

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

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 20-0862
Issued: November 25, 2020**

Appearances:
Wayne Johnson, Esq., for the appellant¹
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 March 6, 2020 appellant, through counsel, filed a timely appeal from a September 12, 2019 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 September 12, 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$21,960.03, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2010 through March 30, 2019 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 \$560.29 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 4, 2000 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2000 he pulled or tore a muscle in his left shoulder/neck and arm when he was removing bags from the pick-up box while in the performance of duty. He continued to work in a limited-duty capacity. OWCP accepted appellant's claim for left shoulder sprain, left hand sprain, cervical sprain, and cervical radiculopathy.

On September 22, 2004 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of disability on September 18, 2004, as a result of his accepted November 3, 2000 employment injury. OWCP accepted the recurrence claim and paid wage-loss compensation on the periodic rolls, effective October 3, 2004.

In a Form CA-1032 dated October 17, 2011, appellant responded "No" indicating that he was not receiving SSA age-related retirement benefits as part of an annuity for federal service. He provided subsequent CA-1032 forms dated October 18, 2012, October 22, 2013, October 7, 2014, October 6, 2015, October 10, 2016, and October 8, 2018 in which he responded "No" indicating that he was not receiving SSA age-related retirement benefits as part of an annuity for federal service.

On October 24, 2018 OWCP requested information from SSA regarding appellant's dual benefits.

On March 18, 2019 OWCP received a completed FERS/SSA dual benefit calculation form from SSA, wherein SSA calculated SSA age-related benefit rates with a FERS offset from November 2010 through December 2019. Beginning November 2010, the SSA rate with FERS was \$846.40 and without FERS was \$643.60. Beginning December 2011, the SSA rate with FERS

⁴ In a June 16, 2005 decision, the Board set aside the November 4 and February 19, 2004 OWCP decisions and remanded appellant's schedule award claim. Docket No. 05-0655 (issued June 16, 2005) In a May 11, 2006 decision, the Board affirmed the October 28, 2005 OWCP decision finding that appellant had not established more than three percent permanent impairment of his left upper extremity causally related to his accepted November 3, 2000 employment injury. Docket No. 06-0572 (issued May 11, 2006).

was \$876.80 and without FERS was \$666.80. Beginning December 2012, the SSA rate with FERS was \$891.70 and without FERS was \$678.10. Beginning December 2013, the SSA rate with FERS was \$905.00 and without FERS was \$688.20. Beginning December 2014, the SSA rate with FERS was \$920.40 and without FERS was \$699.90. Beginning December 2015, the SSA rate with FERS was \$920.40 and without FERS was \$699.90. Beginning December 2016, the SSA rate with FERS was \$923.10 and without FERS was \$701.90. Beginning December 2017, the SSA rate with FERS was \$941.50 and without FERS was \$716.00. Beginning December 2018, the SSA rate with FERS was \$967.80 and without FERS was \$735.90.

In a letter dated April 16, 2019, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his 28-day periodic compensation benefits beginning March 31, 2019.

OWCP completed a FERS offset calculation worksheet on April 15, 2019. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment amount of \$21,960.03. This form indicated: from November 1 through 30, 2010 appellant received an overpayment in the amount of \$200.57; from December 1, 2010 through November 20, 2011 he received an overpayment in the amount of \$2,440.29; from December 1, 2011 through November 30, 2012, he received an overpayment in the amount of \$2,533.85; from December 1, 2012 through November 30, 2013 he received an overpayment in the amount of \$2,570.24; from December 1, 2013 through November 30, 2014 he received an overpayment in the amount of \$2,608.75; from December 1, 2014 through November 30, 2015 he received an overpayment in the amount of \$2,653.27; from December 1, 2015 through November 30, 2016 he received an overpayment in the amount of \$2,660.54; from December 1, 2016 through November 30, 2017 he received an overpayment in the amount of \$2,661.69; from December 1, 2017 through November 30, 2018 he received an overpayment in the amount of \$2,713.43; and from December 1, 2018 through March 30, 2019 he received an overpayment in the amount of \$917.41.

On April 26, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$21,960.03 had been created because it had failed to reduce his wage-loss compensation payments for the period November 1, 2010 through March 30, 2019 to offset his SSA age-related retirement benefits that were attributable to federal service. It determined that he was without fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised him that he could request a waiver of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, it further notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a preresoupment hearing.

On May 7, 2019 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. He indicated that he was requesting waiver of recovery of the overpayment because he should not be held responsible for an overpayment that occurred without his knowledge. Appellant also noted that he could not afford to pay it.

In a Form OWCP-20 completed on May 7, 2019, appellant reported a total monthly income of \$3,419.16 and total monthly expenses of \$2,501.00. He also indicated that he had monthly payments of \$440.00 to and \$250.00 banking institutions. Appellant noted that he had cash on hand of \$100.00, a checking account balance of \$300.98, and a savings account balance of \$2,023.42.

Appellant submitted a letter from his bank dated May 7, 2019, which provided written verification of the balance in three of his accounts. No further documentation regarding income or expenses was received.

By decision dated September 12, 2019, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$21,960.03 for the period November 1, 2010 through March 30, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that, although appellant had submitted an overpayment action request form, he had not provided documentation to support his reported income, expenses, or available funds. It required recovery of the overpayment by deducting \$560.29 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 his or her duty.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

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁷ 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 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$21,960.03, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2010 through March 30, 2019 without

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

an appropriate offset.⁹ The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period November 1, 2010 through March 30, 2019. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from November 1, 2010 through March 30, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that he received an overpayment in the amount of \$21,906.03. The Board thus finds that appellant received prohibited dual benefits for the period November 1, 2010 through March 30, 2019 totaling \$21,960.03.

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.¹¹ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹²

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ An individual is deemed to need

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Supra* note 7.

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² *L.S.*, 59 ECAB 350 (2008).

¹³ 20 C.F.R. § 10.436. OWCP's procedures provide that the 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a (3) (September 2018).

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 \$50.00.¹⁴

Section 10.437 of OWCP's implementing regulations provides that 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 attempting 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.¹⁵ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁶

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.¹⁷

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not provided supporting financial information. Appellant completed a Form OWCP-20 on May 7, 2019 and noted a total monthly income of \$3,419.16, total monthly expenses of \$2,501.00, and total savings and checking account balance of \$2,424.44. The only supporting financial documentation that appellant submitted was a May 7, 2019 letter from his bank confirming the balance in his bank accounts. No other documentation supporting his noted income or expenses was submitted. Although appellant had been advised to submit documentation substantiating his income and expenses, he failed to provide sufficient documentation of his income and expenses as required by section 10.438 of its regulations.¹⁸ OWCP, therefore, did not have the financial information necessary to determine if appellant needed substantially all of his current income to meet current ordinary and necessary living expenses and, also, if his assets exceeded a specified amount as determined by OWCP.¹⁹

The Board also finds that appellant did not establish that he was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience. In an overpayment action request form, appellant indicated that he could not possibly afford to pay the overpayment. He, however, did not provide any financial information to support his allegations.

¹⁴ Federal (FECA) Procedure Manual *id.* at Chapter 6.400.4(a)(3) (September 2018).

¹⁵ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁶ FECA Procedure Manual, *supra* note 14 at Chapter 6.400.4c(3) (September 2018).

¹⁷ 20 C.F.R. § 10.436.

¹⁸ *See R.W.*, Docket No. 18-1059 (issued February 6, 2019).

¹⁹ *Supra* notes 13 & 14.

Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.²⁰

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.²¹

Section 10.441(a) of OWCP's regulations²² 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 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.”²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$560.29 every 28 days from appellant's continuing compensation payments.

OWCP provided appellant a Form OWCP-20 with its April 26, 2019 preliminary determination. It afforded him the opportunity to provide appropriate financial information and documentation to OWCP.²⁴ Although appellant completed the Form OWCP-20 overpayment recovery questionnaire he did not provide the necessary financial documentation to support his income and expenses prior to the final September 12, 2019 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁵ When an individual fails to provide requested financial information, OWCP shall follow minimum collection guidelines designed to collect the debt promptly and in full.²⁶ The Board, therefore, finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$560.29 every 28 days.

²⁰ *R.C.*, *supra* note 9; *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

²¹ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²² *Id.* at § 10.441(a).

²³ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁴ *Id.* at § 10.438.

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

²⁶ *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 6.400.3 (September 2018).

CONCLUSION

The Board finds OWCP properly determined that appellant received an overpayment of compensation in the amount of \$21,960.03, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2010 through March 30, 2019. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$560.29 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 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