

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

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<b>T.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1839</b>
	)	<b>Issued: January 8, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Oakland, CA, Employer</b>	)	
_____	)	

*Appearances:*  
Cary J. Silberman, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On September 3, 2019 appellant, through his representative, filed a timely appeal from a June 19, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</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> The record also contains a May 9, 2019 OWCP decision pertaining to an overpayment of compensation in the amount of \$5,381.16 for the period September 30, 2017 through March 3, 2018 for which appellant was with fault. However, neither appellant nor his representative have appealed from that decision. As such, the May 9, 2019 overpayment decision will not be considered.

Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the modified amount of \$31,585.24, for the period June 13, 2008 through April 2, 2016 for which he was not at fault, as he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an 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>5</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 31, 2008 appellant, then a 71-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2008 he sustained an injury to his right hand while cleaning a moving conveyor belt. He stopped work on January 30, 2008. OWCP accepted the claim for open wound of right hand, injury to right digital nerve, multiple wounds of right arm, and right hand contusion. It paid appellant wage-loss compensation on the supplemental rolls commencing June 13, 2008 and on the periodic rolls as of May 10, 2009.

On September 27, 2012 OWCP granted appellant a schedule award for 16 percent permanent impairment of his right upper extremity. The award ran for the period September 23, 2012 to September 7, 2013, for a total of 49.92 weeks of compensation. On September 8, 2013, after the period of the schedule award ceased, OWCP resumed payment of appellant's wage-loss compensation.

On April 20, 2016 SSA advised that an offset was required as appellant received SSA age-related retirement benefits beginning January 2008. It provided OWCP with his SSA rate with Federal Employees Retirement System (FERS) and SSA rate without FERS from January 2008 onward. OWCP adjusted appellant's ongoing compensation payment to appropriately apply the required FERS offset beginning April 3, 2016.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that following the June 19, 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>5</sup> Docket No. 17-0495 (issued April 19, 2018).

On April 26, 2016 OWCP issued a preliminary determination that a \$57,781.12 overpayment of compensation was created for the period January 1, 2008 to April 2, 2016 as appellant was paid prohibited dual benefits, by having received FECA compensation benefits and SSA age-related retirement benefits without an appropriate offset. It found that he was not at fault in the matter and provided him with a detailed memorandum which showed how the overpayment during the period January 1, 2008 through April 2, 2016 was calculated. OWCP requested that appellant complete the enclosed overpayment action request and overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. It notified him that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On May 2, 2016 appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review on the issue of waiver of recovery of the overpayment. A telephonic hearing was held on August 25, 2016.

By decision dated November 9, 2016, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$57,781.12 for which he was without fault. It denied waiver of recovery of the overpayment as he failed to provide the necessary financial evidence with regard to his assets, income, and expenses to establish that he was unable to repay the debt or that recovery of the debt would be against equity and good conscience. OWCP required that the overpayment would be recovered at the rate of \$600.00 per month from appellant's continuing compensation.<sup>6</sup>

On January 4, 2017 appellant appealed OWCP's November 9, 2016 decision to the Board. By decision dated April 19, 2018, the Board set aside OWCP's November 9, 2016 overpayment decision. The Board found that the \$57,781.12 overpayment was incorrectly calculated because the overpayment period was incorrect. The case was remanded for a *de novo* decision regarding the issues of fact and amount of overpayment, waiver, and recovery.

On January 2, 2018 appellant elected Office of Personnel Management (OPM) retirement benefits in lieu of FECA wage-loss compensation benefits effective September 30, 2017.<sup>7</sup>

On September 7, 2018 OWCP completed a FERS offset calculation for the period June 13, 2008 through April 2, 2016. It determined that the overpayment during this time period totaled \$54,899.41.

In a September 12, 2018 preliminary determination, OWCP notified appellant that he was overpaid benefits in the adjusted amount of \$54,899.41 because he had received prohibited dual benefits without appropriate offset for the period June 13, 2008 through April 2, 2016, for which he was without fault. It explained that as payments had been received towards this overpayment in the amount of \$11,354.90, the adjusted balance was \$43,545.51. OWCP provided copies of the debt history as of September 12, 2018, a FERS/SSA recalculation worksheet dated September 10,

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<sup>6</sup> The monthly recovery rate of \$600.00 was converted into a 28-day payment of \$553.85.

<sup>7</sup> OWCP terminated payment of compensation benefits effective March 4, 2018, based upon appellant's election of OPM benefits effective September 30, 2017, in lieu of FECA benefits.

2018, and copies of appellant's compensation payment history for the period June 13, 2008 through April 2, 2016. It requested that he complete the enclosed Form OWCP-20 and submit supporting financial documentation. OWCP notified appellant that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant, through his representative, requested a prerecoupment hearing. A signed Form OWCP-20 dated October 1, 2018 listed appellant's total monthly income of \$5,400.00 and monthly expenses of \$4,500.00. Available funds totaled \$26,000.00, including \$15,000.00 in a checking account. No supporting financial information was received.

A telephonic hearing was held on April 11, 2019. The representative argued that no legal basis for an offset existed. Appellant testified that he received his monthly SSA age-related retirement benefit, a pension, and an annuity from his Thrift Savings Plan (TSP). He denied other income and indicated that there were no other individuals in his household. Appellant noted that he only had a mortgage and a car payment for debt and paid his credit card in full each month, which included all incidentals including food. He reported a checking account balance of roughly \$10,000.00.

OWCP also received an itemization of appellant's monthly income and expenses. His monthly expenses totaled \$4,636.00. This included a mortgage payment; car payments; various insurance premiums; utilities; internet and cable; fuel for two cars; groceries; and entertainment.<sup>8</sup>

A single bank statement provided showed retirement income of \$981.00, SSA income of \$1,884.00, and a TSP distribution of \$3,150.00, for a total monthly income of \$6,015.00. It also showed monthly expenses including \$1,273.07 for his mortgage payment, \$117.88 for gas and electricity, withdrawals totaling \$700.00, and numerous checks totaling close to \$2,000.00 with no description. An automobile policy declaration establishing a total monthly premium of \$254.42 for two cars, trash disposal bills indicated an approximate monthly rate of \$40.00, water bills indicated approximate monthly rate of \$40.00.

By decision dated June 19, 2019, an OWCP hearing representative finalized OWCP's preliminary overpayment determination, finding that appellant received an overpayment of compensation for the period June 13, 2008 through April 2, 2016.<sup>9</sup> The hearing representative, however, modified the amount of the overpayment as OWCP had failed to account for the SSA age-related retirement benefits appellant had received during the period of a prior schedule award, which was paid for the period September 23, 2012 through September 7, 2013. Thus the schedule award of \$6,960.27, when subtracted from the overpayment amount of \$43,545.51, resulted in a final overpayment amount of \$31,185.24. The hearing representative denied waiver of recovery of the overpayment and set a repayment schedule.

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<sup>8</sup> Monthly expenses for groceries were listed at \$600.00 and entertainment expenses were listed at \$1,200.00.

<sup>9</sup> The Board notes that the period of the overpayment in the decision incorrectly noted that the period of the overpayment ended on April 21, 2016.

## 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>10</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>11</sup> When an overpayment of compensation 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.<sup>12</sup>

Section 10.421(d) of the FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.<sup>13</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement 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>14</sup>

An offset is not required when a retired federal employee is receiving compensation for a schedule award under section 8107.<sup>15</sup> OWCP's regulations provide that retirement benefits paid by the Office of Personnel Management or SSA can be paid concurrently with schedule award compensation under FECA without a deduction from FECA benefits.<sup>16</sup>

## ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the modified amount of \$31,585.24, for the period June 13, 2008 through April 2, 2016 for which he was not at fault, as he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

The record indicates that, while appellant was receiving compensation for disability under FECA, he was also receiving SSA age-related retirement benefits. A FECA beneficiary may not receive wage-loss compensation concurrently with SSA age-related retirement benefits

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<sup>10</sup> 5 U.S.C. § 8102(a).

<sup>11</sup> *Id.* at § 8116.

<sup>12</sup> *Id.* at § 8129(a).

<sup>13</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

<sup>14</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>15</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.6(b) (June 2009). *See L.S.*, Docket No. 08-1270 (issued July 2, 2009); *see also Richard A. Mattson*, Docket No. 06-0264 (issued March 17, 2006); *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

<sup>16</sup> *Supra* note 14; *see also J.M.*, Docket No. 18-1505 (issued June 21, 2019); *K.H.*, Docket No. 18-0171 (issued August 2, 2018); *A.S.*, Docket No. 17-1459 (issued December 22, 2017).

attributable to federal service for the same period.<sup>17</sup> Consequently, the fact of overpayment has been established.

To determine the amount of overpayment, SSA informed OWCP of appellant's SSA rate with FERS and without FERS during the applicable periods. SSA noted that appellant had received age-related retirement benefits from June 13, 2008 through April 2, 2016 in the amount of \$54,585.24. The hearing representative properly found that an additional \$6,960.27 should have been excluded for the period September 23, 2012 to September 7, 2013.<sup>18</sup> The Board finds that subtracting the schedule award amount of \$6,960.27 from the \$54,899.41 overpayment for the period June 13, 2008 through April 2, 2016, results in an overpayment of \$47,939.14.<sup>19</sup> Based on payments made initially from appellant's continuing disability compensation and thereafter on behalf of appellant by OPM, the hearing representative properly calculated that an adjusted overpayment remained unpaid in the modified amount of \$31,185.24.

On appeal counsel challenges the fact and amount of overpayment. As explained above, the Board finds that OWCP properly found that appellant had received a prohibited dual benefit because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation which created an overpayment of compensation.

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

Section 8129(b) of FECA provides: "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 not at fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>20</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>21</sup>

Section 10.438 of OWCP's implementing 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.

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<sup>17</sup> *Supra* note 14; *see also* D.C., Docket No. 19-0118 (issued January 15, 2020); *T.B.*, *supra* note 13; *L.J.*, *supra* note 13.

<sup>18</sup> *See id.*

<sup>19</sup> The hearing representative properly noted that due to payments received the remaining balance of the overpayment was \$31,185.24 and continued to be reduced.

<sup>20</sup> 5 U.S.C. § 8129(b).

<sup>21</sup> 20 C.F.R. § 10.437.

The information is also used to determine the repayment schedule, if necessary.<sup>22</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>23</sup>

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

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

As OWCP found appellant not at 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>24</sup> Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.<sup>25</sup>

OWCP clearly explained the importance of providing the completed overpayment questionnaire and 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 appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. While appellant submitted a completed Form OWCP-20 overpayment recovery questionnaire and supporting financial documentation, the Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses as his monthly income exceeded his ordinary and necessary living expenses by more than \$50.00.<sup>26</sup> Additionally, as appellant did not submit sufficient documentation of his income and expenses as required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.<sup>27</sup>

On appeal appellant asserts that he cannot afford to pay back the overpayment amount. As explained above, OWCP properly denied waiver of recovery of the overpayment.<sup>28</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the modified amount of \$31,585.24, for the period June 13, 2008 through April 2, 2016 for which he was not at fault, as he concurrently received FECA wage-loss

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<sup>22</sup> *Id.* at § 10.438(a); *see T.B., supra* note 13; *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>23</sup> *Id.* at § 10.438.

<sup>24</sup> *Id.* at § 10.436.

<sup>25</sup> *Supra* note 23.

<sup>26</sup> *Supra* note 24. *See also G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>27</sup> *See D.C., supra* note 17; *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

<sup>28</sup> *See* 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

compensation and SSA age-related retirement benefits without an appropriate offset. The Board also finds that OWCP properly denied waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 19, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2021  
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