

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

_____)	
K.L., Appellant)	
)	
and)	Docket No. 20-1223
)	Issued: June 1, 2021
U.S. POSTAL SERVICE, POST OFFICE, Fontana, CA, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 14, 2020 appellant filed a timely appeal from an April 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 appellant received an overpayment of compensation in the amount of \$17,878.53 for the period August 1, 2018 to November 30, 2019 for which she was not at fault because she concurrently received FECA wage-loss compensation benefits and Social

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 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 evidence for the first time on appeal. *Id.*

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 it properly required recovery of the overpayment by deducting \$472.00 from appellant's continuing compensation payments every 28 days.

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 October 31, 1994 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 19, 1994 she injured her lower back and right hip when lifting a tub of mail while in the performance of duty. OWCP accepted the claim for lumbar sprain, L5 radiculopathy, and fibromyalgia. Appellant worked in a part-time, limited-duty capacity following her accepted employment injury. On July 1, 1997 she stopped work. A May 12, 1998 Notification of Personnel Action PS Form 50 indicated that appellant's retirement plan was Federal Employees Retirement System (FERS). OWCP paid her wage-loss compensation on the supplemental rolls as of June 30, 1997 and on the periodic rolls commencing January 25, 2004.

On September 18, 2019 OWCP sent a FERS/SSA dual benefits calculation transmittal form to SSA.

On October 17, 2019 SSA completed the FERS/SSA dual benefits calculation form. It indicated that appellant received SSA age-related retirement benefits as of August 2018 and, as of August 2018, her rate with FERS was \$1,114.30 and without FERS was \$23.70 and, as of December 2018, her SSA rate with FERS was \$1,145.50 and without FERS was \$24.30.

In a February 7, 2020 letter, OWCP related that appellant had received SSA age-related retirement benefits attributable to her federal service under FERS, resulting in a prohibited dual benefit. It informed her that it would begin to offset her SSA age-related retirement benefits attributable to her federal service. Appellant was advised that her new 28-day FECA net payment would be \$1,814.16 after the SSA offset.

A February 21, 2020 OWCP memorandum calculated that appellant was overpaid in the amount of \$17,876.53 due to concurrently receiving SSA age-related retirement benefits and FECA benefits during the period August 1, 2018 to November 30, 2019 without an appropriate offset. In an attached worksheet dated January 7, 2020, OWCP found that from August 1 to November 30, 2018 an overpayment of compensation had been created in the amount of \$4,386.37, and from December 1, 2018 to November 30, 2019 an overpayment of compensation was created in the amount of \$13,490.16, for a total overpayment of \$17,878.53.

On March 4, 2020 OWCP issued a preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$17,878.53 because she received

³ Docket No. 02-709 (issued June 11, 2003).

FECA compensation benefits for the period August 1, 2018 through November 30, 2019 that had not been reduced by the portion of her SSA age-related retirement benefits attributable to her federal service. It further advised that it found that she was without fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it 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.

A March 19, 2020 memorandum of telephone call (Form CA-110) indicates that appellant requested an extension of the time allotted to respond to the March 4, 2020 preliminary overpayment determination. She additionally requested waiver of recovery of the overpayment.

On March 31, 2020 OWCP received an appellant's overpayment action request form dated March 27, 2020 requesting that OWCP issue a decision based on the written evidence regarding possible waiver of overpayment. Appellant requested a waiver because she was found to be without fault in the creation of the overpayment. She indicated that she only found out about the overpayment after OWCP decreased her FECA benefits by her FERS offset. .

In an attached Form OWCP-20 dated March 27, 2020, appellant listed her monthly income totaling \$7,191.38. She stated that she supported her husband in addition to herself and listed her household expenses totaling \$4,280.22. Appellant related that she owned land in Nevada worth \$1,181.00 and land in California worth \$2,576.00. She listed her funds as including \$100.00 in cash on hand, a \$3,388.97 checking account balance, and a \$23,500.00 savings account balance, which she indicated that was due to refinancing her home in anticipation of home repairs, totaling \$26,988.97. Appellant repeated that she only found out about the overpayment after OWCP began deducting her FERS offset from her FECA benefits.

Appellant provided a March 14, 2018 confirmation of receipt of \$56,548.37 from refinancing her home, and she indicated that \$23,500.00 was left and that her house needed a new roof, trim work, and painting. She also provided documentation of other income and expenses.

In an undated statement from appellant also received on March 31, 2020, she indicated that it was a shock when her compensation payments were decreased by her FERS offset, but as the overpayment was not her fault, she hoped that she would not have to return the overpayment.

By decision dated April 23, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$17,878.53 for the period August 1, 2018 through November 30, 2019 because it failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because "the information provided did not specifically ask for a waiver." OWCP required recovery of the overpayment by deducting \$472.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁴ 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.⁵

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.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has established that appellant received an overpayment of compensation.

OWCP found that an overpayment of compensation had been created for the period August 1, 2018 through November 30, 2019 based on evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The record indicates that, while appellant was receiving compensation for disability under FECA from August 1, 2018 to November 30, 2019, she was also receiving SSA age-related retirement benefits. OWCP has, therefore, established fact of overpayment.⁹

With regard to the amount of overpayment, in its March 4, 2020 preliminary overpayment determination and its April 23, 2020 decision OWCP found that an overpayment of compensation in the amount \$17,878.53 was created for the period August 1, 2018 through November 30, 2019. However, a February 21, 2020 OWCP memorandum that was included in the March 4, 2020 preliminary overpayment determination and the April 23, 2020 final decision correctly calculated that appellant was overpaid in the amount of \$17,878.53. The Board therefore finds that an

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see 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).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁸ *Supra* notes 6 and 7; *see also M.S.*, Docket No. 18-0740 (issued February 4, 2019).

⁹ *See L.B.*, Docket No. 19-1322 (issued January 27, 2020).

overpayment in the amount of \$17,876.53 has been established for the period August 1, 2018 through November 30, 2019.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

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.¹¹ 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 \$50.00.¹² 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.¹³ 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.¹⁴

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.¹⁵

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

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2),(3) (September 2018).

¹² *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹³ *See supra* note 11 at Chapter 6.400.4(a)(2) (September 2018).

¹⁴ *Id.* at Chapter 6.400.4(b)(3).

¹⁵ 20 C.F.R. § 10.437(a)(b).

the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision as to whether recovery of the overpayment should be waived.

In the case of *William A. Couch*,¹⁷ the Board held that when adjudicating a claim OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In OWCP's April 23, 2020 decision, OWCP noted that the evidence received did not specifically ask for waiver of recovery of the overpayment. However, the March 19, 2020 Form CA-110 indicated that appellant requested waiver. Additionally, appellant also submitted an overpayment action request form received by OWCP on March 31, 2020 requesting a waiver of her overpayment, indicating with check marks that she was requesting waiver with an accompanying explanation. She also submitted an undated narrative statement indicating that, as the overpayment was not her fault, she hoped that she would not have to return the overpayment, which was also received by OWCP on March 31, 2020. OWCP failed to follow its procedures by properly addressing all of the relevant evidence of record to determine whether the overpayment should be waived.¹⁸

It is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.¹⁹ The Board finds that this case is not in posture for decision as to whether recovery of the overpayment should be waived.²⁰ On remand OWCP shall review all evidence of record, and following any further development deemed necessary, issue a *de novo* decision.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$17,878.53, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period August 1, 2018

¹⁶ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁷ 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

¹⁸ OWCP's procedures provide: all evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. *Supra* note 11 at Chapter 2.1401.5(b)(2) (November 2012).

¹⁹ *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 17.

²⁰ *See V.C.*, Docket No. 16-0694 (issued August 19, 2016).

²¹ In light of the Board's disposition of Issue 2, the issue of recovery of overpayment is rendered moot.

through November 30, 2019 without an appropriate offset. The Board also finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 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.

Issued: June 1, 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