



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 denied waiver of recovery of an overpayment of wage-loss compensation in the amount of \$48,649.60 for the period January 1, 2012 through February 3, 2018; and (2) whether it properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation payments.

### **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 July 23, 1994 appellant, then a 48-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained stress, anxiety, and depression causally related to factors of her federal employment. She stopped work on June 24, 1994. OWCP accepted appellant's claim for post-traumatic stress disorder (PTSD) and a single episode of moderate-to-severe major depression.<sup>6</sup> It paid her wage-loss compensation for total disability.

By decision dated September 30, 1999, OWCP reduced appellant's wage-loss compensation as her actual earnings as a modified mail handler effective March 1, 1999 fairly and reasonably represented her wage-earning capacity.<sup>7</sup>

The employing establishment subsequently withdrew appellant's modified position under the National Reassessment Program (NRP). On April 18, 2011 OWCP modified the September 30, 1999 decision and paid her wage-loss compensation for total disability on the periodic rolls beginning April 10, 2011.

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

<sup>4</sup> The Board notes that following the February 26, 2020 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. 19-1082 (issued October 29, 2019).

<sup>6</sup> By decision dated November 3, 1994, OWCP denied appellant's claim as she had not established an injury in the performance of duty. By decision dated December 12, 1995, an OWCP hearing representative found that appellant had established compensable employment factors. He vacated the November 3, 1994 decision and remanded the case for development of the medical evidence.

<sup>7</sup> In decisions dated 1999 and 2000, OWCP denied appellant's claim for intermittent wage loss for various periods.

On March 28, 2017 SSA provided OWCP with a FERS/SSA dual benefit calculation worksheet setting forth appellant's SSA rate with FERS and without FERS commencing January 2012. Based on this information, OWCP determined that it should have offset \$48,649.60 from her wage-loss compensation.

In a preliminary overpayment determination dated February 22, 2018, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$48,649.60 because it had failed to reduce her wage-loss compensation benefits for the period January 1, 2012 through February 3, 2018 by the portion of her SSA benefits that were attributable to federal service. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment because she had accepted payments that she knew or reasonably should have known to be incorrect.

On March 12, 2018 appellant requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 14, 2018.

By decision dated November 23, 2018, OWCP's hearing representative found that a \$48,649.60 overpayment of compensation was created as appellant received wage-loss compensation from OWCP from January 1, 2012 through February 3, 2016 without an appropriate offset. She further found that appellant was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment. The hearing representative determined that the overpayment would be recovered by withholding \$450.00 every 28 days from appellant's continuing compensation payments.

Appellant appealed to the Board. By decision dated October 29, 2019, the Board affirmed in part and set aside in part the November 23, 2018 decision.<sup>8</sup> The Board found that appellant had received an overpayment of compensation in the amount of \$48,649.00 from January 1, 2012 through February 3, 2018 because she concurrently received wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. The Board further determined, however, that she was without fault in the creation of the overpayment and remanded the case for OWCP to consider waiver of recovery of the overpayment.

On January 10, 2020 OWCP notified appellant of its preliminary determination that she was without fault in the creation of the overpayment of compensation in the amount of \$48,649.80 that had occurred because it failed to offset her SSA age-related retirement benefits from her wage-loss compensation from January 1, 2012 through February 3 2018. It provided her with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In a Form OWCP-20 dated February 9, 2020, appellant advised that she had monthly income of \$3,031.75 and assets of \$17.56. She listed monthly expenses of \$1,226.44 for a mortgage, \$400.00 for food, \$50.00 for clothing, \$110.89 for electricity, \$57.06 for water and sewer, \$217.86 for telephone, internet and cable, and 61.39 for medical expenses. Appellant also

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<sup>8</sup> *Supra* note 4.

provided monthly expenses on credit card and loan balances totaling \$760.00. She listed expenses of \$247.78 a month for prescriptions, supplements, and eye drops; \$75.00 for tire replacement; \$82.64 for car insurance, \$35.00 for merchandise, and \$66.93 for a cell phone, which yielded total monthly expenses of \$3,390.99.

Appellant submitted documentation supporting the monthly payment amounts for her mortgage, electricity, water, sewer, internet and cable, credit card, and car care expenses. She further submitted a bill indicating that she paid around \$31.26 per month for a newspaper, and documentation showing that she paid \$34.00 for vehicle service.

Regarding medical expenses, appellant provided the amounts that she paid for vitamin supplements and eye drops, which totaled \$73.28 monthly. She provided photographs of the vitamin bottles. Appellant also submitted invoices showing the amounts that she paid every 90 days for prescriptions that she received by mail, which totaled \$154.98 monthly. She submitted a dermatologist bill for \$193.51, a bill from a diagnostic laboratory for \$11.39, and explanation of benefit forms from her health insurance provider dated January and February 2020 showing that she owed providers \$52.98 and \$101.66.

Appellant also listed the things that she needed to have done, but was unable to afford, included providing food and veterinary care for her animals, getting a haircut, seeing an ophthalmologist and dentist, and home repairs. She submitted a veterinary bill for \$3,744.52 that was past due and banking statements for November and December 2019. Appellant also provided a yearly bill for homeowner's insurance that indicated that it was paid by the mortgagee.

By decision dated February 26, 2020, OWCP denied waiver of recovery of the overpayment of compensation. It found that she received \$1,462.62 every 28 days after OWCP's deductions of \$450.00 for the current debt and \$25.00 per month for separate overpayment, which it added to her monthly SSA benefits to find total monthly income of \$3,153.50. OWCP reviewed the financial information submitted and determined that appellant had monthly expenses of \$400.00 for food, \$50.00 for clothing, \$277.00 for electricity, \$395.00 for minimum monthly credit card payments, \$122.00 for water, \$83.00 for car insurance, \$66.00 for a cell phone, \$70.00 in car repairs, \$100.00 in monthly medical expenses, and \$1,226.00 for a mortgage, which totaled \$2,789.00. It disallowed her homeowner's insurance, noting that it should be covered in her mortgage payment and determined that the amount claimed for telephone, cable, and internet was not reasonable. OWCP further determined that appellant's credit card bills likely duplicated her medication copayments, newspaper, clothing, and various other expenses and thus found that these would not be separately considered. It found that her income exceeded her ordinary and necessary living expenses by more than the \$50.00 allotted amount. OWCP found that appellant had \$364.00 in discretionary income, which increased to \$418.67 as the repayment amount every 28 days was \$50.00 less than the amount it was currently deducting. It determined that it would recover the overpayment by deducting \$400.00 from her continuing compensation payments every 28 days.

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

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

without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>9</sup>

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary’s assets do not exceed a specified amount as determined by OWCP.<sup>10</sup> 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.<sup>11</sup> Also, 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.<sup>12</sup> An individual’s liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>13</sup>

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 such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>14</sup>

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.<sup>15</sup>

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<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> 20 C.F.R. § 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>11</sup> *Id.* at Chapter 6.400.4(a)(3); *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

<sup>12</sup> *Supra* note 10 at Chapter 6.400.4(a)(2) (September 2018).

<sup>13</sup> *Id.* at Chapter 6.400.4(b)(3).

<sup>14</sup> 20 C.F.R. § 10.437(a)(b).

<sup>15</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

## ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether OWCP properly denied waiver of recovery of an overpayment of wage-loss compensation in the amount of \$48,649.60 for the period January 1, 2012 through February 3, 2018.

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>

In a Form OWCP-20 dated February 9, 2020, appellant listed monthly income of \$3,031.75 and monthly expenses of \$3,390.95. OWCP found that it paid her \$1,462.62 every 28 days, or \$1,584.50 monthly in compensation, which when added to her SSA income of \$1,569.00 yielded monthly income of \$3,153.50. It further noted that appellant had listed assets of \$17.56, which is below the statutorily allowed resource base.<sup>17</sup>

OWCP determined that appellant owed minimum monthly payments on credit cards of \$395.00 and had monthly expenses of \$400.00 for food, \$50.00 for clothing, \$277.00 for electricity, \$122.00 for water, \$83.00 for car insurance, \$66.00 for a cell phone, \$70.00 for car repairs, \$100.00 for medication expenses, and \$1,226.00 for a mortgage, for total monthly expenses of \$2,789.00. It found that the amount that appellant paid for a telephone, cable, and internet was not reasonable.<sup>18</sup> OWCP determined that expenses for items such as some clothing, medication, newspapers, and miscellaneous other items were likely included in her credit card expenses. It concluded that appellant's monthly income exceeded her monthly expenses by \$364.00. OWCP, however, failed to explain exactly what expenses it had disallowed or how it calculated the amount of the minimum monthly payments that appellant owed for credit cards and loans. Appellant submitted documentation supporting that she owed minimum monthly payments for a total minimum monthly payments of \$679.23. She further submitted documentation supporting that she incurred prescription drug expenses of \$154.98 a month. OWCP, however, failed to specifically evaluate these expenses and explain what it was not allowing. Given these discrepancies, it is unclear whether appellant needs substantially all of her current income to meet ordinary and necessary living expenses.<sup>19</sup>

For the above reasons, the case is not in posture regarding whether OWCP properly denied waiver of recovery of the \$48,649.60 overpayment of compensation.<sup>20</sup> The case will be remanded for OWCP to obtain updated financial information and properly determine whether appellant is

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<sup>16</sup> See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.S.*, 59 ECAB 350 (2008).

<sup>17</sup> *Supra* note 12.

<sup>18</sup> The Board notes that, since the issuance of OWCP's February 26, 2020 decision, OWCP's procedures have been revised to include basic cable and internet service as ordinary and necessary living expenses. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(b)(2)(a) (September 2020).

<sup>19</sup> See *S.D.*, Docket No. 19-0618 (issued October 29, 2019).

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

entitled to waiver of recovery of the overpayment. Following this and any further development deemed necessary, it shall issue a *de novo* decision.<sup>21</sup>

**CONCLUSION**

The Board finds that the case is not in posture for decision regarding OWCP's properly denied waiver of recovery of an overpayment of wage-loss compensation in the amount of \$48,649.60 for the period January 1, 2012 through February 3, 2018.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 26, 2021  
Washington, DC

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

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

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

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<sup>21</sup> In light of the Board's disposition regarding the denial of waiver, the issue of recovery of the overpayment is moot.