

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

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C.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer

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**Docket No. 19-1451  
Issued: March 4, 2020**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 25, 2019 appellant, through counsel, filed a timely appeal from an April 26, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) 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> 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.

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

<sup>3</sup> The Board notes that following the April 26, 2019 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 a \$10,059.35 overpayment of compensation for the period October 1, 2017 through August 18, 2018 because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits, for which he was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On July 2, 2008 appellant, then a 56-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he sustained injuries to his neck, back, and left shoulder when he tripped and fell while in the performance of duty. He stopped work on July 3, 2008 and has not returned. OWCP accepted the claim for contusion of the left shoulder and upper arm. It paid wage-loss compensation on the supplemental rolls effective August 17, 2008 and on the periodic rolls effective March 15, 2009.

On August 22, 2018 OWCP received from SSA a July 24, 2018 Federal Employees Retirement System (FERS)/(SSA) dual benefits calculation form which indicated that appellant had been in receipt of age-related SSA benefits since October 2017. The form indicated SSA benefit rates with a FERS offset and without a FERS offset. Beginning October 2017, appellant's SSA rate, with FERS was \$1,690.00 and without FERS was \$757.70. Beginning December 2017, appellant's SSA rate, with FERS was \$1,724.00 and without FERS was \$772.80.

In a letter dated August 24, 2018, OWCP advised appellant that he had been receiving a prohibited dual benefit. It noted that the SSA had confirmed that a portion of his SSA benefits were attributed to his years of federal service as an employee under the FERS retirement program and that portion required an offset of his FECA compensation benefits. OWCP indicated that the adjustment of appellant's FECA benefits to account for his SSA offset would begin on August 19, 2018 and would reflect a new net compensation amount of \$1,416.27.

On August 27, 2018 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$10,059.35 because he received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period October 1, 2017 through August 18, 2018. It explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA amount with and without FERS for each period, and then multiplying that amount by the number of days in each period. The FERS offset calculation worksheet indicated that OWCP had utilized a 28-day FERS offset amount of \$1,874.85 for the 61 days from October 1 through November 30, 2017 and \$8,184.50 for the 261 days from December 1, 2017 through August 18, 2018. Using these figures, OWCP calculated that the total overpayment amount was \$10,059.35. It further found that appellant was without fault in the creation of the overpayment as he was not aware, nor could he reasonably have been aware, that OWCP had paid compensation incorrectly. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or request a preresoupment hearing.

In an overpayment action request form dated September 13, 2018, appellant requested a telephonic prerecouplement hearing on the issues of fault and possible waiver of recovery of the overpayment with OWCP's Branch of Hearings and Review. He indicated that he disagreed with the fact and amount of the overpayment and requested waiver.

Appellant submitted a completed Form OWCP-20 dated September 17, 2018. He noted a total monthly income of \$2,783.97 (which included FECA and SSA benefits) and total monthly expenses of \$4,482.41. This included two mortgages \$2,200.00 and \$1,062.41, food \$300.00, utilities \$495.00, and monthly payments to creditors \$425.00. Appellant indicated that he had available funds of \$1,442.00. He noted that his spouse had passed away on September 1, 2017 and that he supported his adult daughter. Appellant indicated that he was unaware of the overpayments.

A telephonic hearing was held on February 4, 2019. Appellant testified that he lived with his daughter and son-in-law and, while the house was his, they split the cost of the house.<sup>4</sup> The hearing representative held the record open for 30 days for appellant to submit financial information. He advised appellant to complete the documents as thoroughly as possible and to indicate whether or not he pays only half of his mortgage.

Subsequently, OWCP received financial information from appellant. An unsigned statement bearing the initials "AGS," indicated that all of appellant's monthly bills were enclosed.<sup>5</sup> It advised that appellant paid 50 percent of all housing bills with the exception of the water bill. The statement noted that his income exceeded expenses by \$230.60 a month, but he also purchased dog food and fuel for his car. It was noted that appellant had no stocks, bonds, or a 401K. A typed statement indicated that he had monthly expenses of \$2,602.69. This included: mortgage \$1,180.66;<sup>6</sup> Citizens card number 1 \$75.00,<sup>7</sup> Citizens card number 2 \$230.00,<sup>8</sup> Walmart card \$200.00,<sup>9</sup> Progressive Insurance (car) \$86.00; Home Depot card \$100.00;<sup>10</sup> Atlantic City Electric \$129.86;<sup>11</sup> cell phone (T-Mobile) \$92.00;<sup>12</sup> Xfinity \$197.30;<sup>13</sup> American Eagle credit card

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<sup>4</sup> Appellant clarified that his daughter was not dependent upon him and that she did not have a developmental disability.

<sup>5</sup> The statement appeared to be prepared by appellant's daughter.

<sup>6</sup> A monthly mortgage statement on the Ellis Mill property from PennyMac indicated a monthly mortgage of \$2,361.31. No evidence was submitted of appellant's alleged other property at Pinnacle.

<sup>7</sup> The minimum payment due was \$ 49.32.

<sup>8</sup> The minimum payment due was \$200.91.

<sup>9</sup> The Board notes that although appellant noted a monthly Walmart card debt of \$200.00, the attached statement indicated a \$2.00 credit.

<sup>10</sup> The minimum payment due was \$60.00.

<sup>11</sup> The bill indicated a total amount of \$259.72.

<sup>12</sup> The supportive bill indicates that charges are in the name of "C.M.P."

<sup>13</sup> The bill indicated a total amount of \$394.60.

\$100.00;<sup>14</sup> EZ pass \$75.00; South Jersey Gas \$80.35<sup>15</sup> and Mutual of Omaha Insurance \$56.52. Appellant's income totaled \$2,833.29. This included workers' compensation benefits \$1,441.84 and SSA \$1,391.45. The balance after bills paid was noted as \$230.60.

In a Form CA-110 note of a telephone call dated April 11, 2019, appellant verified with a claims examiner that the detailed statement submitted subsequent to the hearing represented his current monthly expenses and income. He also verified that he only had one property, as the other property was sold, and that his daughter paid half of the mortgage on the remaining property. In another Form CA-100 note dated April 11, 2019, appellant indicated that the proceeds from the sale of his property, which took place in January 2019, went toward his current residence. He advised that he had approximately \$60.00 in cash and that all other expenses remained the same.

By decision dated April 26, 2019, an OWCP hearing representative finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$10,059.35 for the period October 1, 2017 through August 18, 2018 as he had received wage-loss compensation from OWCP without an appropriate offset for age-related SSA retirement benefits attributable to FERS. The hearing representative denied waiver of recovery of the overpayment finding that appellant currently had approximately \$848.67 income over debt each month, which exceeded the statutory amount of \$50.00. The hearing representative denied consideration of appellant's \$705.00 monthly credit card debt to avoid counting appellant's expenses twice when totaling ordinary and necessary living expenses; did not accept the cell phone charge of \$92.00 a month as the bill was not in appellant's name; and denied the Xfinity bill of \$192.30 and EZ Pass charge of \$75.00 as they were not deemed to be ordinary and necessary living expenses. The hearing representative directed recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments until the debt was paid in full.

### **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.<sup>16</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>17</sup>

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.<sup>18</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

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<sup>14</sup> The minimum payment due was \$38.00.

<sup>15</sup> The bill indicated a total amount of \$160.69.

<sup>16</sup> 5 U.S.C. § 8102(a).

<sup>17</sup> *Id.* at § 8116.

<sup>18</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>19</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,059.35 for the period October 1, 2017 through August 18, 2018 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

In its April 26, 2019 decision, OWCP found that an overpayment of compensation was created for the period October 1, 2017 through August 18, 2018. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>20</sup> The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to federal service during the period October 1, 2017 through August 18, 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 documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. The SSA provided their rate with FERS, and without FERS for specific periods commencing October 1, 2017 through August 18, 2018. OWCP provided its calculations for each relevant period based on a FERS offset calculation worksheet and in its August 27, 2018 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2017 through August 18, 2018 and finds that an overpayment of compensation in the amount of \$10,059.35 was created.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>22</sup> 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.<sup>23</sup>

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<sup>19</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>20</sup> 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

<sup>21</sup> *See L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>22</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019).

<sup>23</sup> *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>24</sup> An individual is deemed to need substantially all of 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>25</sup>

Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>26</sup>

OWCP 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 of 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.<sup>27</sup> Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>28</sup>

OWCP procedures provide that a finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary. The burden is on the overpaid individual to show that the expenses are reasonable and needed for a legitimate purpose. If the claims examiner or hearing representative determines that the amount of certain expenses is not ordinary and necessary, he or she must state, in writing, the reasons for the determination. The determination should be supported by rationale, which may include utilizing statistics from the Bureau of Labor Statistics that show that the overpaid individual's expenses exceed that of the range for the general population. OWCP should be careful to avoid counting an expense twice when totaling the overpaid individual's ordinary and necessary living expenses. For example, if the overpaid individual's credit card debt is already calculated as a fixed and miscellaneous living expense, the credit card expense(s) should not be added again as consumer debt expense. If the amount is added again, it would result in an excessive total for the overpaid individual's ordinary and necessary living expenses, and would make the individual appear less able to repay his or her overpayment than would actually be the case. Furthermore, OWCP should ensure that the monthly expense used for each credit card reflects only the minimum payment required by the creditor.

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<sup>24</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

<sup>25</sup> *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

<sup>26</sup> *Id.* at § 10.437(a)(b).

<sup>27</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>28</sup> *Id.* at § 10.438(b).

The minimum amount should be verified, if necessary, by requiring the overpaid individual to submit copies of his or her monthly billing statement(s).<sup>29</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 of recovery of the overpayment 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>30</sup> In Form CA-110 dated April 11, 2019, the claims examiner noted that the detailed statement submitted by appellant subsequent to the hearing represented his current monthly income and expenses. OWCP considered appellant's financial information, as reported on the updated statement and in appellant's statements, to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

OWCP determined that appellant had not established that all of his current income was substantially needed to meet ordinary and necessary living expenses. In making that determination, the hearing representative properly excluded the Xfinity bill of \$192.30 and EZ pass charge of \$75.00 as they were not considered ordinary or necessary expenses.<sup>31</sup> The hearing representative also properly excluded a cell phone charge of \$92.00 as the bill was not in appellant's name.<sup>32</sup>

The hearing representative excluded appellant's entire monthly credit card debt finding that it could not be considered so as to avoid counting such expenses twice. The Board notes that while the hearing representative referenced its procedures<sup>33</sup> the hearing representative failed to provide an explanation, as its procedures required, as to why appellant's credit card expenses were not considered ordinary and necessary. Absent such explanation, the Board notes that the procedures allow for the minimum payment required by the creditor to be considered.<sup>34</sup> In this case, the minimum payment required by appellant's creditors total \$286.23.<sup>35</sup> Adding the minimum credit card payment of \$286.23 to appellant's other expenses of \$1,833.33<sup>36</sup> equals a total monthly expense of \$2,119.56. Subtracting that amount from appellant's reported monthly income of \$2,833.29 equals \$713.73 in income over debt each month. Thus, based on appellant's statements and the record, appellant's monthly income exceeded his ordinary and necessary living

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<sup>29</sup> See *supra* note 27 at Chapter 6.400.4(b)(2).

<sup>30</sup> 20 C.F.R. § 10.436.

<sup>31</sup> See *D.C.*, Docket No. 17-0559 (issued June 21, 2018); *S.W.*, Docket No. 11-1687 (issued July 23, 2012).

<sup>32</sup> See *R.A.*, Docket No. 13-1121 (issued October 29, 2013).

<sup>33</sup> See *supra* note 27.

<sup>34</sup> *Id.*

<sup>35</sup> The minimum credit card payments are \$49.32, \$200.91, and \$38.00, which total \$286.23.

<sup>36</sup> Appellant's half of the mortgage \$1,180.60; food \$300.00; car insurance \$86.00; half of electric \$129.86; gas \$80.35; Mutual of Omaha Insurance \$56.52, which total \$1,833.33.

expenses by more than \$50.00, he did not need substantially all of his income for ordinary and necessary living expenses.<sup>37</sup>

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant did not submit evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment he gave up a valuable right or changed his position for the worst. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.<sup>38</sup>

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to establish that OWCP abused its discretion by refusing to waive recovery of the overpayment.<sup>39</sup>

On appeal counsel contends that OWCP's decision is contrary to fact and law. As discussed, OWCP found appellant not at fault in the creation of the overpayment; however, failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP's regulations provides that, 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 the error is discovered 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 any hardship.<sup>40</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$200.00, the hearing representative explained how he considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.<sup>41</sup> Thus, the hearing representative did not abuse his discretion in setting the rate of recovery.<sup>42</sup> The Board therefore finds that OWCP

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<sup>37</sup> See *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>38</sup> See *N.J.*, *supra* note 28; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>39</sup> See *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

<sup>40</sup> 20 C.F.R. § 10.441(a); see *A.F.*, *supra* note 25; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>41</sup> See *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

<sup>42</sup> See *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).



properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$200.00 every 28 days.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$10,059.35 for the period October 1, 2017 through August 18, 2018 because he concurrently received SSA age-related retirement benefits while receiving FECA benefits, for which he was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$200.00 every 28 days from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

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