

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

S.W., Appellant)
and) Docket No. 20-0363
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 23, 2020
Sutter Creek, CA, 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

CHRISTOPHER J. GODFREY, Deputy Chief Judge

JANICE B. ASKIN, Judge

JURISDICTION

On December 4, 2019 appellant filed a timely appeal from a November 22, 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 over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$108,193.47, for which she was not at fault, as she concurrently received FECA wage-loss compensation and Social Security Administration (SSA)

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the November 22, 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.*

age-related retirement benefits for the period March 1, 2013 through March 30, 2019 without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts are set forth below.

On December 13, 1996 appellant, then a 49-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment including repetitive motions required in the sorting, bundling, and delivery of mail. A notification of personnel action (Form SF50) dated June 7, 1995 noted appellant's retirement plan as FERS. OWCP accepted the claim for bilateral carpal tunnel syndrome, right elbow contusion, and right lesion of ulnar nerve.⁴ It placed appellant on the periodic compensation roll commencing December 16, 2012.⁵

On April 1, 2019 OWCP received from SSA a March 23, 2019 Federal Employees' Retirement System (FERS)/(SSA) dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since March 2013. The form showed SSA benefit rates with and without a FERS offset. Beginning March 1, 2013, appellant's SSA rate with FERS was \$1,550.00 and without FERS was \$119.20; beginning December 1, 2013, appellant's SSA rate with FERS was \$1,573.20 and without FERS was \$120.90; beginning December 1, 2014 and December 1, 2015 appellant's SSA rate with FERS was \$1,599.90 and without FERS was \$122.90; beginning December 1, 2016 appellant's SSA rate with FERS was \$1,604.60 and without FERS was \$123.20; beginning December 1, 2017 appellant's SSA rate with FERS was \$1,636.60 and without FERS was \$125.60; and beginning December 1, 2018 appellant's SSA rate with FERS was \$1,682.40 and without FERS was \$129.10.

A FERS offset calculation worksheet indicated that OWCP utilized a 28-day FERS offset amount of \$12,971.54 for the 275 days from March 1 to November 30, 2013; \$17,475.48 for the 365 days from December 1, 2013 to November 30, 2014; \$17,772.69 for the 365 days from December 1, 2014 to November 30, 2015; \$17,821.38 for the 366 days from December 1, 2015 to November 30, 2016; \$17,825.64 for the 365 days from December 1, 2016 to November 30, 2017; \$18,181.81 for the 365 days from December 1, 2017 to November 30, 2018; and \$6,144.92 for the

³ Docket No. 15-0598 (issued June 22, 2015).

⁴ The Board notes that the current claim has been consolidated with OWCP File No. xxxxxx625, with an injury date of February 20, 1996, which was accepted for right elbow contusion; and OWCP File No. xxxxxx366, which was accepted for temporary aggravation of bilateral basal joint arthrosis, with an injury date of January 2, 1998. OWCP File No. xxxxxx680 serves as the master file.

⁵ By decision dated January 13, 2015, OWCP reduced appellant's compensation effective January 13, 2015 based on her capacity to earn wages in the constructed position of surveillance system monitor. By decision dated June 22, 2015, the Board found that OWCP properly reduced appellant's compensation effective January 13, 2015 based on her capacity to earn wages in the constructed position of surveillance system monitor. However, the Board remanded the case to OWCP for a recalculation of her wage-earning capacity based on recent weekly wages for the surveillance system monitor position. *See supra* note 3.

120 days from December 1, 2018 to March 30, 2019. OWCP calculated a total overpayment of \$108,193.47.

In a letter dated April 9, 2019, OWCP advised appellant that she had been receiving a prohibited dual benefit. It noted that the SSA had confirmed that a portion of her SSA age-related retirement benefits were attributed to her years of federal service as an employee under the FERS program and that portion required an offset from her FECA compensation benefits. OWCP indicated that appellant was receiving gross FECA compensation of \$1,887.00 every 28 days, the SSA offset was \$1,433.82, other deductions of \$170.93, which resulted in a new four-week FECA benefit in the amount of \$282.55. The adjustment was effective March 31, 2019.

On April 10, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$108,193.47, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period March 1, 2013 through March 30, 2019, without an appropriate offset. It cited the FERS/SSA dual benefits calculation form and OWCP's FERS offset calculation worksheet and explained that it had calculated the overpayment of compensation by determining the difference between her SSA benefit rate with and without FERS for each period, and then multiplying that amount by the number of days in each period. OWCP further found that appellant was without fault in the creation of the overpayment, as she was not aware, nor could she have reasonably been aware, that it had paid compensation incorrectly. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that within 30 days of the date of the letter, she could request a final decision based on the written record or a prerecougment hearing.

On April 22, 2019 appellant elected benefits from OPM effective April 17, 2019.

In an overpayment action request form dated May 1, 2019, appellant requested a prerecougment hearing regarding possible waiver and recovery of the overpayment since the overpayment occurred through no fault of her own. She noted that she would have suspended her FECA benefits and elected OPM retirement benefits and enrolled in Medicare Part B if she had been timely informed of the overpayment. Appellant also requested waiver based on equity and good conscience, as she had honestly reported all information requested by OWCP. On an attached overpayment recovery questionnaire, she noted monthly income of \$1,682.00 from "SSA, TBD amount in FERS as applied fees were not received, and \$8.00 in dividends." Appellant also indicated that she had a dependent adult daughter. She noted that her monthly expenses were \$3,224.00 with assets totaling \$90,337.00.⁶ Appellant attached documentation confirming SSA amount of \$1,682.00 from SSA; bank account balance of \$1,156.73; available balance of \$15,015.54; and medical expenses in the amounts of \$2,719.82 and \$232.00.

A telephonic hearing was held on September 9, 2019. Appellant expressed frustration with the need for offset and the resulting large overpayment. With respect to income, she reported a dependent adult daughter who was unemployed and did not financially contribute to the

⁶ This included cash on hand, checking account balance, savings account balance which included balance of life insurance from husband's death, stocks and bonds, and a ROTH IRA inherited from her husband.

household.⁷ With respect to monthly income, appellant indicated that she had a very small dividend and her SSA benefit. She noted receipt of a single provisional payment of over \$2,000.00 for the April SSA benefit, after an OPM payment deduction of \$741.32. Appellant testified that her savings account, which held life insurance proceeds, was reduced to \$13,000.00. She revised the estimate of the balance of her husband's 401K account to approximately \$150,000.00. Appellant noted significant recent expenditures to her home, including a well repair and additional expenses in feed and veterinary care for several elderly large farm animals on the property. The hearing representative explained that she needed more substantial documentation to consider her request for waiver. The record was held open for 30 days for the submission of any additional evidence.

Appellant submitted numerous invoices and statements, including invoices for well repair, gate repair, veterinary bills, books for college, and medical bills. The monthly amount due or whether an outstanding balance remained was not indicated. Evidence of a September 3, 2019 net monthly annuity of \$905.37 from SSA was also provided. In handwritten notes, appellant provided expenses totaling \$2,295.00. This included \$210.00 gas; \$100.00 clothing; \$595.00 housing; \$400.00 food; \$85.00 internet; \$40.00 cell phone; \$46.00 heating fuel; \$20.00 trash; \$102.00 cable; \$115.00 electric; \$328.00 horse feed; \$491.00 hay; \$45.00 dog food; \$30.00 cat food; \$28.00 chicken food; and \$60.00 property tax.

By decision dated November 22, 2019, an OWCP hearing representative finalized OWCP's preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$108,193.47,⁸ for which she was not at fault, as she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2013 through March 30, 2019. The hearing representative denied waiver of recovery of the overpayment finding that appellant reported significant assets, which varied between \$90,000.00 and \$175,000.00, and that her liquid assets were being used to fund her budget shortfalls.

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.⁹ 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.¹⁰ When an overpayment has been made to an

⁷ The hearing representative noted that OWCP previously attempted to establish the dependent status of the adult daughter following the death of appellant's husband, but no responsive evidence was received.

⁸ The hearing representative subtracted an OPM annuity offset payment of \$741.32 from the \$108,193.47 overpayment amount to find an adjusted current balance of \$107,452.15.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8116.

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.¹¹

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to federal service of the employee.¹² 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.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$108,193.47 as she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2013 through March 30, 2019 without an appropriate offset.

In its November 22, 2019 decision, OWCP found that an overpayment of compensation was created for the period March 1, 2013 through March 30, 2019. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. Appellant has not challenged the fact or amount of the overpayment. The record indicates that, while appellant was receiving compensation for total disability under FECA, she was also receiving SSA age-related retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA age-related benefits attributable to federal service for the same period.¹⁴ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period March 1, 2013 through March 30, 2019. Consequently, the fact of overpayment has been established.¹⁵

To determine the amount of the overpayment, the portion of SSA age-related retirement 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. SSA provided the SSA rate with FERS, and without FERS for specific periods commencing March 1, 2013 through December 1, 2018. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

¹¹ *Id.* at § 8129(a).

¹² 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).

¹³ FECA Bulletin No. 97-09 (February 3, 1997).

¹⁴ *H.H.*, Docket No. 18-0674 (issued September 3, 2020); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹⁵ *J.R.*, Docket No. 19-1418 (issued March 4, 2020); *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2013 through March 30, 2019 and finds that an overpayment of compensation in the amount of \$108,193.47 was created.¹⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA states: "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 without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹⁷

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.¹⁸ 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 \$50.00.¹⁹ 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.²⁰ 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.²¹ Non liquid 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, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.²²

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

¹⁶ R.F., Docket No. 20-0159 (issued October 15, 2020); see D.C., Docket No. 17-0559 (issued June 21, 2018).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ 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).

¹⁹ 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).

²⁰ See *supra* note 18 at Chapter 6.400.4.a(2) (September 2018).

²¹ Id. at Chapter 6.400.4.b(3).

²² Id. at Chapter 6.400.4b(3)(a), (b).

worse.²³ 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.²⁴

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.²⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$108,193.47 overpayment of compensation.²⁶

The fact that a claimant is without fault in creating an overpayment does not preclude OWCP from recovering the overpayment.²⁷ Even though 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.²⁸

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 over \$90,000.00 and up to a possible \$150,000.00 in total assets, has not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base. While appellant suggested before OWCP and the Board that she had insufficient monthly cash flow to satisfy her obligations, the hearing representative found that appellant was using her liquid assets to fund her budget shortfalls and that those same funds could be used for repayment of the debt. The hearing representative further found that appellant had \$640.00 in surplus income.²⁹ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of

²³ 20 C.F.R. § 10.437(a)(b).

²⁴ *Id.* at § 10.437(b)(1).

²⁵ *Id.* at § 10.438(a); M.S., Docket No. 18-0740 (issued February 4, 2019).

²⁶ A.C., Docket No. 18-1550 (issued February 21, 2019).

²⁷ See D.H., Docket No. 19-0384 (issued August 12, 2019); V.H., Docket No. 18-1124 (issued January 16, 2019).

²⁸ 20 C.F.R. § 10.436.

²⁹ The hearing representative found \$3,913.00 total monthly income minus \$3,224.00 total monthly expenses, minus \$50.00 statutory amount equaled \$640.00 surplus income.

FECA, it is however 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.³⁰

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.³¹ Although she has asserted that she would have altered her retirement plans had she been informed of the offset, she has not submitted any evidence to establish that such decision would have been financially advantageous had such notice been provided.

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.³²

On appeal appellant argues that OWCP improperly denied her request for waiver of recovery of the overpayment as it incorrectly reported her income and understated her monthly expenses. However, the Board notes that the fact that her assets exceed the allowable resource base served as the basis for denial of appellant's waiver request.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$108,193.47, for which she was not at fault, as she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2013 through March 30, 2019. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

³⁰ *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

³¹ See *B.C.*, Docket No. 19-0629 (issued June 2, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

³² *B.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board