

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

P.D., Appellant)	
)	
and)	Docket No. 18-0557
)	Issued: January 22, 2020
DEPARTMENT OF JUSTICE, BUREAU OF)	
ALCOHOL TOBACCO, FIREARMS &)	
EXPLOSIVES, Washington, DC, Employer)	
)	

Appearances:
Analese B. Dunn, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 19, 2018 appellant, through counsel, filed a timely appeal from a July 27, 2017 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 over 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 July 27, 2017 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 has received an overpayment of compensation in the amount of \$46,557.53 because she concurrently received Social Security Administration (SSA) age-related retirement benefits while also receiving FECA benefits for the period July 1, 2006 through January 7, 2017; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly withheld \$700.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On September 13, 1999 appellant, then a 57-year-old administrative assistant, filed a claim for a traumatic injury claim (Form CA-1) alleging that on September 7, 1999 she sustained injuries to her "back, left leg, hip, calf, and foot" while in the performance of duty when an elevator closed suddenly. She stopped work and did not return. OWCP accepted the claim for lumbar sprain, lumbar, thoracic or lumbosacral radiculitis or neuritis, and lumbago. It paid appellant wage-loss compensation on the daily rolls commencing November 7, 1999, and on the periodic rolls as of June 16, 2002.

On December 27, 2016 OWCP received a transmittal wherein the SSA advised OWCP that appellant had concurrently received FECA benefits and SSA retirement benefits through the Federal Employees Retirement System (FERS) beginning July 2006. It provided the amount that she had received in retirement benefits, including the amount earned through FERS, and the hypothetical amount that she would have received without FERS. Including FERS, appellant was entitled to a monthly SSA rate of: \$711.20, effective July 2006; \$734.50, effective December 2006; \$751.30, effective December 2007; \$794.90, effective December 2008; \$823.40, effective December 2011; \$837.40, effective December 2012; \$849.90, effective December 2013; \$864.30, effective December 2014; and \$866.80, effective December 2016.

SSA further advised that, without FERS, appellant would have been entitled to a monthly SSA rate of: \$351.10, effective July 2006; \$362.60, effective December 2006; \$370.90, effective December 2007; \$392.40, effective December 2008; \$406.50, effective December 2011; \$413.30, effective December 2012; \$419.50, effective December 2013; \$426.60, effective December 2014; and \$427.80, effective December 2016.

By letter dated January 4, 2017, OWCP informed appellant that it had recently determined that she had been receiving SSA age-related retirement benefits since July 1, 2006. It explained that SSA confirmed that a portion of the SSA benefits were attributable to her years of federal service as an employee under FERS retirement program. OWCP explained that the portion of appellant's SSA benefits attributed to her federal service required an offset of her FECA compensation benefits per applicable federal regulations. It explained how her offset would occur going forward with her payment dated January 8 to February 4, 2017.

OWCP completed a FERS offset calculation form on February 7, 2017. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$46,557.53.

On February 16, 2017 OWCP issued a preliminary determination that appellant was overpaid compensation benefits in the amount of \$46,557.53, for the period July 1, 2006 to

January 7, 2017. It explained that the overpayment was a result of her receipt of dual benefits from OWCP and SSA age-related retirement benefits attributable to federal service, without offset, which was a prohibited dual benefit. OWCP advised appellant that she was not at fault in the creation of the overpayment. A breakdown and calculation of how the overpayment was calculated was also attached. OWCP also provided appellant with an overpayment recovery questionnaire (Form OWCP-20) and informed her of her appeal rights.

By letter dated March 6, 2017, appellant requested a prerecoupment hearing, which was held on June 2, 2017. She asserted her disagreement with the fact and amount of overpayment and contended that the overpayment occurred through no fault of her own. During the hearing, appellant requested waiver of recovery of the overpayment, and verified the financial information introduced during the hearing. She also completed an overpayment recovery questionnaire, (Form OWCP-20), on April 30, 2017.

By decision dated July 27, 2017, OWCP's hearing representative finalized the preliminary determination regarding the fact and amount of the overpayment, as well as OWCP's finding that appellant was not at fault in the creation of the overpayment. He denied waiver of recovery of the overpayment, finding that her current household income exceeded expenses by \$2,778.84 and also included significant assets. The hearing representative required recovery of the overpayment by deducting \$700.00 every 28 days from appellant's continuing 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.⁴ However, section 8116 also 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.⁵

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.⁶ 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.⁷

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.⁸ These

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

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

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(2) (May 2004).

procedures note that, if the claimant is determined to be without fault, a Form CA-2202 (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 without fault must be clearly stated. A Form CA-2202 informs the claimant of the right to submit evidence and the right to a prerecoumpment hearing on the issues of: (a) fact and amount of overpayment; and (b) waiver of recovery of the overpayment. Along with the Form CA-2202, OWCP should provide a clearly written statement explaining how the overpayment was created.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of wage-loss compensation in the amount of \$46,557.53 because she concurrently received SSA age-related retirement benefits while also receiving FECA benefits for the period July 1, 2006 through January 7, 2017.

Beginning July 1, 2006, appellant received age-related retirement benefits from SSA based upon her federal service, while she continued to receive FECA wage-loss compensation. As noted, the receipt of benefits concurrently under FECA and age-related SSA federal retirement benefits attributable to federal service is a prohibited dual benefit.¹⁰

The Board finds, however, that OWCP failed to follow its own procedures in issuing the July 27, 2017 overpayment decision.¹¹ As noted-above, OWCP's procedures provide that a Form CA-2202 (preliminary finding notice) must be released along with a (Form OWCP-20) overpayment recovery questionnaire within 30 days of the date the overpayment is identified.¹²

SSA notified OWCP on December 27, 2016 that appellant had concurrently received FECA benefits and SSA age-related retirement benefits with a FERS component since July 2006. SSA also informed OWCP of the amounts of SSA benefits she was entitled to receive with the FERS component, and without, during the period July 1, 2006 through January 7, 2017. OWCP, however, did not issue a preliminary determination of overpayment until February 16, 2017. This preliminary notice was therefore not issued within 30 days after the overpayment was identified.

The Board concludes 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-related retirement benefits.¹³

⁹ *Id.*; see also *P.H.*, Docket No. 18-1539 (issued August 2, 2019).

¹⁰ 5 U.S.C. § 8116(d). See *J.W.*, Docket No. 16-1355 (issued January 10, 2017); see also FECA Bulletin No. 97-09 (February 3, 1997).

¹¹ *P.H.*, Docket No. 18-1539 (issued August 2, 2019).

¹² *Supra* note 9.

¹³ In light of the Board's disposition in Issues 1, 2, and 3 are rendered moot.

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$46,557.53 for the period July 1, 2006 through January 7, 2017.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 22, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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