

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

M.H., Appellant)	
)	
and)	Docket No. 19-1497
)	Issued: September 9, 2020
DEPARTMENT OF THE AIR FORCE, JOINT)	
BASE LACKLAND, San Antonio, TX, Employer)	
)	

Appearances:
Dr. Anthony Rogers, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 10, 2019 appellant, through his representative, filed a timely appeal from a June 3, 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 June 3, 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 \$2,010.09, for which he was not at fault, because he received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits for the period August 1, 2015 through March 30, 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 \$100.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On August 4, 2014 appellant, then a 62-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on July 30, 2014 he injured his back, neck, right shoulder, and legs when he tripped on a rubber mat laying over the curb and fell while in the performance of duty. On the reverse side of the claim form, appellant's supervisor noted appellant's retirement coverage as Federal Employees' Retirement System (FERS). OWCP accepted appellant's claim for neck and lumbar sprains, right shoulder and upper arm sprains, right rotator cuff sprain, and bilateral knee contusions. It paid him intermittent wage-loss compensation on the supplemental rolls, and on the periodic rolls effective September 20, 2015.

On March 15, 2019 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. The form provided appellant's SSA benefit rates with and without FERS offset as follows: beginning in August 2015 his SSA rate with FERS was \$1,870.20 and without FERS \$1,825.10; beginning in December 2016, his rate with FERS was \$1,875.70 and without FERS \$1,830.60; beginning December 2017, his SSA rate with FERS was \$1,913.20 and without FERS \$1,867.10; and beginning in December 2018, his SSA rate with FERS was \$1,966.70 and without FERS \$1,919.40.

OWCP prepared a FERS offset calculation worksheet verifying its calculations. This worksheet showed that: during the period August 1, 2015 to November 30, 2016 appellant received an overpayment in the amount of \$725.56; during the period December 1, 2016 to November 30, 2017 he received an overpayment of \$542.69; during the period December 1, 2017 to November 30, 2018 he received an overpayment of \$554.72; and during the period December 1, 2018 to March 30, 2019 appellant received an overpayment of \$187.12, for a total overpayment of \$2,010.09.

In a letter dated April 18, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA benefit attributable to federal service, his FECA wage-loss compensation had been adjusted.

⁴ Docket No. 17-0499 (issued June 22, 2017); Docket No. 17-0766 (issued July 3, 2017).

On May 2, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$2,010.09 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related benefits that he received for the period August 1, 2015 through March 30, 2019 was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him not at fault in the creation of the overpayment. It explained its calculation of the overpayment, attached its calculation worksheet, and informed appellant of the actions he could take. OWCP provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed, and allotted 30 days for him to respond.

In correspondence dated May 11, 2019, appellant's representative requested waiver. He attached a completed Form OWCP-20, which reported monthly income from SSA of \$1,831.00 and monthly expenses of \$2,385.87 with assets totaling \$165,328.00. Neither an overpayment action request form nor supporting financial documentation were submitted.

By decision dated June 3, 2019, OWCP finalized the May 2, 2019 its determination that appellant had received an overpayment of compensation in the amount of \$2,010.09 for the period August 1, 2015 through March 30, 2019 because a portion of his SSA age-related benefits was based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery. OWCP noted that in addition to monthly income of \$1,831.00 from SSA, appellant received net FECA compensation of \$1,660.94. It calculated his monthly FECA compensation as \$1,799.35. When the SSA and FECA compensation were added together they equaled total monthly compensation of \$3,630.35, and that was \$1,244.48 greater than his claimed monthly expenses of \$2,385.87, demonstrating that he did not need all his monthly income for ordinary and necessary living expenses. OWCP also found that appellant had not met the second prong of the test to demonstrate financial hardship, noting that he listed assets of \$165,328.00 which exceeded the accepted resource base. It concluded that recovery of the overpayment would not defeat the purpose of FECA and would not be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing wage-loss compensation payments.

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 his or her 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 When an overpayment of compensation has been made to an individual because of an error of fact or law, adjustment shall be made under

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁷

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,010.09, as he received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period August 1, 2015 through March 30, 2019 without an appropriate offset

The record indicates that while appellant was receiving compensation for total disability under FECA, he also received SSA age-related retirement benefits. A claimant cannot receive concurrent FECA wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.¹⁰ OWCP therefore properly determined that an overpayment of compensation occurred in this case.

To determine the amount of the overpayment, the portion of the SSA age-related benefits appellant received during the period August 1, 2015 through March 30, 2019 that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to appellant's federal service. SSA provided the SSA rate with FERS and without FERS for specific periods commencing in August 2015 through March 2019. OWCP provided its calculations for each relevant period based on the SSA worksheets. No contrary evidence is of record.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2015 through March 30, 2019 and finds that an overpayment of compensation in the amount of \$2,010.09 has been established.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of 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

⁷ *Id.* at § 8129(a).

⁸ 20 C.F.R. § 10.421(d); *see J.S.*, Docket No. 19-0824 (issued October 4, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹⁰ *Supra* notes 6 and 7.

¹¹ *See M.B.*, Docket No. 18-1101 (issued January 17, 2019).

conscience.¹² 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 on 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.¹³

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.¹⁴

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 current income (including compensation benefits) to meet current ordinary and necessary living expenses 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.¹⁵ For waiver 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.¹⁶ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

OWCP's procedures provide that the 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 and the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings/supplies.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

¹² 5 U.S.C. § 8129.

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.* at §§ 10.434-10.437.

¹⁵ *Id.* at § 10.436.

¹⁶ *Id.*

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018).

¹⁸ *Id.* at Chapter 6.400.4a(2).

¹⁹ *Id.*

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.

As OWCP found appellant without fault in the creation of the overpayment, waiver was required to 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.²²

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his assets exceed the resource base of \$6,200.00, as provided in OWCP procedures.²³ The completed OWCP Form-20 of record documents assets of \$165,328.00. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test, *i.e.*, whether his monthly income exceeded her monthly ordinary and necessary expenses by more than \$50.00.²⁴

Appellant also has not established that recovery of the overpayment would be against equity and good conscience. He has not submitted evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on the overpayment he gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²⁵

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.²⁶

²⁰ 20 C.F.R. § 10.437(a)(b).

²¹ *Id.* at § 10.438(a).

²² 20 C.F.R. § 10.436.

²³ *Supra* note 18.

²⁴ *Id.*

²⁵ 20 C.F.R. § 10.437(a), (b).

²⁶ 20 C.F.R. § 10.441; *see C.B.*, Docket No. 20-0031 (issued July 27, 2020).

Section 10.441 of OWCP's regulations provides in pertinent part: "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."²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$100.00 every 28 days, 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.²⁸ As noted, appellant submitted a Form OWCP-20 on May 16, 2019 showing that he had assets totaling \$165,328.00. Thus, OWCP did not abuse its discretion in setting the rate of recovery.²⁹ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$100.00 every 28 days.

Although appellant's representative generally contends on appeal that the overpayment was in error, there is no evidence of record to support this contention.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,010.09, for which he was not at fault, as he received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period August 1, 2015 through March 30, 2019 without an appropriate offset. The Board further finds that OWCP

²⁷ *Id.*

²⁸ *See R.D.*, Docket No. 19-0159 (issued April 17, 2020).

²⁹ *C.B.*, *supra* note 26.

properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$100.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2020
Washington, DC

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

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

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