

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

_____)	
R.B., Appellant)	
)	
and)	Docket No. 20-0022
)	Issued: October 28, 2020
U.S. POSTAL SERVICE, NW ROCHESTER)	
PROCESSING & DISTRIBUTION CENTER,)	
Rochester, NY, Employer)	
_____)	

Appearances:
James A. Meserve, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2019 appellant, through counsel, filed a timely appeal from an August 13, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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.

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

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$8,907.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period January 1 to June 22, 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 \$424.09 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On March 13, 2009 appellant, then a 54-year-old distribution clerk, filed a notice of recurrence (Form CA-2a) alleging that she sustained additional neck, arm, and shoulder pain on or before March 3, 2009, due to factors of her federal employment.⁴ OWCP converted the recurrence claim as one for a new occupational disease assigned File No. xxxxxx602.

On May 6, 2009 appellant filed a Form CA-2a under OWCP File No. xxxxxx602 alleging a May 4, 2009 increase in neck and shoulder pain due to factors of her federal employment. She stopped work on May 4, 2009 and did not return.

On June 10, 2009 OWCP accepted appellant's claim in File No. xxxxxx602 for cervical spondylosis without myelopathy. It paid her wage-loss compensation on the supplemental rolls as of June 20, 2009 and on the periodic rolls as of August 2, 2009.

On April 26, 2011 OWCP expanded acceptance of her claim in File No. xxxxxx602 to include cervical spondylosis without myelopathy, right rotator cuff syndrome, and allied disorders.

On April 28, 2011 appellant elected to receive FECA compensation benefits.

On November 28, 2012 appellant completed an EN1032 form, which asked that she report any benefits received from SSA received as part of an annuity under the Federal Employees Retirement System (FERS), but indicated that she was not to report any benefits received from SSA on account of employment in the private sector. She responded "No" to the question of

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 13, 2019 decision, OWCP received additional evidence. Appellant also submitted additional evidence on appeal. 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.*

⁴ The recurrence claim was originally filed by appellant under OWCP File No. xxxxxx638. In that claim, OWCP had accepted that on January 1, 2009 appellant sustained a lumbosacral sprain and a left shoulder/upper arm sprain when she slipped and fell on ice while in the performance of duty.

whether she received benefits from SSA as part of an annuity for federal service. Appellant completed additional EN1032 forms on November 14, 2013, November 15, 2015, November 10, 2016, November 22, 2017, January 9, 2018, and November 8, 2018.

On May 14, 2019 OWCP requested that SSA provide a dual benefits calculation. In a form dated May 20, 2019, SSA responded that effective January 1, 2019 appellant's SSA rate with FERS was \$2,012.00 and without FERS was \$450.40.

In a June 20, 2019 FERS offset calculation worksheet, OWCP determined that appellant's monthly FERS offset was \$1,561.80, equivalent to \$1,441.66 every 28 days, or \$51.49 per day. OWCP multiplied the \$51.49 daily offset by 173, the number of days from January 1 through June 22, 2019, resulting in a total overpayment amount of \$8,907.41.

In a June 20, 2019 letter, OWCP informed appellant that she had been receiving SSA age-related retirement benefits since January 1, 2019 and that a portion of her SSA benefits were attributed to her federal service. It found that, if her federal service was not included in her SSA computation, she would be entitled to \$450.40 rather than \$2,012.20, and that her monthly FERS offset was \$1,561.80, and the 28-day offset was \$1,441.66. OWCP reduced appellant's 28-day compensation payments by \$1,441.66.

In a preliminary determination dated July 5, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$8,907.41 because her compensation benefits had not been reduced for the period January 1 through June 22, 2019, by the portion of her SSA benefits that were attributable to her federal service and, therefore, she had received a prohibited dual benefit.

OWCP calculated the overpayment amount by determining the difference between appellant's SSA amount with and without FERS for the period January 1 through June 22, 2019. It noted that her monthly SSA rate was \$2,012.20, with a FERS offset of \$1,561.80 per month, \$1,441.66 every 28 days, or \$51.59 per day. Multiplying the \$51.49 daily offset by the 173 days from January 1 through June 22, 2019 resulted in a total overpayment of \$8,907.41. OWCP further made a preliminary determination that appellant was without fault in the creation of the overpayment due to the complexity of her benefits situation. It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that, within 30 days of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On July 24, 2019 appellant requested that OWCP make a decision based on the written evidence. She indicated her disagreement with the fact and amount of the overpayment and requested waiver of recovery of the overpayment. Appellant asserted that OWCP erred in calculating the amount of the overpayment because her monthly SSA benefit was \$1,766.00 and not \$2,012.00. In support of her assertion, she provided a March 21, 2019 SSA "Notice of Award," indicating that her January 2019 payment was \$1,327.00 based on her request to receive reduced retirement benefits due to the FECA offset. An April 5, 2019 SSA letter notes a monthly benefit payment of \$1,766.00.

By decision dated August 13, 2019, OWCP finalized its preliminary overpayment determination and found an overpayment of compensation in the amount of \$8,907.41 for the period January 1 through June 22, 2019 because it had failed to offset appellant's compensation payments for the portion of her SSA age-related retirement benefits that were attributable to her federal service. It found that she was not at fault in the creation of the overpayment, but denied waiver of recovery as appellant failed to complete the Form OWCP-20. Therefore, the evidence of record was insufficient to substantiate that recovery would either defeat the purpose of FECA or be against equity and good conscience. OWCP determined that it would require recovery by deducting \$424.09 from appellant's continuing compensation payments every 28 days.

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 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 it reduce the amount of compensation by the amount of SSA benefits that are attributable to the federal service of the employee.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

The case record establishes that beginning January 1, 2019, appellant concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The Board finds that fact of overpayment is therefore established.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see B.B.*, Docket No. 19-0822 (issued February 18, 2020); *B.F.*, Docket No. 18-1345 (issued February 6, 2019).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also M.D.*, Docket No. 19-1500 (issued February 24, 2020); *G.K.*, Docket No. 18-0243 (issued August 17, 2018).

⁹ 5 U.S.C. § 8116(d)(2); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

The Board further finds, however, that OWCP improperly calculated appellant's overpayment for the period January 1 through June 22, 2019. OWCP determined the \$8,907.41 amount of the overpayment based on monthly SSA age-related retirement benefits of \$2,012.00. However, the record contains conflicting evidence regarding the amount of appellant's monthly SSA benefits. The May 20, 2019 dual benefits calculation, verified on July 11, 2019, indicated a \$2,012.00 monthly SSA benefit. A March 21, 2019 SSA "Notice of Award" letter noted a monthly payment of \$1,327.00 and an April 5, 2019 SSA "Notice of Award" letter noted a monthly payment of \$1,766.00, both amounts are significantly less than \$2,012.00.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹⁰ The Board finds that the overpayment decision in this case does not provide such an explanation.¹¹ Therefore, the amount of the overpayment has not yet been established.

On remand OWCP shall determine the exact amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that fact of overpayment has been established. The Board further finds that this case is not in posture for decision regarding the amount of the overpayment.

¹⁰ *L.B.*, Docket No. 19-1322 (issued January 27, 2020); *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); *see also O.R.*, 59 ECAB 432 (2008) (with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); *see Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

¹¹ *Id.*

¹² As the case is not in posture for decision regarding the amount of overpayment, the issues of waiver and recovery of the overpayment are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 28, 2020
Washington, DC

Christopher J. Godfrey, Deputy 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