

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

V.B., Appellant	)	
	)	
and	)	Docket No. 20-0977
	)	Issued: January 26, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Sunrise, FL, Employer	)	
	)	

*Appearances:*  
Joanne Wright, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 2, 2020 appellant, through her representative, filed a timely appeal from a January 17, 2020 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 February 26, 2020 OWCP decision finding that appellant received an overpayment of wage-loss compensation in the amount of \$48,649.60 and denying waiver of recovery of the overpayment. She has filed a separate appeal from this decision, which will be considered under Docket No. 20-0976.

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 appellant received an overpayment of wage-loss compensation in the amount of \$11,747.43 from February 4, 2018 through June 22, 2019 for which she was without fault because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits 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 \$25.00 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> OWCP 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 January 17, 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 compensation employment factors. He vacated the November 3, 1994 decision and remanded the case for development of the medical evidence.

<sup>7</sup> By decisions dated 1999 and 2000, OWCP denied appellant's claims for intermittent wage-loss compensation for various periods.

On March 28, 2017 SSA provided OWCP with a Federal Employees Retirement System (FERS)/SSA dual benefit calculation form. The form set forth appellant's SSA benefit rates with and without FERS for the period January 2012 to January 2016.

By decision dated November 23, 2018, OWCP's hearing representative found that appellant had received a \$48,649.60 overpayment of compensation as she received wage-loss compensation from OWCP from January 1, 2012 through February 3, 2018 without an appropriate offset. She further found that she was at fault in the creation of the overpayment and, thus, 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.

On April 17, 2019 appellant appealed the November 23, 2018 overpayment decision to the Board.

On June 6, 2019 SSA provided OWCP with a FERS/SSA dual benefit calculation form. The form indicated that, with FERS, appellant was entitled to a monthly payment of \$1,503.20, effective December 2017 and \$1,545.20 effective December 2018. Without her federal service contributions, she was entitled to a monthly payment rate of \$815.00 effective December 2017 and \$837.80 effective December 2018.

OWCP completed a FERS offset calculation form on July 11, 2019. It calculated the amount that it should have offset from appellant's wage-loss compensation from February 3, 2018 through June 22, 2019. OWCP found that, effective December 1, 2017, the monthly offset was \$687.90 (\$1,503.20-\$815.300), or \$634.98 every 28 days and effective December 1, 2018, the monthly offset was \$707.40 (\$1,545.20-\$837.80), or \$652.98 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from February 3, 2018 through June 22, 2019 to find the amount that it had overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset \$11,583.65 from her wage-loss compensation.

In a preliminary overpayment determination dated July 11, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$11,770.11 because it had failed to reduce her wage-loss compensation benefits for the period February 4, 2018 through June 22, 2019 by the portion of her SSA benefits that were attributable to federal service. It included the calculations from its July 11, 2019 calculation form showing an overpayment of compensation in the amount of \$11,583.65. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment of compensation. 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.

On July 29, 2019 appellant requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She noted that her disability benefits from SSA had stopped when she had turned 65 and that she had consistently reported her income from SSA to OWCP. In a Form OWCP-20, appellant advised that she had monthly income of

\$3,052.56 and assets of \$564.18. She listed monthly expenses of \$1,226.44 for mortgage, \$400.00 for food, \$25.00 for clothing, \$493.99 for utilities, and \$533.83 for other expenses. Appellant advised that she had monthly credit card expenses totaling \$522.00. She also listed expenses of \$387.00 monthly for pet care. Appellant submitted supporting financial documentation.

By decision dated October 29, 2019, the Board affirmed, in part and set aside in part, the November 23, 2018 overpayment decision.<sup>8</sup> It 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 found, however, that appellant was without fault in the creation of the overpayment and remanded the case for OWCP to consider waiver of recovery of the overpayment.

On November 4, 2019 appellant submitted a note indicating that she owed a private individual \$850.00 and statements showing that she owed minimum monthly payments totaling \$58.00. She also submitted documentation showing that she paid \$16.00 for a yearly membership renewal and had received two checks for \$300.00 and \$500.00 from an individual, L.B. L.B. submitted a statement confirming that she had loaned appellant \$800.00.

A telephonic hearing was held on November 5, 2019. Appellant related that she paid about \$550.00 a month for utilities and had more than \$533.83 a month in miscellaneous expenses. She asserted that she paid \$50.00 to \$60.00 a month for vitamins.

On December 2, 2019 appellant's representative advised that her SSA benefits were being reduced by \$144.60 a month and that she had a line of credit for car repairs of \$1,461.54. She had also borrowed \$50.00 to pay for an exhaust repair and had delayed dental work, an eye examination, and glasses due to a lack of money.

By decision dated January 17, 2020, OWCP's hearing representative modified the July 11, 2019 preliminary determination of overpayment to find that appellant had received an \$11,747.43 overpayment of compensation for the period February 4, 2018 through June 22, 2019 because she received wage-loss compensation for OWCP and age-related retirement benefits from SSA without an appropriate offset. He noted that OWCP had previously determined that she received an overpayment of wage-loss compensation from January 1, 2012 through February 3, 2018 and, thus, modified the period of the overpayment to begin February 4, 2018 and reduced the amount of the overpayment from \$11,770.11 to \$11,747.43. OWCP's hearing representative determined that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as her income exceeded her ordinary and necessary living expenses by more than the allowed amount. He found that she received \$1,497.11 every 28 days, or \$1,621.87 a month from OWCP and \$1,545.00 from SSA, for total monthly income of \$3,166.87. The hearing representative determined that appellant had documented expenses of \$2,861.43 per month.<sup>9</sup> He

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

<sup>9</sup> OWCP's hearing representative determined that appellant had substantiated that she paid \$1,226.44 for a mortgage, \$400.00 for food, \$533.85 for utilities, and a total of \$2,861.43 for credit card debt. The hearing representative added \$50.00 for gasoline and vehicle maintenance and then subtracted these expenses from \$3,166.87 to find discretionary income of \$255.44.

added \$50.00 per month for gasoline and vehicle maintenance, which left discretionary income of \$255.44 per month. The hearing representative determined that the bills for appellant's newspaper, veterinary expenses, and membership failed to constitute ordinary and necessary living expenses and further indicated that she had not submitted documentation of all financial expenses. He found that the overpayment would be recovered by deducting \$25.00 every 28 days from appellant's continuing 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.<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>

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 retirement benefits that are attributable to the employee's federal service.<sup>12</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>13</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period February 4, 2018 through June 22, 2019 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits,

OWCP paid appellant wage-loss compensation for total disability following her injury. It subsequently paid her wage-loss compensation for partial disability based on her loss of wage-earning capacity, effective March 1, 1999, and again for total disability beginning April 10, 2011. Beginning January 1, 2012, appellant received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>14</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. As OWCP neglected to offset her FECA benefits for the period February 4, 2018

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<sup>10</sup> 5 U.S.C. § 8102

<sup>11</sup> *Id.* at § 8116.

<sup>12</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>13</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>14</sup> *Supra* note 12; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

through June 22, 2019, she received an overpayment of wage-loss compensation.<sup>15</sup> Therefore, fact of overpayment is established.<sup>16</sup>

The Board further finds, however, that the case is not in posture for decision regarding the amount of the overpayment.

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA benefits that were attributable to appellant's federal service. SSA provided appellant's SSA benefit rates with FERS and without FERS beginning January 1, 2012. After calculating the amount that it should have offset for each relevant period based on the SSA worksheet and adding these amounts together, OWCP concluded that she had received an overpayment of compensation in the amount of \$11,583.54. It then found, however, without explanation, that the amount of the overpayment was \$11,770.11. OWCP's hearing representative modified the preliminary overpayment determination after finding that it should have begun on February 4, 2018 rather than February 3, 2018. He subtracted the daily offset amount for one day to find an overpayment of compensation in the amount of \$11,747.43 rather than \$11,770.11. The hearing representative did not, however, address the issue of why OWCP had found the initial amount of the overpayment of compensation to be \$11,770.11 rather than \$11,583.54. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>17</sup> The Board will, therefore, remand the case for OWCP to explain its calculation of the amount of the overpayment.

On remand OWCP shall determine the exact amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information.<sup>18</sup> After this and other such further development as deemed necessary, it shall issue a *de novo* decision.<sup>19</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of wage-loss compensation from February 4, 2018 through June 22, 2019 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board further finds, however, that the case is not in posture for decision regarding the amount of the overpayment.

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<sup>15</sup> *Id.*

<sup>16</sup> *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

<sup>17</sup> *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *O.R.*, 59 ECAB 432 (2008).

<sup>18</sup> *See L.K.*, Docket No. 29-0416 (issued November 12, 2020).

<sup>19</sup> In light of the Board's disposition regarding the period and amount of the overpayment, the issues of waiver and recovery of the overpayment are moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.<sup>20</sup>

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>20</sup> In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.