

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

_____)	
J.B., Appellant)	
)	
and)	Docket No. 19-1734
)	Issued: November 5, 2020
DEPARTMENT OF DEFENSE, HUNTER)	
ARMY AIRFIELD COMMISSARY,)	
Hunter Army Airfield, GA, Employer)	
_____)	

Appearances:
Appellant, pro se
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 August 15, 2019 appellant filed a timely appeal from a June 7, 2019 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 to consider the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$32,975.18, for which she was without fault, because she

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 7, 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.*

concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period December 1, 2015 through October 13, 2018, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On February 28, 2002 appellant then a 52-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that she slipped on a soapy floor and fell when cleaning a dairy cooler, injuring her hip, back, and leg while in the performance of duty. OWCP accepted her claim for lumbosacral contusion and right hip contusion. Appellant stopped work on February 25, 2002 and worked intermittently thereafter. OWCP paid her wage-loss compensation on the periodic rolls effective June 16, 2002.

In a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form dated February 24, 2015, SSA advised OWCP that no offset of appellant's compensation benefits was applicable at this time because she was receiving disability benefits. SSA indicated that, effective December 2015, she would reach normal retirement age and become eligible for SSA age-related retirement benefits. It noted that, since appellant's retirement coverage was under FERS, her compensation benefits must be offset by any part of her SSA benefit that was calculated by using her federal employment earnings.

On EN1032 Forms dated December 2015, December 22, 2016, and December 12, 2017, appellant indicated that she received SSA benefits as part of an annuity for federal service. On an EN1032 Form dated December 2015, she indicated that she received \$1,238.00 per month from SSA for herself and \$385.00 in SSA survivor's benefits. On an EN1032 Form dated December 22, 2016, appellant indicated that she received regular age-related retirement and survivor's SSA benefits \$1,606.00 per month from SSA. On an EN1032 Form dated December 12, 2017, she indicated that she received \$1,769.00 per month from SSA.

On September 22, 2018 SSA completed the dual benefits calculation form, which indicated appellant's SSA benefit rates with FERS offset and without a FERS offset from December 2015 through December 2017. Beginning December 2015, the SSA rate with FERS was \$1,343.50 and without FERS was \$396.70. Beginning December 2016, the SSA rate with FERS was \$1,347.50 and without FERS was \$397.80. Beginning December 2017, the SSA rate with FERS was \$1,374.40 and without FERS was \$405.70.

On October 29, 2018 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from December 1, 2015 through October 13, 2018. The total overpayment was determined to be \$32,975.18.

In a letter dated October 29, 2018, OWCP notified appellant that, based on information provided by SSA regarding the amount of her age-related retirement benefits was partially attributable to federal service, her FECA wage-loss compensation had been adjusted.

On October 29, 2018 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$32,975.18 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that she received from December 1, 2015 through October 13, 2018 were partially based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP further made a preliminary determination that she was with fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoumment hearing.

On a November 25, 2018 overpayment action request form, appellant requested a prerecoumment hearing. In an attached statement, she noted disagreement with the fault finding and indicated that on September 11 and 25, 2015 she met with SSA and was informed that the current calculation was correct. Appellant submitted copies of her benefit statements from SSA dated August 9 and November 30, 2015, and September 21, 2016. She also submitted a copy of her late husband's benefit statement from SSA dated November 3, 2014.

On a September 25, 2018 Form OWCP-20, appellant indicated that her total monthly income included \$1,635.00 from SSA and FECA benefits of \$1,117.54, resulting in total monthly income of \$2,752.54. She reported expenses totaling \$2,700.50. Appellant attached financial information including bank statements, utility bills, and credit card bills.

Appellant timely requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 26, 2019.

Subsequent to the hearing, OWCP received an April 11, 2019 statement in which appellant reported her monthly expenses as: \$468.79 for mortgage; \$320.00 for food; \$50.00 for clothing; \$18.75 for haircuts; \$110.00 for personal items; \$91.00 for water; \$178.33 for electricity; \$3.50 for "eye insurance"; \$8.85 for "vision insurance"; \$209.72 for television, internet, and telephone; \$81.14 for car insurance for two automobiles; and monthly credit card payments totaling \$253.00 a month. Appellant also listed other expenses of \$54.00 for house repairs, \$102.08 for lawn maintenance, \$108.33 for gas, \$10.83 for auto club membership, and \$38.33 for prescriptions, but did not provide supporting billing statements or receipts. By decision dated June 7, 2019, OWCP's hearing representative found that appellant had received an overpayment of compensation in the amount of \$32,975.18 for the period December 1, 2015 through October 13, 2018, because it failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$400.00 every 28 days from her 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 his or her duty.³ 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.⁴

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.⁵ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,975.18, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period December 1, 2015 through October 13, 2018, without an appropriate offset.

The record supports that appellant received FECA wage-loss compensation for total disability beginning in July 9, 2002, and that she received SSA age-related retirement benefits beginning December 2015. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.⁷ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to her federal service commencing December 1, 2015. Thus, the record establishes that she received an overpayment of FECA wage-loss compensation.⁸

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to appellant's specific SSA age-related retirement benefit rates. It provided its calculations of the amount that it should have offset for the relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$32,975.18, thereby creating an overpayment of compensation in that amount, for the period December 1, 2015 through October 13, 2018.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

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

⁶ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁷ 20 C.F.R. § 10.421(d); *S.M.*, Docket No. 17-1802 (issued August 20, 2018); *id.*; *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁸ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.”⁹

Recovery of an overpayment will defeat the purpose of FECA when 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.¹⁰ 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 \$50.00.¹¹ Also, 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.¹² An individual’s liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹³

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.¹⁴

OWCP’s 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

⁹ 5 U.S.C. § 8129.

¹⁰ 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, Debt Management, *Final Overpayment Determination*, Chapter 6.400.4(a)(2) (September 2018).

¹¹ *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹² *See id.* at Chapter 6.400.4(a)(2) (September 2018).

¹³ *Id.* at Chapter 6.400.4(b)(3).

¹⁴ 20 C.F.R. § 10.437(a)(b).

the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁵

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.¹⁶

Evidence in the case record shows that appellant has income totaling \$2,816.84. She listed expenses as \$468.79 for mortgage; \$320.00 for food; \$50.00 for clothing; \$18.75 for haircuts; \$110.00 for personal items; \$91.00 for water; \$178.33 for electricity; \$3.50 for “eye insurance”; \$8.85 for “vision insurance”; \$198.73 for television, Internet and telephone; \$81.14 for car insurance for two automobiles; and monthly credit card payments totaling \$253.00 a month. Other expenses of \$54.00 for house repairs, \$102.08 for lawn maintenance, \$108.33 for gas, \$10.83 for auto club membership, and \$38.33 for prescriptions were not supported by billing statements or receipts and were therefore not counted.

Based upon the information provided on the Form OWCP-20, and evidence received after the hearing, appellant’s household income totaled \$2,816.84 while her expenses totaled \$1,732.38. As her monthly income exceeds her monthly expenses by \$1,084.86, appellant does not need substantially all of her monthly income to meet current and ordinary living expenses.

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance on the payment, which created the overpayment.¹⁷ Therefore, OWCP properly denied waiver of recovery of the overpayment.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP’s regulations provides in pertinent part: 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 the same. If no refund is made, OWCP shall decrease later payments of compensation,

¹⁵ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁶ 5 U.S.C. § 8129.

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

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.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation payments.

In determining whether appellant could repay the overpayment through \$400.00 deductions from continuing compensation payments, OWCP took into account her financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion.¹⁹ The Board finds that OWCP gave due regard to the financial information provided and found that her monthly income exceeded monthly expenses by \$1,084.46. OWCP further applied its procedures, which require that an appropriate payment amount should be deducted in order to recover the overpayment within three years.²⁰ Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,975.18, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period December 1, 2015 through October 13, 2018 without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$400.00 every 28 days from her continuing compensation payments.

¹⁸ 20 C.F.R. § 10.441(a); A.S., Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁹ See *L.F.*, Docket No. 15-0489 (issued May 11, 2015) (the Board affirmed an OWCP hearing representative's denial of waiver of recovery of an overpayment because appellant and his spouse had over \$17,000.00 in their savings account and as such his assets exceeded the specified resource base).

²⁰ *Supra* note 10 at Chapter 6.500.8.c (September 2018). These procedures further note that, if no response to the preliminary overpayment determination is received, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full (emphasis added) *id.* at Chapter 6.500.8.c(1).

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 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