

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, LARGO POST
OFFICE, Largo, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-0204
Issued: October 16, 2020**

Appearances:

*Sara Kincaid, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 4, 2019 appellant, through counsel, filed a timely appeal from a September 9, 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 9, 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 \$54,910.24, for which he was not at fault, as he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period June 1, 2008 through 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 \$400.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On April 11, 2008 appellant, then a 61-year-old mail handler, filed a notice of recurrence of disability (Form CA-2a) alleging that on March 31, 2008 he stopped work because repetitive lifting, casing, and delivery of mail while in the performance of duty caused increased pain to his neck and right shoulder.⁴ He returned to part-time work on April 2, 2008. OWCP converted the notice of recurrence of disability to a claim for an occupational disease and accepted the claim for a complete rupture of the right rotator cuff. On September 17, 2008 appellant underwent an OWCP authorized right shoulder arthroscopy which included subacromial decompression, rotator cuff repair, proximal humeral resection, distal claviclectomy, and bursectomy. OWCP paid him appropriate wage-loss compensation on the periodic rolls, effective September 28, 2008.⁵

A notification of personnel action (Form SF-50) dated April 9, 2009 indicated that appellant was covered under the Federal Employees Retirement System (FERS).

On June 20, 2019 OWCP received from SSA a June 15, 2019 (FERS)/(SSA) dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since June 1, 2008. The form showed SSA benefit rates with and without a FERS offset. Beginning June 1, 2008, appellant's SSA rate with FERS was \$1,441.20 and without FERS was \$1,419.80; beginning January 1, 2009, and February 1, and April 2011, appellant's SSA rate with FERS was \$1,583.80 and without FERS was \$1,502.10; beginning May 1, 2011, appellant's SSA rate with FERS was \$1,999.40 and without FERS was \$1,502.10; beginning December 1, 2011, appellant's SSA rate with FERS was \$2,071.30 and without FERS was \$1,556.20; beginning December 1, 2012, appellant's SSA rate with FERS was \$2,106.50 and without FERS was \$1,582.60; beginning December 1, 2013, appellant's SSA rate with FERS was \$2,138.00 and without FERS was \$1,606.20; beginning December 1, 2014 and December 1, 2015, appellant's SSA rate with FERS was \$2,174.30 and without FERS was \$1,633.60; beginning December 1, 2016, appellant's SSA rate with FERS was \$2,180.70 and without FERS was \$1,638.40; beginning December 1, 2017, appellant's SSA rate with FERS was \$2,224.40 and without FERS was

⁴ Under OWCP File No. xxxxxx439, the master file number, appellant has an accepted March 17, 2005 traumatic injury claim for the conditions of right rotator cuff tear, labral tear right shoulder, and acromion impingement, right shoulder. He returned to work in a limited-duty assignment as a modified letter carrier with lifting restrictions on January 24, 2006.

⁵ Effective April 10, 2011, appellant's wage-loss compensation was reduced based on his wage-earning capacity in the constructed position of a sales attendant. By decisions dated December 18, 2012 and January 8, 2014, OWCP denied modification of its loss of wage-earning capacity determination.

\$1,671.10; and beginning December 1, 2018, appellant's SSA rate with FERS was \$2,286.60 and without FERS was \$1,717.90.

In a letter dated July 26, 2019, OWCP advised appellant that he had been receiving a prohibited dual benefit. It noted that 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 reflect a new net compensation amount of \$1,583.87. The adjustment was effective June 23, 2019.

On July 26, 2019 OWCP also issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$54,910.24, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period June 1, 2008 through June 22, 2019. It explained that it had calculated the overpayment of compensation by determining the difference between his SSA benefit rate 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 utilized a 28-day FERS offset amount of \$150.98 from June 1, 2008 to December 31, 2009; \$2,049.68 from January 1, 2009 to January 31, 2011; \$158.91 from February 1 to March 31, 2011; \$80.80 from April 1 to 30, 2011; \$3,508.42 from May 1 to November 30, 2011; \$6,215.16 from December 1, 2011 to November 30, 2012; \$6,304.07 from December 1, 2012 to November 30, 2013; \$6,399.13 from December 1, 2013 to November 30, 2014; \$6,506.23 from December 1, 2014 to November 30, 2015; \$6,527.67 from December 1, 2015 to November 30, 2016; \$6,526.23 from December 1, 2016 to November 30, 2017; \$6,657.84 from December 1, 2017 to November 30, 2018; and \$3,823.66 from December 1, 2018 to June 22, 2019. Using these figures, OWCP calculated that the total overpayment amount was \$54,910.24.

OWCP 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. It requested that he 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, he could request a final decision based on the written record or a prerecoupment hearing.

On August 23, 2019 appellant submitted a completed Form OWCP-20. His household income totaled \$4,361.55, including FECA compensation benefits of \$1,583.87, SSA benefits of \$2,286.00, and other retirement income of \$490.85 and interest of \$0.83.

Appellant reported that his monthly expenses included: \$550.00 for rent/mortgage; \$400.00 for food; \$100.00 for clothing; \$850.00 for utilities; \$3,400.00 for other expenses; and monthly payments to creditors of \$450.00.⁶ He indicated that he had available assets of \$2,950.13 in a savings account, \$44,936.49 in stocks/bonds, \$557,598.76 in an Individual Retirement Account. Appellant indicated that he was diagnosed with Alzheimer's disease approximately three years prior and was unaware of the overpayments or that his SSA benefits constituted an annuity. He also indicated that both he and his wife had a lot of expenses associated with their medical

⁶ The Board notes that this totals \$5,750.00.

conditions. Appellant further noted that his wife had retired early due to her inability to work from her medical conditions and that she had relied on the money he was earning from OWCP and SSA.⁷ OWCP also received supporting financial documentation from him.

By decision dated September 9, 2019, OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$54,910.24 because the SSA/FERS offset was not applied to wage-loss compensation payments for the period June 1, 2008 through June 22, 2019. While appellant was without fault in the creation of the overpayment, OWCP denied waiver of recovery of the overpayment, finding that his monthly income exceeded his monthly qualifying expenses by \$1,116.40, not counting his assets. OWCP noted that the \$3,400.00 miscellaneous expenses claimed was not broken down or clarified as to what those expenses were and that he was given credit for monthly expenses based on copies of bills and cancelled checks submitted which were qualifying expenses under the FECA. It required recovery of the overpayment by deducting \$400.00 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 of an employee resulting from personal injury sustained while in the performance of his or her federal employment.⁸ 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.⁹ When an overpayment has been made to an 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.¹⁰

Section 10.421(d) of the FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to federal service of the employee.¹¹ 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.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,910.24, for which he was not at fault, as he concurrently

⁷ A statement was provided which detailed his wife's medical condition.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8116.

¹⁰ *Id.* at § 8129(a).

¹¹ 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).

¹² FECA Bulletin No. 97-09 (February 3, 1997).

received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2008 through June 22, 2019 without appropriate offset.

In its September 9, 2019 decision, OWCP found that an overpayment of compensation was created for the period June 1, 2008 through June 22, 2019. 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.¹³ The information provided by SSA demonstrated that appellant had received SSA age-related retirement benefits that were attributable to federal service during the period June 1, 2008 through June 22, 2019. OWCP therefore properly determined that an overpayment was created in this case.

OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided appellant's benefit rates with and without FERS for specific periods commencing June 1, 2008 through June 22, 2019. OWCP provided its calculations for each relevant period based on a FERS offset calculation worksheet and in its July 26, 2019 preliminary overpayment determination. No contrary evidence was received.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period June 1, 2008 through June 22, 2019 and finds that an overpayment of compensation in the amount of \$54,910.24 was created.¹⁴

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."¹⁵

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.¹⁶ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses

¹³ 5 U.S.C. § 8116(d)(2); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

¹⁴ *See R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, *id.*; *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 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).

if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷ 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.¹⁸ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificates of deposit.¹⁹

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.²⁰

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 the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

Appellant provided his current monthly income and expenses in Form OWCP-20 on August 23, 2019 as well as a summary of his liquid assets. OWCP properly determined that he listed available assets totaling \$47,886.62. This amount exceeds the base asset amount of \$10,300.00 for individuals with a spouse or dependent.²² It was therefore unnecessary for OWCP to consider whether appellant's monthly income exceeds his monthly ordinary and necessary expenses by more than \$50.00.²³ OWCP therefore properly denied waiver of recovery.

Appellant also has not established that he or his wife detrimentally relied on the overpayment or that recovery of the overpayment would be against equity and good conscience. He does not qualify for waiver under the principle of detrimental reliance because, while his wife may have retired early, he has not shown that the amount by which he was overpaid caused his wife to retire, to her detriment, and that she would not have otherwise made the decision to retire.²⁴

¹⁷ *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).

¹⁸ *See id.* at Chapter 6.400.4.a(2) (September 2018).

¹⁹ *Id.* at Chapter 6.400.4.b(3).

²⁰ 20 C.F.R. § 10.437(a)(b).

²¹ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²² *Supra* note 15; *see R.D.*, *supra* note 14.

²³ *Id.*

²⁴ *See H.F.*, Docket No. 17-0101 (issued September 5, 2017).

As noted, appellant's monthly income exceeded his monthly qualifying expenses by more than the statutory amount. While both he and his wife may have out-of-pocket medical expenses, he has not submitted evidence detailing such out-of-pocket medical expenses.²⁵ Appellant had the responsibility to provide sufficient financial information and supporting documentation to OWCP.²⁶ He has not submitted evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²⁷

On appeal counsel contends that appellant's wife detrimentally relied on the overpayment when she retired early and, due to the progression of her medical condition, she can no longer return to work. As a result, appellant's wife's reliance on the overpayment monies changed their financial position for the worse. As discussed above, there is no evidence to support these contentions.

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 his 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.²⁸

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 setting the recovery rate, OWCP explained that the factors set forth at 20 C.F.R. § 10.441(a) had been considered to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.²⁹ As noted, appellant submitted a Form OWCP-20 on August 23, 2019 showing that he had available assets of over \$47,000.00, which included \$2,950.13 in a savings account and \$44,936.49 in stocks/bonds. Thus, OWCP did not abuse its discretion in setting the rate of recovery.³⁰ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$400.00 every 28 days.

²⁵ See *J.A.*, Docket No. 08-1892 (issued July 16, 2009).

²⁶ See *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

²⁷ See *supra* note 19; *R.D.*, *supra* note 14.

²⁸ 20 C.F.R. § 10.441(a); see *C.M.*, *supra* note 13.

²⁹ See *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

³⁰ See *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,910.24, for which he was not at fault, as he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2008 through June 22, 2019 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 appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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