, 2014, appellant received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹¹ The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. As OWCP neglected to offset her FECA benefits for the period March 1, 2014 to May 26, 2018, she received an overpayment of wage-loss compensation.¹²

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ *Id.* at § 8129(a).

⁹ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

¹⁰ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹¹ *See supra* notes 9 and 10; *see also A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹² *Id.*

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. SSA provided appellant's SSA rates with FERS and without FERS for specific periods beginning March 1, 2014.¹³ OWCP provided its calculations of the amount that it should have offset for each relevant period based on SSA's documentation. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$50,438.34, creating an overpayment of compensation in that amount.¹⁴

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁵ Section 8129 of FECA¹⁶ 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁷

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.¹⁸ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. 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, furnishings/supplies,

¹³ Documentation from SSA provided applicable rates effective the following dates: March 1 and December 1, 2014, December 1, 2015, December 1, 2016, and December 1, 2017.

¹⁴ See *A.S.*, Docket No. 19-0171 (issued June 12, 2019).

¹⁵ See *J.R.*, Docket No. 19-1418 (issued March 4, 2020); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁶ 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁷ *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹⁸ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁹

According to 20 C.F.R. § 10.437 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.²⁰ 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.²¹

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 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 of recovery of the overpayment.²²

ANALYSIS -- ISSUE 2

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

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The Board finds that appellant, who reported \$43,150.00 in assets, has not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base. Appellant reported assets of \$50.00 in cash on hand, \$100.00 in her checking account, and \$43,000.00 in her savings account. She suggested that a portion of her savings account was in her children's names "in case of emergency" following the sale of a home, but she did not clarify the nature of any such potential entitlement and the monies in the saving account must be considered to belong to her as she reported that \$43,000.00 was the balance of her own savings account.²³ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.²⁴

¹⁹ *Id.* at Chapter 6.400.4b(3)(a), (b).

²⁰ 20 C.F.R. § 10.437(a), (b).

²¹ *Id.* at § 10.437(b)(1).

²² *Id.* at § 10.438.

²³ *See supra* note 18.

²⁴ *Id.*

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.²⁵

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP improperly refused to waive recovery of the overpayment.²⁶

On appeal counsel argues that OWCP improperly denied appellant's request for waiver of recovery of the overpayment because it overstated her monthly income amount and understated her monthly expenses. However, the Board notes that the fact that appellant's assets exceed the allowable resource base served as the basis for denial of appellant's waiver request. In addition, the Board notes that counsel has not presented sufficient argument, supported by relevant precedent, to demonstrate that OWCP made an improper determination regarding appellant's monthly income and expenses.

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.²⁷ Section 10.441(a) of the regulations provides:

“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 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 any hardship.”²⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

The record supports that, in requiring repayment of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441

²⁵ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁶ See *supra* note 17.

²⁷ *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²⁸ 20 C.F.R. § 10.441(a); see *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

and found that this method of recovery would minimize any resulting hardship on her.²⁹ It indicated that appellant had \$4,831.00 in monthly income and \$3,125.00 in documented monthly expenses, and that she had reported \$43,150.00 in assets. Therefore, OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

On appeal counsel argues that OWCP did not adequately consider the financial impact on appellant of having \$300.00 deducted every 28 days from her continuing compensation payments. However, as noted, OWCP considered appellant's monthly income, monthly expenses, and assets when making its determination regarding the method of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$50,438.34 for the period March 1, 2014 to May 26, 2018, for which she was without fault, as she concurrently received SSA age-related retirement benefits while in receipt of FECA compensation benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2020
Washington, DC

Alec J. Koromilas, 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

²⁹ *See id.*