

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

M.R., Appellant	)	
	)	
and	)	<b>Docket No. 20-0427</b>
	)	<b>Issued: October 30, 2020</b>
DEPARTMENT OF THE ARMY, GUTHRIE	)	
AMBULATORY HEALTH CARE CLINIC,	)	
Fort Drum, NY, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 December 16, 2019 appellant, through counsel, filed a timely appeal from an October 28, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the October 28, 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 \$26,125.80, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period August 1, 2015 through August 17, 2019 without appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$932.18 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On October 7, 2005 appellant, then a 52-year-old clinical nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 20, 2005 she twisted her left knee when she tripped on a floor protector when placing patient charts in folders while in the performance of duty. Her retirement coverage was listed as Federal Employees Retirement System (FERS). OWCP initially accepted the claim for left knee sprain/strain, and later expanded acceptance of the claim to include aggravation of left knee osteoarthritis, derangement of the left medial meniscus, and lower left leg arthropathy. Appellant stopped work on September 23, 2005. OWCP paid appellant wage-loss compensation on the supplemental rolls from November 5 through 26, 2005, and on the periodic rolls from November 27, 2005 until September 30, 2006. Appellant returned to work intermittently, again receiving wage-loss compensation on the periodic rolls from May 13, 2007 to March 10, 2012. She later stopped work again and resumed wage-loss compensation on the periodic rolls as of November 18, 2012.

On November 20, 2018 OWCP sent SSA a FERS/SSA dual benefits calculation form for its completion. On January 3 and August 29, 2019 it received the completed FERS/SSA dual benefits calculation form, wherein SSA calculated SSA benefit rates with a FERS offset and without a FERS offset from August 2015 through December 2018. Beginning August and December 2015, the SSA rate with FERS was \$1,288.20 and without FERS was \$760.20. Beginning December 2016, the SSA rate with FERS was \$1,292.00 and without FERS was \$762.50. Beginning December 2017, the SSA rate with FERS was \$1,317.80 and without FERS was \$777.60. Beginning December 2018, the SSA rate with FERS was \$1,354.70 and without FERS was \$799.40.

By letter dated September 10, 2019, OWCP informed appellant that the portion of SSA age-related retirement benefits attributable to her federal service would be deducted from her 28-day periodic rolls compensation payments beginning August 18, 2019, in the amount of \$512.58.

In a FERS offset calculation form dated September 20, 2019, OWCP used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods, and calculated a total overpayment in the amount of \$26,125.80. It found that during the period August 1 through November 30, 2015 an overpayment had been created in the amount of \$2,123.60; for the period December 1, 2015 through November 30, 2016 an amount of \$6,370.81; for the period December 1, 2016 through November 30, 2017 an amount of \$6,371.46; for the period December 1, 2017 through November 30, 2018 an amount of \$6,500.21; and for the period December 1, 2018 through August 17, 2019 an amount of \$4,759.71.

On September 20, 2019 OWCP issued a preliminary determination that appellant was overpaid compensation in the amount of \$26,125.80 for the period August 1, 2015 through August 17, 2019 because the SSA/FERS offset was not applied to payments for this period. It determined that she was without fault in the creation of the overpayment due to the complexity of benefits administration and could not have reasonably known about the improper payments. OWCP requested that appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method, and advised her that she could request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. It further notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. No response was received.

By decision dated October 28, 2019, OWCP determined that appellant had received an overpayment of compensation in the amount of \$26,125.80 because the SSA/FERS offset had not been applied to payments for the period August 1, 2015 through August 17, 2019. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery, because she had not completed the Form OWCP -20. OWCP required recovery of the overpayment by withholding \$932.18 from appellant's continuing compensation payments every 28 days beginning December 8, 2019.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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 duty.<sup>4</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>5</sup>

Section 10.421(d) of FECA's implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.<sup>6</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>7</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$26,125.80 as she concurrently received SSA age-related

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997).

retirement benefits and FECA wage-loss compensation for the period August 1, 2015 through August 17, 2019 without 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>8</sup> The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to her federal service from August 1, 2015 through August 17, 2019.

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. The SSA provided appellant's SSA rate with FERS and without FERS during the applicable period. OWCP found that, since SSA benefits were paid monthly and FECA benefits were paid every 28 days, the monthly offset had to be adjusted to a 28-day payment cycle amount. This amount differed for each period beginning August 2015. OWCP calculated that the lack of offset from August 1, 2015 through August 17, 2019 resulting in an overpayment total of \$26,125.80. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$26,125.80, thus creating an overpayment of compensation in that amount, for the period August 1, 2015 through August 17, 2019.

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

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."<sup>9</sup> Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>10</sup>

### **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.<sup>11</sup> Appellant,

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<sup>8</sup> *Supra* note 6. See also *N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 20 C.F.R. § 10.438.

<sup>11</sup> *Id.* at § 10.436.

however, had the responsibility to provide the appropriate financial information and documentation to OWCP.<sup>12</sup>

In its preliminary determination dated September 20, 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 reported income and expenses. It advised appellant that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days. Appellant did not timely submit a completed Form OWCP-20 or otherwise submit financial information necessary for OWCP to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, necessary to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>13</sup>

### **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.<sup>14</sup> Section 10.441(a) of the regulations<sup>15</sup> provides:

“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.”<sup>16</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$932.18 from appellant's continuing compensation payments every 28 days.

Appellant did not complete the Form OWCP-20 or otherwise provide the necessary financial information to support her income and expenses prior to the final October 28, 2019 overpayment decision. The overpaid individual is responsible for providing information about

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<sup>12</sup> *Id.* at § 10.438.

<sup>13</sup> *See T.E.*, Docket No. 19-0348 (issued December 11, 2019).

<sup>14</sup> *See C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

<sup>15</sup> 20 C.F.R. § 10.441(a).

<sup>16</sup> *Id.*

income, expenses, and assets as specified by OWCP.<sup>17</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>18</sup> As appellant did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in requiring recovery of the \$26,125.80 overpayment at the rate of \$932.18 every 28 days from appellant's continuing compensation payments.<sup>19</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$26,125.80, for which she was without fault, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period August 1, 2015 through August 17, 2019 without 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 \$932.18 every 28 days from her continuing compensation payments.

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<sup>17</sup> *Supra* note 11.

<sup>18</sup> *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.3 (September 2018).

<sup>19</sup> *See E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 30, 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