

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

D.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Hayward, CA, Employer)
_____)

Docket No. 19-0118
Issued: January 15, 2020

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 19, 2018 appellant filed a timely appeal from an October 11, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$44,303.77 for the period January 1, 2009 through June 23, 2018, for which she was not at fault, because she concurrently received FECA benefits and age-based benefits from the

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 11, 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.*

Social Security Administration (SSA) without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$214.66 from appellant's continuing compensation payments.

FACTUAL HISTORY

On September 29, 2000 appellant, then a 53-year-old modified city mail carrier, filed an occupational disease claim (Form CA-2) alleging that her low back pain was caused or aggravated by factors of her federal employment including prolonged bending, standing, walking, stooping and carrying of letters and parcels on a hard cement floor. OWCP accepted the claim for sciatica and displaced lumbar intervertebral disc. It initially paid appellant intermittent wage-loss compensation on the supplemental rolls. On December 4, 2001 appellant underwent OWCP authorized lumbar surgery. She did not return to work. OWCP thereafter paid wage-loss compensation and medical benefits on the periodic rolls.³

In CA-1032 forms dated December 20, 2009, January 18, 2011, January 31, 2012, January 9, 2013, January 11, 2014, January 15, 2015, January 7, 2016, January 26, 2017, and January 8, 2018 appellant reported that she was receiving SSA benefits as part of an annuity for federal service.

On February 9, 2018 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form. On April 10, 2018 SSA submitted the completed form, which showed SSA benefit rates with a FERS offset and without a FERS offset from January 2009 through December 2017. From January 2009 through November 2011, appellant's SSA rate with FERS was \$584.40 and without FERS was \$297.60. Beginning December 2012, the SSA rate with FERS was \$817.30 and without FERS was \$341.30. Beginning December 2013, the SSA rate with FERS was \$829.50 and without FERS was \$319.00. Beginning December 2014 through November 2016, the SSA rate with FERS was \$843.60 and without FERS was \$324.30. Beginning December 2016, the SSA rate with FERS was \$846.10 and without FERS was \$325.20. Beginning December 2017, the SSA rate with FERS was \$863.00 and without FERS was \$331.70.⁴

In a letter dated July 6, 2018, OWCP advised appellant that she had been receiving a prohibited dual benefit. It noted that the portion of SSA benefits earned as a federal employee was part of her retirement and that the receipt of wage-loss compensation under FECA and federal retirement was prohibited. OWCP adjusted appellant's FECA benefits to account for her SSA offset, which reduced her FECA wage-loss compensation payments from \$1,642.00 to \$1,151.47.

³ By decision dated February 26, 2008, OWCP reduced appellant's wage-loss compensation benefits effective February 17, 2008, as the position of Admitting Clerk fairly and reasonably represented her wage-earning capacity.

⁴ OWCP paid appellant wage-loss compensation for disability from November 2005 through December 2008 and December 2011 through November 2012.

A FERS offset calculation worksheet for the period January 1, 2009 through June 23, 2018 indicated a total overpayment of \$44,303.77.

On July 20, 2018 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$44,303.77 because she received FECA wage-loss compensation benefits concurrently with SSA age-based benefits from January 1, 2009 through June 23, 2018. It provided a calculation of the overpayment. OWCP recommended that appellant be found not at fault in the creation of the overpayment because she was not aware nor could she reasonably have been expected to know that it had paid compensation incorrectly. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. OWCP also noted that appellant could request waiver of recovery of the overpayment. It provided her with appeal rights and afforded 30 days for a response. No response or additional evidence was received.

By decision dated October 11, 2018, OWCP determined that appellant had received an overpayment of compensation in the amount of \$44,303.77 because a portion of her SSA age-based benefits was based on credits earned while working in the Federal Government and that this portion of her SSA benefit was a prohibited dual benefit. It further found that she was not at fault in the creation of the overpayment, but denied waiver of recovery. OWCP noted that no response had been received following the preliminary determination. After completing a waiver of charges/compromise of principal worksheet, it found that charges could not be waived as the period necessary to repay the debt with charges was less than appellant's life expectancy. However, as accrued charges and principle had increased the period of indebtedness by more than 35 percent, it compromised the accrued charges and principle to \$32,900.00. It required recovery of the compromised overpayment of \$32,900.00 by deducting \$214.66 every 28 days from appellant's continuing wage-loss compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his or her federal employment.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 When an overpayment of compensation 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.⁷

Section 10.421(d) of the FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-based benefits that are attributable to federal

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8129(a).

service of the employee.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$44,303.77 because she concurrently received SSA retirement benefits while receiving FECA benefits for the period January 1, 2009 through June 23, 2018.

Appellant has not challenged the fact or amount of overpayment. The record indicates that, while appellant was receiving compensation for disability under FECA, she was also receiving SSA age-based retirement benefits during the applicable period. A claimant cannot receive both compensation for wage-loss and SSA age-based benefits attributable to federal service for the same period.¹⁰ Consequently, the fact of overpayment has been established.

To determine the amount of overpayment, the SSA informed OWCP of appellant's SSA rate with FERS and without FERS during the applicable periods. SSA noted that appellant had received disability, rather than age-based benefits from December 2011 through November 2012. Based on the information provided by SSA, OWCP calculated that an overpayment of \$44,303.77 had occurred during the applicable period. It excluded the December 2011 through November 2012 period during which appellant had received disability, rather than age-based benefits. The Board has reviewed OWCP's calculations of the dual benefits that appellant received and finds that it properly determined that she received a \$44,303.77 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is not at fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹¹

Section 10.437 of the FECA implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment of compensation would experience severe financial hardship attempting

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

⁹ FECA Bulletin No. 97-09 (February 3, 1997).

¹⁰ *See supra* note 8.

¹¹ 5 U.S.C. § 8129(b).

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.¹²

Section 10.438 of the implementing regulations provide 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. The information is also used to determine the repayment schedule, if necessary.¹³ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁴

ANALYSIS -- ISSUE 2

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

As OWCP found appellant not at 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.¹⁵ Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.¹⁶

In its preliminary determination dated July 20, 2018, OWCP clearly explained the importance of providing the completed overpayment questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant, however, did not respond, nor did she complete a Form OWCP-20 or submit the financial documentation necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁷

On appeal appellant asserts that she was not at fault in the creation of the overpayment and that she cannot afford to lose any more income. She indicated that she had to sell her house to meet her necessary expenses. As explained above, OWCP found appellant not at fault in the creation of the overpayment. However, because appellant did not provide a completed Form

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438(a); *see T.B., supra* note 8; *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁴ *Id.* at § 10.438.

¹⁵ *Id.* at § 10.436.

¹⁶ *Supra* note 14.

¹⁷ *See S.B.*, Docket No. 16-1795 (issued March 2, 2017).

OWCP-20 overpayment recovery questionnaire and supporting financial documentation as requested in OWCP's July 20, 2018 preliminary determination, OWCP properly denied waiver of recovery of the overpayment.¹⁸

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.¹⁹ Section 10.441(a) of the regulations²⁰ provide:

“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.”²¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$214.66 from appellant's continuing compensation payments every 28 days.

The record reflects that appellant continues to receive wage-loss compensation under FECA. When, as in this case, no response is received to the preliminary overpayment determination, OWCP should set the rate of repayment at 25 percent of the 28 days net compensation amount.²² Appellant, as noted, did not provide the information necessary for OWCP to consider the amount to be withheld from her continuing compensation. OWCP gave due regard to the relevant factors noted above.

The Board, therefore, finds that OWCP properly determined appellant's repayment schedule.

¹⁸ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹⁹ See *E.F.*, Docket No. 18-1320 (issued March 13, 2019); *C.H.*, Docket No. 18-0772 (issued November 14, 2018); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²⁰ 20 C.F.R. § 10.441(a).

²¹ *Id.*

²² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.500.8(c)(1) (September 2018).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,900.00 for the period January 1, 2009 through June 23, 2018. The Board also finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the compromised overpayment amount by deducting \$214.66 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board