

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

R.M., Appellant	)	
	)	
and	)	<b>Docket No. 19-1856</b>
	)	<b>Issued: March 23, 2021</b>
<b>DEPARTMENT OF THE INTERIOR, FISH &amp; WILDLIFE SERVICE, Kilauea, HI, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On August 29, 2019 appellant filed a timely appeal from a March 7, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 7, 2019, the date of OWCP's last decision, was September 3, 2019. Because using September 6, 2019, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 29, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the March 7, 2019 decision, appellant submitted additional evidence to OWCP and on appeal. 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 \$63,944.85, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period September 1, 2008 through January 5, 2019 without appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$437.00 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On November 16, 2004 appellant, then a 58-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on November 4, 2004, he sustained right-sided lower back pain when due to a broken spring, he manually lifted wood panels of a garage door to gain access to a shop while in the performance of duty. Appellant's supervisor noted on the claim form that appellant stopped work on the date of injury. He also noted appellant's retirement coverage as Federal Employees' Retirement System (FERS). OWCP accepted the claim for lumbar strain.

By letter dated January 4, 2006, the employing establishment notified OWCP that appellant's permanent physical limitations rendered him unable to perform the duties of his date-of-injury position as a maintenance worker, and he had voluntarily resigned from that position, accepting a less physically challenging position as a park ranger/fee collector. OWCP paid appellant wage loss compensation for loss of wage-earning capacity on the supplemental rolls from January 9 through April 15, 2006; and on the periodic rolls as of April 16, 2006.

On August 28, 2008 appellant became eligible to receive SSA age-related retirement benefits as he had reached the age of 62 years.

On an EN1032 form dated September 19, 2008, appellant indicated that he had not received SSA benefits as part of an annuity for federal service. On EN1032 forms dated August 21, 2009 through August 29, 2018, he indicated that he had received SSA benefits as part of an annuity for federal service.

On August 24, 2012 OWCP provided SSA with a FERS/SSA dual benefits calculation form for its completion. On April 1, 2013 it received a form indicating SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2012. Beginning September 2008, the SSA rate with FERS was \$820.90 and without FERS was \$394.30. Beginning December 2008, the SSA rate with FERS was \$868.40 and without FERS was \$417.20. Beginning January 2009 through December 2010, the SSA rate with FERS was \$873.60 and without FERS was \$417.20. Beginning December 2011, the SSA rate with FERS was \$905.00 and without FERS was \$432.20. Beginning December 2012, the SSA rate with FERS was \$920.40 and without FERS was \$439.50. On May 10, 2013 SSA submitted another form indicating SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2012, containing the same figures as in the form received April 1, 2013. However, on the same date, another SSA representative submitted a form indicating SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2012. This form did not contain any SSA rates with FERS, but listed SSA rates without FERS corresponding to the SSA rates with FERS contained in the form received on April 1, 2013.

On February 7, 2017 OWCP provided SSA with another FERS/SSA dual benefits calculation form for its completion. On March 9, 2017 SSA submitted the completed form, which indicated SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2016. Beginning September 2008, the SSA rate with FERS was \$820.90 and without FERS was \$365.10. Beginning December 2008, the SSA rate with FERS was \$868.00 and without FERS was \$386.20. Beginning December 2009 through December 2010, the SSA rate with FERS was \$873.60 and without FERS was \$386.20. Beginning December 2011, the SSA rate with FERS was \$873.60 and without FERS was \$400.10. Beginning December 2012, the SSA rate with FERS was \$920.40 and without FERS was \$406.90. Beginning December 2013, the SSA rate with FERS was \$934.20 and without FERS was \$412.90. Beginning December 2014 through December 2015, the SSA rate with FERS was \$950.00 and without FERS was \$419.90. Beginning December 2016, the SSA rate with FERS was \$952.80 and without FERS was \$421.20. The SSA representative remarked that appellant was entitled to SSA age-related retirement benefits beginning September 2008 and that these benefits were subject to FERS offset.

By letter dated April 7, 2017, OWCP informed appellant that it had received information from the SSA that he was currently in receipt of SSA benefits due to his federal employment, and that OWCP would determine his new rate of pay and offset due to the overpayment.

On October 23, 2018 OWCP provided SSA with another FERS/SSA dual benefits calculation form for its completion. On November 5, 2018 SSA submitted the completed form, which indicated SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2017. Beginning September 2008, the SSA rate with FERS was \$1,088.50 and without FERS was \$515.70. Beginning December 2008, the SSA rate with FERS was \$1,151.60 and without FERS was \$545.60. Beginning January 2009 through December 2010, the SSA rate with FERS was \$1,158.40 and without FERS was \$545.60. Beginning December 2011, the SSA rate with FERS was \$1,200.10 and without FERS was \$565.20. Beginning December 2012, the SSA rate with FERS was \$1,220.50 and without FERS was \$574.80. Beginning December 2013, the SSA rate with FERS was \$1,238.80 and without FERS was \$583.40. Beginning December 2014 through December 2015, the SSA rate with FERS was \$1,259.80 and without FERS was \$593.30. Beginning December 2016, the SSA rate with FERS was \$1,263.50 and without FERS was \$595.00. Beginning December 2017, the SSA rate with FERS was \$1,288.70 and without FERS was \$606.90.

On November 15, 2018 OWCP requested that SSA clarify its calculations, as the figures provided on November 5, 2018 differed from the figures provided on March 2, 2017.

On January 2, 2019 an SSA representative replied, noting that the rates provided on November 5, 2018 did not account for reduced benefits due to filing before full retirement age. He explained that the rates provided on March 9, 2017 were missing one year of earnings. The SSA representative provided another set of SSA benefit rates with a FERS offset and without a FERS offset from September 2008 through December 2018. Beginning September 2008, the SSA rate with FERS was \$820.00 and without FERS was \$364.40. Beginning December 2008, the SSA rate with FERS was \$868.00 and without FERS was \$385.00. Beginning January 2009 through December 2010, the SSA rate with FERS was \$873.00 and without FERS was \$385.00. Beginning July 2011, the SSA rate with FERS was \$873.40 and without FERS was \$385.40. Beginning September 2011, the SSA rate with FERS was \$873.00 and without FERS was \$385.00. Beginning December 2011, the SSA rate with FERS was \$905.00 and without FERS was \$399.00. Beginning December 2012, the SSA rate with FERS was \$920.00 and without FERS was \$406.00.

Beginning December 2013, the SSA rate with FERS was \$934.00 and without FERS was \$412.00. Beginning December 2014 through December 2015, the SSA rate with FERS was \$950.00 and without FERS was \$419.00. Beginning December 2016, the SSA rate with FERS was \$952.00 and without FERS was \$420.00. Beginning December 2017, the SSA rate with FERS was \$971.00 and without FERS was 428.00. Beginning December 2018, the SSA rate with FERS was \$999.00 and without FERS was \$440.00.

A FERS offset calculation worksheet dated January 23, 2019, using the figures provided on January 2, 2019, noted each period of overpayment and provided calculations, which resulted in a total overpayment of \$63,944.85 during the period September 1, 2008 through January 5, 2019.

In a preliminary determination notice dated January 30, 2019

OWCP informed appellant that he received an overpayment of compensation in the amount of \$63,944.85 because the SSA/FERS offset was not applied to payments for the period September 1, 2008 through January 5, 2019. It determined that he was without fault in the creation of the overpayment, because he was not aware, nor could he reasonably have been expected to know, that it had paid him compensation incorrectly. OWCP requested that appellant submit a completed Form OWCP-20 to determine a fair repayment method, and advised him that he could request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. It further 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 precoupment hearing.

On February 23, 2019 appellant submitted an OWCP-20 questionnaire and requested a decision based on the written evidence regarding possible waiver of the overpayment. He reported the income he received from SSA benefits and FECA benefits. Appellant also listed specific expense amounts for his monthly rent or mortgage, food, clothing, utilities, and other expenses, as well as debts being paid by monthly installments, and his assets in terms of funds. He provided some financial documentation including his checking account balance, investments, savings account balance, credit card statements, and automobile policy.

By decision dated March 7, 2019, OWCP finalized its determination that appellant had received an overpayment of compensation in the amount of \$63,944.85 because the FERS offset was not applied to payments for the period September 1, 2008 through January 5, 2019. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative noted that supporting financial documentation for appellant's expenses had not been received, other than credit card bills. OWCP required recovery of the overpayment by withholding \$437.00 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.<sup>4</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>5</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.<sup>6</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>7</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$63,944.85 as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period September 1, 2008 through January 5, 2019 without appropriate offset.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.<sup>8</sup> Appellant acknowledged on his EN1032 forms that while he had not previously received SSA benefits, as of his 62<sup>nd</sup> birthday he did receive SSA benefits as part of an annuity for federal service. The information provided by SSA on January 2, 2019 accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to his own federal service from September 1, 2008 through January 5, 2019. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.<sup>9</sup>

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. The Board finds that OWCP properly determined the amount of the overpayment. While SSA had previously completed dual benefit calculation forms on April 1 and May 10, 2013, as well as March 9, 2017 and November 5, 2018; on January 2, 2019 an SSA analyst explained the prior rates were incorrect as they either were missing one year's worth of appellant's earnings, or the rates did not account for appellant's reduced benefit due to his receipt of SSA age-based benefits before full retirement age. The Board finds that on January 2, 2019 the SSA provided appellant's SSA rate with FERS and without FERS during the applicable period, and sufficiently explained why the figures differed from SSA rates with FERS and without FERS provided to OWCP on prior occasions. OWCP determined that the

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>8</sup> *Supra* note 6. *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>9</sup> *Id.*

difference of the portion of SSA benefits attributed to appellant's federal service needed to be offset against his OWCP compensation benefits. It found that, since SSA benefits were paid monthly and FECA benefits were paid every 28 days, the monthly offset had to be adjusted to a 28-day payment cycle amount. This amount differed for each period beginning September 2008. OWCP calculated that the lack of offset from September 1, 2008 through January 5, 2019 resulted in an overpayment total of \$63,944.85.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$63,944.85 for the period September 1, 2008 through January 5, 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."<sup>10</sup> Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>11</sup>

### **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.<sup>12</sup> Appellant, however, had the responsibility to provide supporting financial information and documentation to OWCP.<sup>13</sup>

In its preliminary determination dated January 30, 2019, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant, however, did not submit sufficient financial documentation necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would

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<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> 20 C.F.R. § 10.438.

<sup>12</sup> *Id.* at § 10.436.

<sup>13</sup> *Supra* note 11.

be against equity and good conscience. Appellant submitted only financial documentation of assets, credit card payments, and an automobile policy.

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>14</sup>

### **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.<sup>15</sup> Section 10.441(a) of the regulations<sup>16</sup> provides:

“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.”<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$437.00 from appellant's continuing compensation payments every 28 days.

OWCP provided appellant a Form OWCP-20 with the January 30, 2019 preliminary determination. Appellant did not provide the necessary financial information to support his income and expenses prior to the final March 7, 2019 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>18</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>19</sup> As appellant did not submit financial documentation of income, assets, debts, and expenses to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in

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<sup>14</sup> See *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

<sup>15</sup> See *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

<sup>16</sup> 20 C.F.R. § 10.441(a).

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 11.

<sup>19</sup> See *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.3 (September 2018).

directing recovery of the \$63,944.85 overpayment at the rate of \$437.00 every 28 days from appellant's continuing compensation payments.<sup>20</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$63,944.85, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period September 1, 2008 through January 5, 2019 without 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 \$437.00 every 28 days from appellant's continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 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

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<sup>20</sup> See *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).