

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

J.R., Appellant

and

**DEPARTMENT OF THE ARMY, WALTER
REED ARMY MEDICAL CENTER,
Washington, DC, Employer**

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Docket No. 20-1215
Issued: June 17, 2021

Appearances:

C. Justin Davis-Evans, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 12, 2020 appellant, through her representative, filed a timely appeal from a January 15, 2020 merit decision and a March 16, 2020 nonmerit 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 March 16, 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,567.09, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period May 1, 2018 through September 14, 2019, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$190.00 from appellant's continuing compensation payments every 28 days; and (4) whether OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 16, 1992 appellant, then a 39-year-old lead medical data technician, filed a traumatic injury claim (Form CA-1) alleging that on December 27, 1991 she struck her left knee on the adjustable knob on her desk. OWCP accepted the claim for a left knee contusion and left knee chondromalacia patellae. Appellant stopped work on December 30, 1991. OWCP paid her appropriate wage-loss compensation on the daily and short-term rolls. Appellant resigned from the employing establishment on February 6, 1992. A leave and earnings statement reflected that her retirement system coverage was Federal Employees Retirement System (FERS).

By decision dated January 9, 1995, the Board reversed an April 28, 1993 OWCP decision, which terminated appellant's wage-loss compensation benefits effective April 4, 1993.⁵ Accordingly, OWCP paid her on its periodic compensation rolls for disability until she returned to work on a part-time basis in a light-duty office position with a local hospital on June 21, 2000. It thereafter adjusted appellant's compensation for partial disability based on her actual earnings.⁶

On July 6, 2019 SSA indicated that appellant had received disability benefits for the period October 2009 through April 2018. A FERS/SSA dual benefits calculation worksheet related her SSA benefit rates with a FERS offset and without a FERS offset from May through December 2018: beginning May 2018, the SSA rate with FERS was \$769.10 and without FERS was \$675.90; and beginning December 2018, the SSA rate with FERS was \$790.60 and without FERS was \$694.80.

In an August 27, 2019 letter, the employing establishment noted that appellant was a FERS employee who had reached retirement age. It requested that, since she was a FERS employee, her compensation payments should be offset by any part of her SSA benefit that was based on her federal employment earnings.

⁴ Docket No. 93-1906 (issued January 9, 1995).

⁵ *Id.*

⁶ The Board notes that appellant's loss of wage-earning capacity determination is not of record.

On September 16, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from May 1, 2018 through September 14, 2019. The total overpayment was determined to be \$1,567.09. OWCP found that appellant received an overpayment of compensation in the amount of \$657.52 for the period May 1 through November 30, 2018 and \$909.57 for the period December 1, 2018 through September 14, 2019.

On November 22, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$1,567.09 had been created. It explained that the overpayment occurred because appellant's SSA age-related retirement benefits that she received from May 1, 2018 through September 14, 2019 were partially based on credits earned while working for the Federal Government, and that this portion of her SSA benefit constituted a prohibited dual benefit. OWCP found her not at fault in the creation of the overpayment and forwarded 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 to support her reported income and expenses. Additionally, OWCP notified her 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 December 5, 2019 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. She indicated that she was requesting waiver of recovery of the overpayment because she was found to be without fault in the creation of the overpayment and she did not know that she had been overpaid. Appellant also disagreed with the fact and amount of the overpayment.

In a Form OWCP-20 completed on December 13, 2019 appellant reported a total monthly income for her household of \$2,194.00. This included a monthly income of \$1,404.00, SSA benefits of \$790.60 before Medicare insurance was deducted and \$609.00 after, and rental assistance income of \$200.00. Appellant reported total monthly expenses of \$2,444.44. This included \$967.00 for rent, \$150.00 for food, \$184.02 for utilities, \$309.50 for dental, \$86.40 for medicine, \$175.00 for tires, \$199.52 for car repairs, \$150.00 for computer expenses, \$173.00 for credit card debt, and \$50.00 for the endodontist. Appellant also noted assets in the amount of \$1,373.70. She provided some documentation of her expenses. Appellant indicated that she continued to have difficulty understanding the overpayment.

By decision dated January 15, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$1,567.09 for the period May 1, 2018 through September 14, 2019 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment finding that her monthly household income of \$3,225.75 exceeded her monthly household ordinary and necessary expenses of \$1,857.92 by more than the \$50.00 statutory threshold for considering a waiver. OWCP explained that appellant did not list her monthly FECA income. It explained that her 28-day compensation payment was \$952.38, converted to a monthly benefit resulted in a monthly FECA benefit of \$1,031.75. OWCP added the \$1,031.75 to appellant's other income of \$2,194.00 to find a total monthly income of \$3,225.75. It required recovery of the overpayment by deducting \$190.00 from her continuing compensation payments every 28 days.

By overpayment action request form dated February 22, 2020, received on March 2, 2020 appellant requested a prercoupmnt hearing before a representative of OWCP's Branch of Hearings and Review. She noted that she had limited income and that repayment of the overpayment would cause a severe financial hardship. Appellant reiterated that her monthly income was only \$2,194.00. She denied having a FECA income of \$1,031.75 per month and indicated that OWCP should provide evidence of such.

On March 11, 2020 OWCP received appellant's signed overpayment action request form dated February 20, 2020 requesting a prercoupmnt hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 16, 2020, OWCP denied appellant's request for a prercoupmnt hearing, finding that a final decision concerning an overpayment was not subject to the hearing provisions of 5 U.S.C. § 8124(b).⁷ It explained that she did not submit a request for a prercoupmnt hearing following the preliminary overpayment determination and that it issued the final overpayment determination on January 15, 2020.

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 a personal injury sustained while in the performance of his or her federal employment.⁸ 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.⁹

Section 10.421(d) of the 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,567.09, for which she was without fault, because she concurrently received FECA wage-loss

⁷ In a July 29, 2020 letter, OWCP advised appellant that she had been receiving SSA benefits on account of age since May 1, 2018 and that the SSA confirmed that a portion of her benefits were attributed to federal service and required an offset of her FECA compensation benefits. It indicated that, as of September 15, 2019, her new net compensation payment was \$953.79 and that her gross compensation benefit every 28 days was \$1,404.00. OWCP also noted that appellant's current balance on her overpayment was \$243.82.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8116.

¹⁰ 20 C.F.R. § 10.421(d); *see M.A.*, Docket No. 20-0120 (issued January 8, 2021); *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

¹¹ FECA Bulletin No. 97-09 (February 3, 1997).

compensation and SSA age-related retirement benefits for the period May 1, 2018 through September 14, 2019 without an appropriate offset.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her 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.¹² The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period May 1, 2018 through September 14, 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 May 1, 2018 through September 14, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$1,567.09. While appellant disputed that the overpayment occurred and the amount of the overpayment, no contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits received by the employee for the period May 1, 2018 through September 14, 2019 and finds that an overpayment of compensation in the amount of \$1,567.09 was created.

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.¹³ 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.¹⁴

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.¹⁵ An individual is deemed to need

¹² *Supra* note 9.

¹³ 5 U.S.C. § 8129(a)-(b).

¹⁴ *Id.*; *L.S.*, 59 ECAB 350 (2008).

¹⁵ 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 (3) (September 2018).

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 \$50.00.¹⁶

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.¹⁷ 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.¹⁸

OWCP 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.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision regarding waiver of recovery of the overpayment.

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.²⁰

In her December 13, 2019 Form OWCP-20, appellant reported that she received a monthly income of \$1,404.00, SSA benefits of \$790.60 before Medicare insurance was deducted and \$609.00 after, and rental assistance income of \$200.00. OWCP found, however, that she did not include her monthly FECA income, which it calculated as \$1,031.75 based on her 28-day payment of \$952.38. It therefore added the \$1,031.75 to appellant's monthly income of \$2,194.00 to find a total monthly income of \$3,225.75.

While appellant did not identify the source of the listed \$1,404.00 monthly income, OWCP's records reflect that as of September 15, 2019, \$1,404.00 was the gross amount of her 28-day compensation payment. It is also the exact gross amount of monthly FECA compensation she was in receipt of at the time of her December 13, 2019 filing of the Form OWCP-20.²¹ OWCP

¹⁶ *Id.* at Chapter 6.400.4(a)(3) (September 2018).

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

¹⁸ *Id.* at § 10.437(b)(1); *supra* note 15 at Chapter 6.400.4b(3)(a), (b).

¹⁹ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²⁰ 5 U.S.C. § 8129(b); *R.L.*, Docket No. 20-0186 (issued September 14, 2020).

²¹ The 28-day net amount of compensation is also consistent with OWCP's figure of \$952.38.

therefore incorrectly calculated appellant's income when it added the \$1,031.75 to her monthly income of \$2,194.00 to find a total monthly income of \$3,225.75.

Accordingly, the Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period May 1, 2018 through September 14, 2019. The case must be remanded to OWCP for issuance of a *de novo* decision on the issue of waiver of recovery of the overpayment.²²

LEGAL PRECEDENT -- ISSUE 4

OWCP's regulations provide that a claimant may request a prercoupmnt hearing with respect to an overpayment.²³ The date of the request is determined by the postmark or other carrier's date marking.²⁴ Failure to request the prercoupmnt hearing within 30 days constitutes a waiver of the right to a hearing.²⁵ The only right to a review of a final overpayment decision is with the Board.²⁶ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.²⁷

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly denied appellant's request for a prercoupmnt hearing as untimely filed.

OWCP issued a preliminary overpayment determination on November 22, 2019. It advised appellant that she had 30 days from that date to request a prercoupmnt hearing. The record indicates that OWCP properly mailed its preliminary overpayment determination to her last known address of record. On December 5, 2019 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. Following a review of the written evidence, by decision dated January 15, 2020, OWCP finalized its preliminary overpayment determination.

By request dated February 22, 2020, received March 2, 2020, appellant requested a prercoupmnt hearing before a representative of OWCP's Branch of Hearings and Review. As noted, the hearing provisions of section 8124(b) are not applicable to final overpayment decisions. OWCP's regulations provide that, when a final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a

²² In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

²³ 20 C.F.R. § 10.432; *see S.O.*, Docket No. 20-0753 (issued October 28, 2020); *E.M.*, Docket No. 19-0857 (issued December 31, 2019); *D.H.*, Docket No. 19-0384 (issued August 12, 2019).

²⁴ *Id.* at §§ 10.439, 10.616(a); *see A.B.*, Docket No. 18-1172 (issued January 15, 2019); *see also B.W.*, Docket No. 18-1004 (issued October 24, 2018); *C.R.*, Docket No. 15-0525 (issued July 20, 2015).

²⁵ *Id.*

²⁶ 20 C.F.R. § 10.440(b).

²⁷ 5 U.S.C. § 8124(b); *see G.L.*, Docket No. 19-0297 (issued October 23, 2019).

request.²⁸ The only right to appeal is with the Board.²⁹ As appellant's February 22, 2020 request for a prerecoumpt hearing was made after the final overpayment determination, the Board finds that OWCP properly denied her request for a hearing after issuance of the final overpayment determination.³⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,567.09, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period May 1, 2018 through September 14, 2019 without an appropriate offset. The Board, however, finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment. The Board further finds that OWCP properly denied appellant's request for a prerecoumpt hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2020 decision is affirmed in part and set aside in part, and this case is remanded for further proceedings consistent with this decision of the Board. The March 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

²⁸ *Id.*

²⁹ 5 U.S.C. § 8124(b); *see A.B., supra* note 24.

³⁰ *Id.*