



## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,732.20 for the period September 1, 2008 through March 30, 2019, for which she was not at fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On August 10, 1984 appellant, then a 40-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 1984 she hit her right elbow on the skid when lifting a sack while in the performance of duty. OWCP accepted the conditions of right elbow lateral epicondylitis and tendinitis of the right shoulder. By decision dated April 2, 1990, it granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity. The award ran for 40.56 weeks for the period February 19 through November 29, 1990. Appellant stopped work on February 25, 1992 and has not returned. The record reflects that OWCP paid her wage-loss compensation benefits on the periodic rolls as of June 16, 2002.

On March 29, 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 September 2008. The form showed SSA benefit rates with and without a FERS offset. Beginning September 1, 2008, appellant's SSA rate with FERS was \$888.00 and without FERS was \$622.80; beginning October 1, 2008, appellant's SSA rate with FERS was \$888.40 and without FERS was \$622.80; beginning December 1, 2008, appellant's SSA rate with FERS was \$940.40 and without FERS was \$658.90; beginning July 1 and December 1, 2009, appellant's SSA rate with FERS was \$940.00 and without FERS was \$658.90; beginning June 1, 2010, appellant's SSA rate with FERS was \$939.50 and without FERS was \$658.90; beginning December 1, 2010, appellant's SSA rate with FERS was \$940.40 and without FERS was \$658.90; beginning December 1, 2011, appellant's SSA rate with FERS was \$973.90 and without FERS was \$682.60; beginning December 2012, appellant's SSA rate with FERS was \$989.90 and without FERS was \$694.10; beginning December 2013, appellant's SSA rate with FERS was \$1,004.90 and without FERS was \$704.40; beginning December 2014 and December 2015, appellant's SSA rate with FERS was \$1,021.90 and without FERS was \$716.30; beginning December 2016, appellant's SSA rate with FERS was \$1,025.00 and without FERS was \$718.50; beginning December 2017, appellant's SSA rate with FERS was \$1,046.00 and without FERS was \$732.70; beginning December 2018, appellant's SSA rate with FERS was \$1,074.50 and without FERS was \$753.20.

An April 2, 2019 FERS offset calculation worksheet indicated that OWCP utilized a 28-day FERS offset amount of: \$262.29 for September 1 to 30, 2008; \$534.12 for October 1 to November 30, 2008; \$1,967.41 for December 1, 2008 to June 30, 2009; \$1,417.86 for July 1 to November 30, 2009; \$1,686.60 for December 1, 2009 to May 31, 2010; \$1,692.85 for June 1 to November 30, 2010; \$3,387.28 for December 1, 2010 to November 30, 2011; \$3,514.81 for December 1, 2011 to November 30, 2012; \$3,559.35 for December 1, 2012 to November 30, 2013; \$3,615.91 for December 1, 2013 to November 30, 2014; \$3,677.27 for December 1, 2014 to November 30, 2015; \$3,687.35 for December 1, 2015 to November 30, 2016; \$3,688.10 for

December 1, 2016 to November 30, 2017; \$3,769.93 for December 1, 2017 to November 30, 2018; and \$1,271.08 for December 1, 2018 to March 30, 2019, for a total overpayment of \$37,732.20.

In a letter dated April 4, 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 retirement program and that portion required an offset of her FECA compensation benefits, in the amount of \$296.58 every 28 days. OWCP indicated that the adjustment of appellant's FECA wage-loss compensation benefits to account for her SSA offset would reflect a new net compensation amount of \$2,596.00 beginning March 31, 2019.

On April 12, 2019 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$37,732.20, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period September 1, 2008 through March 30, 2019. It explained that it had calculated the overpayment of compensation by determining the difference between appellant's 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 reasonably have 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. Appellant was advised that failure to submit the requested information within 30 days would result in the denial of waiver and no further request would be considered until the requested information was received. Additionally, OWCP notified her that within 30 days of the date of the letter, she could request a waiver of recovery of the overpayment based on the written record or a precoupment hearing.<sup>4</sup> No additional evidence was received.

By decision dated May 15, 2019, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$37,732.20 because the SSA/FERS offset was not applied to FECA wage-loss compensation payments for the period September 1, 2008 through March 30, 2019. While appellant was without fault in the creation of the overpayment, it denied waiver of recovery of the overpayment as no evidence was received in response to the preliminary determination and subsequent request for financial information. OWCP required recovery of the full amount of the \$37,732.20 overpayment within 30 days.

### **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.<sup>5</sup> 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.<sup>6</sup> When an overpayment has been made to an

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<sup>4</sup> Appellant was advised that for hearing requests only, the request should be mailed directly to the Branch of Hearings and Review at the Office of Workers' Compensation Programs.

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,732.20, for the period September 1, 2008 through March 30, 2019, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset.

As noted, a claimant cannot receive concurrent FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>10</sup> The information provided by SSA accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to her federal service from September 1, 2008 until March 30, 2019. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.<sup>11</sup>

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. SSA provided appellant's SSA rate with FERS and without FERS during the applicable period. OWCP determined that the difference of the portion of SSA age-related retirement benefits attributed to appellant's federal service needed to be offset against her OWCP compensation benefits. Appellant has not contested the amount of the overpayment and it is concluded that OWCP properly calculated that the prohibited dual benefit from September 1, 2008 through March 30, 2019 resulted in an overpayment of compensation in the amount of \$37,732.20.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who

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<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> 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).

<sup>9</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>10</sup> 20 C.F.R. § 10.421(d); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>11</sup> *See R.R.*, *supra* note 8.

is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>12</sup>

Section 10.437 of the FECA implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment of compensation 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.<sup>13</sup>

Section 10.438 of the implementing 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 on 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.<sup>14</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the \$37,732.20 overpayment of compensation.

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.<sup>16</sup> Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP.<sup>17</sup>

In its preliminary determination dated April 12, 2019, OWCP explained the importance of providing the completed Form OWCP-20 and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. However, prior to the May 15, 2019 decision, she did not complete a Form OWCP-20, nor did she submit supporting financial documentation necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. As previously noted, OWCP's regulation at 20 C.F.R. § 10.438 provides that failure to submit the requested information within

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<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.437.

<sup>14</sup> *Id.* at § 10.438(a); *see T.B., supra* note 8; *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>15</sup> *Id.* at § 10.438.

<sup>16</sup> *Id.* at § 10.436.

<sup>17</sup> *Supra* note 15.

30 days of the request shall result in denial of waiver and no further request for waiver would be considered until the requested information is furnished.<sup>18</sup>

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment, based upon the evidence of record as of May 15, 2019.<sup>19</sup>

On appeal counsel contends that appellant was denied her right to a prerecoument hearing as she had timely requested waiver and submitted evidence prior to OWCP's May 15, 2019 final overpayment determination. Counsel submitted evidence in support of her contention and cited to Board case law, arguing that since the postmark was not retained for on appellant's prerecoument hearing request, the Board should rely on the date appellant signed the Form OWCP-20, May 6, 2019, and remand the matter so a prerecoument hearing could be held on the issue of waiver. The Board notes, however, that the record is devoid of a prerecoument request or financial evidence prior to the issuance of OWCP's May 15, 2019 final overpayment determination.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$37,732.20 for the period September 1, 2008 through March 30, 2019, for which she was not at fault, as she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation. The Board also finds that OWCP properly denied waiver of recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> *Supra* note 15.

<sup>19</sup> *See R.R., supra* note 8; *T.E.*, Docket No. 19-0348 (issued December 11, 2019).