



Federal Employees' Compensation Act<sup>4</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>5</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,287.56, for which she was not at fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period August 1, 2008 through April 28, 2018 without appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>6</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 16, 1999 appellant, then a 55-year-old letter carrier, filed a notice of recurrence of disability (Form CA-2a) alleging that on January 15, 1999 she sustained a recurrence of disability when she was casing mail, heard a loud "pop" in her right shoulder, and experienced a sharp pain extending from her shoulder to her back while in the performance of duty.<sup>7</sup> OWCP created a new case file and converted the claim to a new traumatic injury case on February 24, 1999, assigned OWCP File No. xxxxxx601, which is the subject of the current appeal. It accepted the claim for right shoulder strain on April 19, 1999 and paid appellant wage-loss compensation for temporary total disability on the supplemental rolls beginning April 11, 1999 and on the periodic rolls beginning April 24, 1999. Appellant returned to work on September 29, 1999 for four hours per day in a limited-duty capacity and worked as a modified distribution clerk effective April 8, 2000.<sup>8</sup> The record reflects that OWCP paid her compensation for loss of wage-earning capacity (LWEC) on the periodic rolls from June 16, 2002 through November 10, 2018.

In a claim for compensation (Form CA-7) dated May 8, 1999, a human resources specialist noted that appellant was enrolled in the Federal Employees Retirement System (FERS).

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that following the April 8, 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.*

<sup>6</sup> *Order Dismissing Appeal*, Docket No. 13-0347 (issued March 11, 2013).

<sup>7</sup> Appellant's claim for recurrence was based on a traumatic injury claim accepted for cervical strain on January 2, 1998 under OWCP File No. xxxxxx046.

<sup>8</sup> In October 2005, appellant was eligible to receive age-related retirement benefits from the SSA.

By letter dated September 22, 2009, OWCP requested that appellant complete and return an enclosed Form EN1032 reporting the information requested including any benefits received from SSA which were received as part of an annuity under FERS. In the completed form, dated October 8, 2009, appellant noted “private sector work” in response to the question regarding benefits received from SSA as part of an annuity under FERS. In a completed Form EN1032 dated September 8, 2010, she indicated that she did not receive benefits from SSA as part of an annuity for federal service. In a completed Form EN1032 dated October 21, 2010, appellant indicated that she did not receive benefits from the SSA as part of an annuity for federal service, but annotated the answer with a question mark and explained that she had always paid into SSA during her working career. She again indicated no receipt of SSA benefits as part of an annuity for federal service on September 22, 2011, followed by a question mark. Appellant continued to indicate no receipt of SSA benefits as part of an annuity for federal service through September 19, 2013. In a Form EN1032 dated September 19, 2014, she indicated that she did receive benefits from SSA as part of an annuity for federal service, but left the field indicating a monthly amount blank. Appellant continued to indicate receipt of benefits from SSA as part of an annuity for federal service through October 30, 2017.

On May 7, 2018 OWCP received a completed FERS/SSA dual benefits calculation form from SSA, wherein SSA calculated benefit rates with a FERS offset and without a FERS offset from August 2008 through December 2017. Beginning August 2008, the SSA rate with FERS was \$1,512.60 and without FERS was \$1,140.80. Beginning December 2008, December 2009, and December 2010, the SSA rate with FERS was \$1,600.30 and without FERS was \$1,206.90. Beginning December 2011, the SSA rate with FERS was \$1,657.90 and without FERS was \$1,250.30. Beginning December 2012, the SSA rate with FERS was \$1,686.00 and without FERS was \$1,271.50. Beginning December 2013, the SSA rate with FERS was \$1,711.20 and without FERS was \$1,290.50. Beginning December 2014 and December 2015, the SSA rate with FERS was \$1,740.20 and without FERS was \$1,312.40. Beginning December 2016, the SSA rate with FERS was \$1,745.40 and without FERS was \$1,316.30. Beginning December 2017, the SSA rate with FERS was \$1,780.30 and without FERS was \$1,342.60. The SSA representative noted that appellant began receiving SSA age-related retirement benefits in August 2008 and that “disability” compensation benefits terminated in July 2008.

OWCP completed a FERS offset calculation form on May 21, 2018. It found that: from August 1 through November 30, 2008 appellant had received an overpayment of \$1,495.37; from December 1, 2008 through November 30, 2009 an overpayment of \$4,733.77; from December 1, 2009 through November 30, 2010 an overpayment of \$4,733.77; from December 1, 2011 through November 30, 2012 an overpayment of \$4,918.07; from December 1, 2012 through November 30, 2013 an overpayment of \$4,987.66; from December 1, 2013 through November 30, 2014 an overpayment of \$5,062.27; from December 1, 2014 through November 30, 2015 an overpayment of \$5,147.70; from December 1, 2015 through November 30, 2016 an overpayment of \$5,161.81; from December 1, 2016 through November 30, 2017 an overpayment of \$5,163.35; and from December 1, 2017 through April 28, 2018 an overpayment of \$2,150.02. OWCP determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$48,287.56 for the period August 1, 2008 through April 28, 2018, representing 3,558 days of overpayment.

By letter dated May 21, 2018, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-day periodic compensation benefits beginning April 29, 2018.

In a preliminary determination dated August 10, 2018, OWCP related that appellant was overpaid compensation in the amount of \$48,287.56 for the period August 1, 2008 through April 28, 2018 because the SSA/FERS offset was not applied to payments for this period. It determined that she was at fault in the creation of the overpayment because she was aware or should have reasonably been aware that she received a payment of compensation to which she was not entitled. OWCP advised appellant of the actions she could take if she disagreed that the overpayment occurred, the amount of the overpayment, or that she was at fault in the creation of the overpayment. It enclosed an overpayment recovery questionnaire (Form OWCP-20) to determine if recovery of the overpayment could be waived, if she was subsequently found to be without fault, and to determine a reasonable repayment method. OWCP further requested that appellant 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. It advised her that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days, and noted that no further request for waiver would be considered until the requested information was furnished.

On August 15, 2018 appellant requested a prerecoumment hearing by teleconference. She contested that the overpayment occurred.

The prerecoumment hearing was held on January 24, 2019, at which appellant was represented by counsel. The hearing representative explained to counsel that if the fault finding regarding appellant's overpayment was changed to without fault, OWCP would review appellant's financial information upon submission of a Form OWCP-20 for consideration of waiver. By letter dated January 24, 2019, OWCP provided appellant's counsel with a Form OWCP-20.

In a completed Form OWCP-20 dated January 29, 2019, appellant advised that she received \$1,699.00 in monthly SSA benefits. She listed monthly expenses of \$400.00 for food, \$50.00 for clothing, \$20.00 for oil changes, \$56.00 for automobile insurance, \$100.00 for prescriptions, \$50.00 for electricity, \$102.93 for a telephone, \$83.00 for water, and \$40.00 for lawn service. Appellant indicated that she owed a creditor \$10,000.00 and had \$150.00 cash on hand. No documentation of her income or expenses were included. Appellant explained that she was without fault because she had advised OWCP about her receipt of SSA benefits and that she fully understood reporting responsibilities.

By decision dated April 8, 2019, OWCP's hearing representative found that appellant received an overpayment of compensation in the amount of \$48,287.56 for the period August 1, 2008 through April 28, 2018 and modified the preliminary finding of fault, finding appellant without fault as there was no evidence that appellant was aware that the receipt of SSA age-related retirement benefits concurrent with disability/wage-loss compensation benefits was prohibited. He calculated her expenses to be \$881.93 per month based on appellant's undocumented expenses and noted that she did not require substantially all her monthly income to meet her living expenses. The hearing representative determined that the overpayment would be repaid in installments of

\$400.00 per month, which would allow the overpayment to be repaid within a reasonable amount of time while minimizing interest charges and hardship on appellant.

### **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>9</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>10</sup>

Section 10.421(d) of the 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>11</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>12</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$48,287.56 for the period August 1, 2008 through April 28, 2018, for which she was not at fault, as she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits without appropriate offset.

SSA paid appellant age-related retirement benefits beginning August 2008. OWCP paid her compensation for an LWEC until April 28, 2018 without offsetting the portion of SSA age-related retirement benefits due to her federal service. As noted, a claimant cannot receive both FECA compensation for wage loss and the portion of SSA age-related retirement benefits that are attributable to his or her federal service for the same period.<sup>13</sup> Appellant received SSA age-related retirement benefits based on her federal service concurrent with compensation for an LWEC from OWCP without an appropriate offset, and thus an overpayment of compensation was created.<sup>14</sup>

To determine the amount of the overpayment, OWCP calculated the portion of the SSA benefits that were attributable to federal service. It received documentation from SSA providing appellant's SSA rate with FERS and without FERS for the period August 1, 2008 through April 28, 2018. OWCP calculated the amount that should have been offset during the relevant

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<sup>9</sup> 5 U.S.C. § 8102(a).

<sup>10</sup> *Id.* at § 8116.

<sup>11</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>12</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

period based on information provided by SSA. The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2008 through April 28, 2018 and finds that an overpayment of compensation in the amount of \$48,287.56 was created.<sup>15</sup>

### **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>16</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>17</sup>

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.<sup>18</sup> Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense, 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.<sup>19</sup> Therefore for waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.<sup>20</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary

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<sup>15</sup> See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020); *R.B.*, Docket No. 19-0571 (issued June 12, 2020).

<sup>16</sup> 5 U.S.C. § 8129.

<sup>17</sup> 20 C.F.R. § 10.438.

<sup>18</sup> *Id.* at §§ 10.434-10.437.

<sup>19</sup> *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that 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. *Id.* at Chapter 6.400.4a(2).

<sup>20</sup> *Id.*

and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>21</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>22</sup>

While appellant submitted a completed Form OWCP-20 dated January 29, 2019, she failed to furnish any financial documentation to support her income and expenses. OWCP's hearing representative found that, if appellant's accounting of her income and expenses was accepted, absent supporting financial documentation, appellant's listed monthly income of \$1,699.00 exceeded her listed expenses of \$881.9 by more than \$50.00. Appellant therefore did not need substantially all of her monthly income to meet current ordinary and necessary living expenses and she had not established that recovery of the overpayment would defeat the purpose of FECA.<sup>23</sup> There is also no evidence to support that appellant gave up a valuable right or changed her position for the worse, in reliance on her FECA compensation. Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.<sup>24</sup>

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.<sup>25</sup>

On appeal counsel noted that appellant was financially unable to afford the repayment of the debt based on her current income and that she had been hospitalized for a mental condition for an uncertain duration at the time of appeal. With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits.<sup>26</sup> As appellant was not in receipt of continuing wage-loss compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case.<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at § 10.436.

<sup>23</sup> *Id.*

<sup>24</sup> *See R.D.*, Docket No. 19-1598 (issued April 17, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

<sup>25</sup> *Id.*

<sup>26</sup> *L.L.*, Docket No. 19-0097 (issued March 20, 2020); *A.B.*, Docket No. 18-0915 (issued October 24, 2018).

<sup>27</sup> *See id.*; *Miguel A. Muniz*, 54 ECAB 217 (2002); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,287.56, for which she was not at fault, as she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period August 1, 2008 through April 28, 2018 without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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