

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

A.Q., Appellant)	
)	
and)	Docket No. 20-1328
)	Issued: June 14, 2021
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Richmond, VA, Employer)	
)	

Appearances:
Appellant, pro se
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 June 8, 2020 appellant filed a timely appeal from an April 14, 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 \$24,616.52 for which she was without fault because she concurrently received FECA wage-loss compensation and Social Security

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence following the April 14, 2020 decision. 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.*

Administration (SSA) age-related retirement benefits for the period October 1, 2016 through February 29, 2020, 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 \$100.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 5, 2001 appellant, then a 47-year-old support service clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a cervical condition due to factors of her federal employment, including heavy lifting of case orders and pushing heavy boxes. She noted that she first became aware of her condition on February 9, 2001 and realized its relationship to her federal employment on February 16, 2001. Appellant's retirement system coverage was noted as Federal Employees Retirement System (FERS). On March 30, 2001 OWCP accepted the claim for herniated disc, left C6-7, myalgia, myositis, and prolonged depressive reaction. It paid appellant wage-loss compensation on the supplemental rolls, effective February 26, 2002, and on the periodic rolls effective September 8, 2002.

On November 8, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form. It listed the computation period as February 1, 2001 to the present.

On December 11, 2019 OWCP received from SSA a December 3, 2019 completed FERS/SSA dual benefits calculation form, which indicated that appellant had been in receipt of SSA age-related retirement benefits since 2016. The form showed appellant's SSA benefit rates with and without appellant's FERS contributions. Beginning October 2016, the SSA rate with FERS was \$858.00 and without FERS was \$275.00, beginning December 2016, the SSA rate with FERS was \$860.00 and without FERS was \$276.00, beginning December 2017, the SSA rate with FERS was \$877.00 and without FERS was \$281.00, beginning December 2018, the SSA rate with FERS was \$901.50 and without FERS was \$288.50, and beginning December 2019, the SSA rate with FERS was \$916.60 and without FERS was \$293.60.

OWCP completed a FERS offset calculation worksheet on March 12, 2020. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period from October 1, 2016 through February 29, 2020, resulting in a total overpayment amount of \$24,616.52. The form indicated that from October 1, through November 30, 2016, appellant received an overpayment in the amount of \$1,172.41; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$7,027.75; from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$7,171.65; from December 1, 2018 through November 30, 2019, she received an overpayment in the amount of \$7,376.21; and from December 1, 2019 through February 29, 2020, she received an overpayment in the amount of \$1,869.00.

On March 12, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$24,616.52 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period October 1, 2016 through February 29, 2020 to offset her SSA age-related retirement benefits that were attributable

to federal service.³ It determined that she was without fault in the creation of the overpayment because she could not have reasonably known that an improper payment had occurred. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised her that she could request a waiver of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP provided an overpayment action request form and further 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 April 9, 2020 OWCP received appellant's overpayment action request form. Appellant indicated that she wished to contest the overpayment. She placed a check mark in all three categories to indicate that she disagreed that an overpayment had occurred, she disagreed with the amount of the overpayment, and she was requesting a waiver because she was found without fault in the creation of the overpayment.

In a Form OWCP-20 completed on March 31, 2020, appellant reported total monthly income from the SSA of \$1,254.00 and total monthly expenses of \$2,491.00. She noted that she had no cash on hand, a checking account balance of \$1,923.84, and a savings account balance of \$914.45. Appellant also submitted financial documentation.

By decision dated April 14, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$24,616.52 for the period October 1, 2016 through February 29, 2020,⁴ because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as her monthly income exceeded her monthly expenses by more than \$50.00. While appellant did not list her FECA income, OWCP noted that she was receiving monthly FECA income of \$1,472.92; therefore, appellant had total monthly income of \$2,726.92, which exceeded her monthly expenses of \$2,491.00 by more than \$50.00. It required recovery of the overpayment by deducting \$100.00 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.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

³ OWCP noted that it had adjusted appellant's 28-day periodic rolls compensation payment effective March 1, 2020.

⁴ The decision contains a typographical error which indicates October 10, 2016 as the beginning date of the overpayment rather than October 1, 2016.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

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 attributable to the employee's federal service.⁷ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefits 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 \$24,616.52 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2016 through February 29, 2020, without an appropriate offset.⁹ The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, she also was 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.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period October 1, 2016 through February 20, 2020. Consequently, fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA 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 appellant's benefit rates with FERS and without FERS for specific periods from October 1, 2016 through February 29, 2020. OWCP provided its calculations for each relevant period based on the SSA worksheet and determined that appellant received an overpayment in the amount of \$24,616.52.

The Board, thus, finds that appellant received prohibited dual benefits for the period October 1, 2016 through February 29, 2020, totaling \$24,616.52.

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.¹¹ Thus, a finding that appellant was without fault does not automatically result in waiver of the

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 *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 7; *L.J.*, *supra* note 7.

¹¹ 5 U.S.C. § 8129(a)-(b).

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.¹²

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.¹³ 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 \$50.00.¹⁴

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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied 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.¹⁷

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses. The Board notes that appellant only listed her SSA income of \$1,254.00. However, OWCP included her FECA income of \$1,472.92 in its calculations. As her monthly income of \$2,726.92 exceeds her monthly expenses of \$2,491.00 by more than \$50.00, she has not shown that she needs substantially all of her current income to meet current

¹² *L.S.*, 59 ECAB 350 (2008).

¹³ 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).

¹⁴ Federal (FECA) Procedure Manual, *id.* at Chapter 6.400.4(a)(3) (September 2018).

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

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 6.400.4c(3) (September 2018).

¹⁷ 20 C.F.R. § 10.436.

ordinary and necessary living expenses.¹⁸ Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it was unnecessary for OWCP to consider the second prong of the test based on her assets.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁹

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has not established that OWCP acted improperly by denying waiver of recovery of the \$24,616.52 overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁰

Section 10.441(a) of OWCP's regulations²¹ 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.”²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

OWCP found that appellant had total monthly income of \$2,726.92 and expenses of \$2,491.00 and; therefore, her monthly income exceeds her expenses by \$235.92. Its hearing

¹⁸ *Id.* at § 10.437(a), (b).

¹⁹ *Id.*

²⁰ *Id.* at § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²¹ *Id.* at § 10.441(a).

²² *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

representative gave due regard to the relevant factors noted above and did not abuse its discretion in setting the rate of recovery.²³

The Board, therefore, finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,616.52 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2016 through February 29, 2020, without an appropriate offset, and that OWCP properly denied waiver of recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 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

²³ See *R.L.*, Docket No. 20-0186 (issued September 14, 2020); *L.M.*, Docket No. 19-1197 (issued January 8, 2020); *T.G.*, Docket No. 17-1989 (issued June 6, 2018).