

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

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J.R., Appellant)	
)	
and)	Docket No. 20-1094
)	Issued: January 5, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Little Rock, AR, Employer)	
)	

Appearances:
Appellant, pro se
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 April 29, 2020 appellant filed a timely appeal from a March 23, 2020 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,720.41, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the issuance of the March 23, 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.*

FECA wage-loss compensation, for the period September 1, 2015 through July 20, 2019, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board.³ 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 March 26, 1993 appellant, then a 43-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 1993⁴ he sustained whiplash and a lower back injury when he was rear-ended by a truck delivering mail while in the performance of duty. He stopped work on March 10, 1993. OWCP accepted appellant's claim for cervical sprain/strain and cervicgia. It paid wage-loss compensation effective June 12, 1993.

Effective August 16, 2013 appellant retired from the employing establishment due to disability.

In a Form EN1032 dated September 21, 2015, appellant responded "Yes" indicating that he had received retirement benefits from SSA as part of an annuity for federal service in a monthly amount of \$1,422.00. He noted that his SSA was reduced due to FECA benefits. Appellant continued to complete EN1032 forms dated October 3, 2016; September 27, 2017; and September 12, 2018. He responded "Yes" indicating that he received retirement benefits from SSA as part of an annuity for federal service.

In a February 25, 2019 letter, E.S., an injury compensation specialist for the employing establishment, informed OWCP that appellant was in the Federal Employees Retirement System (FERS) retirement system and was entitled to receive SSA retirement benefits. She requested that OWCP contact SSA in order to determine whether appellant's benefits qualified for the FERS offset and subsequent reduction of wage-loss compensation benefits.

On February 26, 2019 OWCP requested that SSA provide a dual benefits calculation.

In a form dated June 1, 2019, SSA provided OWCP with a FERS/SSA dual benefit calculation worksheet. The form indicated that beginning September 1, 2015, appellant's SSA rate with FERS was \$1,516.90 and without FERS was \$1,228.50; that beginning December 1, 2015, his SSA rate with FERS was \$1,517.80 and without FERS was \$1,228.50; that beginning December 1, 2016, appellant's SSA rate with FERS was \$1,522.00 and without FERS was \$1,232.10; that beginning December 1, 2017, his SSA rate with FERS was \$1,552.00 and without

³ Docket No. 05-0326 (issued May 20, 2005).

⁴ The Form CA-1 noted the date of injury of March 9, 1992, which appears to be a typographical error.

FERS was \$1,256.70; that beginning December 1, 2018, appellant's SSA rate with FERS was \$1,595.50 and without FERS was \$1,291.80.

Effective July 21, 2019, OWCP adjusted appellant's entitlement amount and paid him at an adjusted amount of \$1,589.40 to include the offset of his SSA age-related retirement benefits attributable to his federal service.

OWCP completed a FERS offset calculation worksheet on July 22, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period September 1, 2015 through July 20, 2019 for a total overpayment amount of \$13,720.41.

In a preliminary overpayment determination dated August 5, 2019, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$13,720.41 because it had failed to reduce his wage-loss compensation benefits for the period September 1, 2015 through July 20, 2019 by the portion of his SSA benefits that were attributable to federal service. It further advised him of its preliminary determination that he was not at fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP provided appellant an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified him that within 30 days of the date of the letter he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing.

On August 21, 2019 appellant requested a telephonic prerecoument hearing with OWCP's Branch of Hearings and Review. He requested waiver of the overpayment because he was found to be without fault in its creation and questioned how he could explain something that he did not have anything to do with.

In a completed Form OWCP-20 dated August 21, 2019, appellant indicated that his monthly income included \$1,589.40 in income, \$2,167.00 in SSA benefits, and \$479.83 in "other" benefits, for a total of \$4,236.23 in monthly income. He advised that his monthly expenses included \$1,369.06 for housing, \$1,125.00 for food, \$50.00 for clothing, \$815.46 for utilities, and \$806.00 for other expenses. Appellant listed debts being paid by monthly installments in the amounts of \$100.00, \$100.00, \$100.00, and \$63.00 for credit cards and existing lines of credit. He indicated that he had assets of \$23.00 in cash on hand, \$2,400.00 in his checking account, \$600.00 in his savings account, and \$7,000.00 for the value of his truck, car, and tractor.

In an August 27, 2019 letter, appellant explained that the deduction of income meant it would take more to live than what he made. He reported that his family had significantly depleted their savings over the years in order to live and had sold almost everything they had.

Appellant submitted a monthly mortgage statement for \$1,369.06, three checks made payable to a creditor in the amounts of \$88.09, \$188.67, and \$192.08; receipts for purchases in the amounts of \$148.09, \$180.12, and \$184.65; grocery receipts in the amount of \$73.16, \$33.60, \$235.74; an energy bill for \$132.19; a telephone and internet bill for \$91.75; a sewage and waste bill of \$87.01; a car insurance bill for \$151.11; and medical bills totaling \$35.96. He also provided bank statements, which showed that he paid \$150.00 for cellular service and an income tax

statement for 2017. Credit card statements demonstrated that he owed monthly minimum payments of \$118.00, \$28.00, \$51.38, and \$63.00 for various bank credit cards.

Appellant also submitted handwritten notes indicating that he paid \$300.00 a month for electricity, \$50.00 a month for propane, \$140.00 for recreation, \$50.00 for medicine, \$125.00 for miscellaneous household supplies, and \$491.00 in automotive expenses.

On January 7, 2020 a telephonic prerecoupment hearing was held. Appellant's wife testified that the monthly income of \$1,589.40 was appellant's wage-loss compensation, the \$2,167.00 was the combined amount for her and appellant's social security benefits, and the \$479.00 was appellant's VA benefits. The hearing representative also discussed appellant's monthly expenses and credit statements.

Appellant subsequently submitted a handwritten statement. He alleged that cutting into their monthly income would cause undue stress to him and his family. Appellant reported that their "other" monthly expenses included \$140.00 for recreation, \$270.00 for gas, \$35.00 for tires, \$10.00 for oil, and \$25.00 for repairs. He explained that they had to budget expenses for tires, oil, and car repairs so that they would have money when needed. Appellant also indicated that their monthly food bill was \$1,125.00. He related that he had a large family and hosted family day on Sundays. Appellant also submitted a bill for \$136.70 for satellite television.

By decision dated March 23, 2020, an OWCP hearing representative finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$13,720.41 because it had failed to reduce his wage-loss compensation benefits for the period September 1, 2015 through July 20, 2019 by the portion of his SSA benefits that were attributable to federal service. The hearing representative further found that he was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because his monthly income exceeded his monthly living expenses by more than \$50.00, and thus recovery of the overpayment would not be against equity and good conscience. OWCP's hearing representative further determined that the overpayment would be recovered by withholding \$300.00 every 28 days from appellant's continuing compensation benefits, as it would afford appellant a recoupment period similar in length to the period of the overpayment.

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

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

attributable to the employee's federal service.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,720.41, because he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period September 1, 2015 through July 20, 2019 without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-retirement benefits that were attributable to federal service during the period September 1, 2015 through July 20, 2019. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from September 1, 2015 through July 20, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period September 1, 2015 through July 20, 2019 and finds that an overpayment of compensation in the amount of \$13,720.41 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹²

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Supra* note 7.

¹¹ *See E.L.*, Docket No. 20-0723 (issued October 15, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019).

¹² 5 U.S.C. § 8129(a) - (b).

Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹³

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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, 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.¹⁴ 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 \$50.00.¹⁵

Section 10.437 of OWCP's implementing regulations provides that 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 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.¹⁶ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁷

ANALYSIS -- ISSUE 2

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

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.¹⁸ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

¹³ *L.S.*, 59 ECAB 350 (2008).

¹⁴ 20 C.F.R. § 10.436. 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(1) & (2) (September 2018).

¹⁵ Federal (FECA) Procedure Manual at Chapter 6.400.4(a)(3) (September 2018).

¹⁶ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁷ *Supra* note 15 at Chapter 6.400.4(c)(3) (September 2018).

¹⁸ *Supra* note 13.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the documents of record, he had total current monthly income of \$4,250.86, which included \$1,604.03 in wage-loss compensation benefits, \$479.83 in VA benefits, and \$2,167.00 for his and his wife's social security benefits. Although appellant had listed \$1,589.40 on his completed Form OWCP-20, a review of appellant's wage-loss compensation history showed that he was receiving \$1,604.03 in wage-loss compensation benefits. Appellant also reported monthly expenses of \$1,369.06 for housing, \$1,125.00 for food, \$50.00 for clothing, \$815.46 for utilities, and \$806.00 for other expenses. He noted monthly payments on various bank credit cards of \$100.00, \$100.00, \$100.00, and \$63.00. OWCP's hearing representative, however, reduced appellant's monthly food expenses to \$650.00 based on information from the Bureau of Labor and Statistics. The hearing representative also determined that statements and financial documentation confirmed \$812.46 for utilities, \$50.00 for medication, \$151.00 for car insurance, \$270.00 for gas, and \$125.00 in household and personal hygiene supplies. OWCP's hearing representative noted that credit card statements showed minimum credit payments of \$118.00, \$28.00, \$51.38, and \$63.00.¹⁹ Thus, the amount of appellant's new household monthly expenses totaled \$3,727.90, which left \$512.96 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.²⁰

The Board also finds that OWCP properly determined that recovery of the overpayment would not be against equity and good conscience. Appellant has not submitted evidence to establish that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²¹ On appeal he argues that repaying the overpayment would put burden and stress on himself and his wife. As explained above, however, the evidence of record demonstrates that appellant would not face financial hardship as his monthly income exceeds his ordinary and necessary living expenses by over \$50.00.²²

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 of the overpayment.

¹⁹ The Board notes that OWCP's hearing representative incorrectly noted a minimum monthly payment of \$53.00 for one of his bank credit cards.

²⁰ See *R.F.*, Docket No. 20-0159 (issued October 15, 2020); *M.C.*, Docket No. 19-0699 (issued February 12, 2020).

²¹ *Supra* note 17.

²² *R.B.*, Docket No. 19-0571 (issued June 12, 2020); see also *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of OWCP's regulations²³ 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 soon as the error is discovered or his or her attention is called to 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.”²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation.

In the March 23, 2020 decision, OWCP's hearing representative took into consideration the financial information appellant submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship as the period of the repayment would be similar in length to the period in which the overpayment had been created. The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments by deducting \$300.00 every 28 days.²⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$13,720.41, for which he was without fault, because he concurrently received FECA benefits and SSA age-related retirement benefits, for the period September 1, 2015 through July 20, 2019, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$300.00 every 28 days from his continuing compensation payments.

²³ 20 C.F.R. § 10.441(a).

²⁴ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁵ See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2021
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