

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 21-0190</b>
	)	<b>Issued: June 28, 2021</b>
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE,	)	
Andover, MA, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Mary C. Wilson, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On November 17, 2020 appellant filed a timely appeal from a June 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</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> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the June 1, 2020 decision, appellant submitted additional evidence to OWCP. 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 \$73,592.65, for the period December 1, 2012 through March 11, 2020 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 it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$350.00 from appellant's compensation payments every 28 days.

## **FACTUAL HISTORY**

On June 17, 2013 appellant, then a 66-year-old lead contact representative, filed a traumatic injury claim (Form CA-1) alleging injury on June 4, 2013 she stumbled on a rug and fell forward, first hitting her head on a cubicle and then falling to the floor on her knees while in the performance of duty. OWCP assigned OWCP File No. xxxxxx603. Appellant stopped work on June 4, 2013. OWCP initially accepted appellant's claim for post-concussion syndrome, contusion of the right scalp, and concussion, not otherwise specified. It later expanded the accepted conditions to include contusions of the right face, scalp, and neck (except the eyes); neck sprain; and headache.

Payment documents in the case record reveal that, under OWCP File No. xxxxxx603, appellant first received FECA wage-loss compensation benefits on the supplemental rolls commencing July 22, 2013, and first received FECA wage-loss compensation benefits on the periodic rolls, commencing July 28, 2013.

On February 10, 2020 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form.

On March 2, 2020 SSA completed the dual benefits calculation, which listed appellant's SSA benefit rates with a FERS offset and without a FERS offset from December 1, 2012 through December 2019. Beginning December 1, 2012, the SSA rate with FERS was \$1,708.70 and without FERS was \$1,008.70, beginning January 1, 2013, the SSA rate with FERS was \$1,784.60 and without FERS was \$1,008.70, beginning December 1, 2013, the SSA rate with FERS was \$1,811.30 and without FERS was \$1,023.80, beginning January 1, 2014, the SSA rate with FERS was \$1,850.80 and without FERS was \$1,023.80, beginning December 1, 2014, the SSA rate with FERS was \$1,882.20 and without FERS was \$1,041.20, beginning December 1, 2015, the SSA rate with FERS was \$1,882.20 and without FERS was \$1,041.20, beginning December 1, 2016, the SSA rate with FERS was \$1,887.80 and without FERS was \$1,044.30, beginning December 1, 2017, the SSA rate with FERS was \$1,925.50 and without FERS was \$1,065.10, beginning December 1, 2018, the SSA rate with FERS was \$1,979.40 and without FERS was \$1,094.90, and beginning December 1, 2019, the SSA rate with FERS was \$2,011.00 and without FERS was \$1,112.40.

On March 11, 2020 OWCP prepared a FERS offset calculation based on the SSA documentation wherein it noted the calculation of appellant's overpayment from December 1, 2012 through March 11, 2020. It determined: during the period December 1 through 31, 2012, appellant received an overpayment of \$715.38; during the period January 1 through November 30, 2013, she received an overpayment of \$8,543.43; during the period December 1 through 31, 2013,

she received an overpayment of \$804.81; during the period January 1 through November 30, 2014, she received an overpayment of \$9,106.09; during the period December 1, 2014 through November 30, 2015, she received an overpayment of \$10,119.73; during the period December 1, 2015 through November 30, 2016, she received an overpayment of \$10,147.45; during the period December 1, 2016 through to November 30, 2017, she received an overpayment of \$10,149.81; during the period December 1, 2017 through November 30, 2018, she received an overpayment of \$10,341.13; during the period December 1, 2018 through November 30, 2019, she received an overpayment of \$10,643.16; and during the period December 1, 2019 through March 11, 2020, she received an overpayment of \$3,021.67.<sup>4</sup> The total overpayment was determined to be \$73,592.65.

On March 18, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$73,592.65 had been created for the period December 1, 2012 through March 11, 2020, because appellant received SSA age-related retirement benefits based on her age and attributable to her federal service while she received FECA compensation benefits, without an appropriate offset being made. It also determined that appellant was without fault in the creation of the overpayment and forwarded an overpayment recovery questionnaire (Form OWCP-20). OWCP requested that she provide supporting documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other record, which supported income and expenses. It informed appellant that she could submit additional evidence in writing or at precouplement hearing, but that a precouplement hearing must be requested within 30 days of the date of the written notice of overpayment.

On April 17, 2020 OWCP received an overpayment action request form, signed on the same date in which appellant requested waiver of recovery of the overpayment. It also received a Form OWCP-20, signed on April 17, 2020 in which she listed \$3,664.86 in monthly income, \$5,488.79 in monthly expenses, and \$2,234.96 in assets. Appellant listed her monthly expenses of \$5,488.79 as being comprised of \$2,600.02 for mortgage/rent; \$722.71 for utilities; \$645.00 for food; \$250.00 for clothing; \$536.06 for credit card payments; and \$735.00 for miscellaneous expenses (such as unreimbursed medical expenses, transportation costs, and household expenses). After OWCP requested additional supporting financial documents on April 21, 2020, appellant submitted additional records, including bank statements, utility bills, and credit case statements.

By decision dated June 1, 2020, OWCP determined that appellant received an overpayment of compensation in the amount of \$73,592.65 for the period December 1, 2012 through March 11, 2020, because she received SSA retirement benefits based on her age and attributable to her federal service, while she received FECA compensation benefits without an appropriate offset. It further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because appellant's monthly income exceeded her monthly expenses by more than \$50.00. OWCP found that the financial documents submitted by appellant and income statements of record indicated that she had \$6,486.55 in monthly income. It also noted that appellant claimed monthly expenses of \$5,488.79, but did not provide financial documentation supporting all of these expenses. OWCP required recovery of the overpayment by deducting \$350.00 from appellant's continuing compensation payments every 28 days.

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<sup>4</sup> Beginning March 12, 2020, OWCP applied the FERS offset to appellant's FECA wage-loss compensation.

### **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>5</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>6</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>7</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>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset, but the case is not in posture for decision regarding the period and amount of the overpayment.

The evidence of record indicates that, while appellant was receiving 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 wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during a period while she was receiving wage-loss compensation on the periodic rolls. Consequently, the fact of overpayment has been established.<sup>10</sup>

The Board finds, however, that the period and amount of the overpayment have not been established and that, therefore, the case is not in posture. OWCP found that the overpayment occurred during the period December 1, 2012 through March 11, 2020. It determined that, during this entire period, appellant concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset, and that these prohibited dual benefits totaled \$73,592.65. The Board notes, however, that the payment records as presently constituted

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<sup>5</sup> 5 U.S.C. § 8102.

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

<sup>9</sup> *See E.L., id.; L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>10</sup> *Id.*

in the case record show that appellant did not begin to receive FECA wage-loss compensation until July 22, 2013, *i.e.*, a date more than seven months after the date OWCP identified as the starting date for appellant's receipt of FECA wage-loss compensation.

To determine the amount of the overpayment, the portion of SSA's age-related retirement 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 December 1, 2012 through March 11, 2020. OWCP provided its calculations of the overpayment for each relevant period based on the SSA worksheet regarding the FERS offset for various periods, but its worksheet does not explain how prohibited dual benefits could have been received during a period, December 1, 2012 through July 21, 2013 for which the present case record does not contain evidence of appellant's receipt of FECA wage-loss compensation benefits.

For these reasons, the case shall be remanded to OWCP for further evaluation of the precise period and amount of the overpayment created by appellant's concurrent receipt of FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. This evaluation shall include consideration of the issues of waiver of recovery of the overpayment and the method of recovery of the overpayment.<sup>11</sup> 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. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's overpayment.

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset, but the case is not in posture for decision regarding the period and amount of the overpayment.

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<sup>11</sup> In light of the Board's disposition of Issue 1, Issues 2 and 3 are moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 28, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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