

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

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S.S., Appellant	)	
	)	
and	)	Docket No. 19-1945
	)	Issued: March 25, 2021
DEPARTMENT OF THE NAVY, NORFOLK	)	
NAVAL BASE, Williamsburg, VA, Employer	)	
	)	

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*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 September 16, 2019 appellant filed a timely appeal from a March 21, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$28,772.70, for the period October 1, 2014 through September 15, 2018, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA)

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 21, 2019 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.*

age-related retirement benefits without an appropriate offset, for which he was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$356.93 from appellant's continuing compensation benefits, every 28 days.

### **FACTUAL HISTORY**

On January 8, 2001 appellant, then a 48-year-old supply technician, filed a traumatic injury claim (Form CA-1) alleging that, on December 13, 2000 he injured his neck and back when climbing on a defective ladder, he fell while in the performance of duty. He stopped work on December 13, 2000, and on March 7, 2001 OWCP accepted the claim for temporary aggravation of a preexisting back strain. OWCP paid appellant wage-loss compensation benefits on the periodic rolls commencing May 19, 2002. On June 13, 2002 appellant retired from his federal employment due to disability. On November 28, 2006 OWCP accepted the additional conditions of cervicgia and thoracic or lumbosacral neuritis.

In October 2014 appellant became eligible to receive SSA age-related retirement benefits.

On December 29, 2017 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form.

On May 9, 2018 SSA completed the dual benefits calculation form, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from October 2014 through December 2017. Beginning October 2014, the SSA rate with FERS was \$1,699.50 and without FERS was \$1,108.90. Beginning December 2014, the SSA rate with FERS was \$1,728.30 and without FERS was \$1,127.70. Beginning December 2015, the SSA rate with FERS was \$1,728.30 and without FERS was \$1,127.70. Beginning December 2016, the SSA rate with FERS was \$1,733.40 and without FERS was \$1,131.00. Beginning December 2017, the SSA rate with FERS was \$1,768.00 and without FERS was \$1,153.50.

A September 25, 2018 FERS offset calculation worksheet noted each period of overpayment and provided calculations which resulted in a total overpayment to appellant of \$28,772.70 during the period October 1, 2014 through September 15, 2018.

A September 26, 2018 periodic disability rolls payment plate for appellant's compensation from September 16, to October 13, 2018 indicated that his FERS offset was deducted from his compensation.

In a preliminary overpayment determination notice dated February 13, 2019, OWCP informed appellant that he received an overpayment of compensation in the amount of \$28,772.70 because the SSA/FERS offset was not applied to payments for the period October 1, 2014 through September 15, 2018. It determined that he was without fault in the creation of the overpayment because he was not aware he was paid compensation incorrectly. OWCP requested that appellant submit a completed Form OWCP-20 to determine a reasonable method for recovery 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.

Appellant provided a December 7, 2018 Chapter 13 bankruptcy plan that listed his monthly income as \$2,714.61, which included \$1,199.00 from Social Security, \$1,399.00 from OWCP, and \$116.00 from pension or retirement income. He noted his monthly expenses as \$2,388.00, which included \$50.00 for home maintenance, repair, and upkeep expenses; \$200.00 for electricity, heat, and natural gas; \$100.00 for water, sewer, and garbage collection; \$110.00 for telephone, cellphone, internet, satellite, and cable services; \$375.00 for food and household supplies; \$40.00 for clothing, laundry, and dry cleaning; \$32.00 for personal care products and services; \$125.00 for medical and dental expenses; \$175.00 for transportation expenses including gas, maintenance, bus, or train fare; \$79.00 for entertainment, clubs, recreation, newspapers, magazines, and books; \$60.00 for charitable contributions and religious donations; \$92.00 for vehicle insurance; \$33.00 for personal property; and \$135.00 for miscellaneous expenses. The form indicated that when appellant subtracted his monthly expenses from his monthly income he arrived at a remainder amount of \$325.65. He further provided account summaries from two separate bank accounts, one of which indicated that on February 13, 2019 his account balance was \$575.72, and the other indicated that on February 19, 2019 his account balance was \$218.08.

In a February 22, 2019 Form OCWP-20 appellant listed his monthly income as \$1,614.00. He included his monthly SSA benefits, which he listed as \$1,498.00, and he listed other unspecified benefits as \$116.00. Appellant noted that he did not have any dependents. He listed the total value of funds in his possession as \$577.00.

On March 4, 2019 appellant requested a decision based on the written evidence. He contested the overpayment because he was found to be without fault in the creation of the overpayment, and therefore requested waiver of recovery of the overpayment. Appellant explained further that he had always submitted requested information, and he stated that he had previously requested an explanation of how his benefits were calculated and was never given an answer.

By decision dated March 21, 2019, OWCP finalized the February 13, 2019 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$28,772.70 for the period October 1, 2014 through September 15, 2018 because it had failed to offset his compensation payments by the portion of his SSA benefits that were attributable to federal service and that appellant did not have actual knowledge of the calculation error. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP found that it would recover the overpayment by deducting \$356.93 every 28 days from appellant's continuing wage-loss 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.<sup>3</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>4</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>5</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>6</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation for the period October 2014 through September 15, 2018.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>7</sup> The information provided by SSA accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to his federal service from October 2014 through September 15, 2018. Thus, the record establishes that he received an overpayment of FECA wage-loss compensation.<sup>8</sup>

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. The Board finds that OWCP miscalculated the amount of the overpayment. To determine the amount of overpayment, the SSA provided appellant's SSA rate with FERS and without FERS during the applicable period. OWCP determined that the difference of the portion of SSA age-related retirement benefits attributed to his federal service needed to be offset against his OWCP compensation benefits. It found that, since SSA age-related retirement benefits were paid monthly (12 per year) and FECA benefits were paid every 28 days (13 per year), the monthly offset needed to be adjusted to a 28-day payment cycle amount. This amount differed for each period beginning October 1, 2014. OWCP calculated that the lack of offset from October 1, 2014 to September 15, 2018 resulted in an

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>6</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also E.M.*, Docket No. 19-0857 (issued December 31, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>7</sup> *Supra* note 5. *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>8</sup> *Id.*

overpayment in the amount of \$28,772.70, however, when calculating the offset it used incorrect numbers for appellant's SSA rate without FERS for the period December 1, 2014 to November 30, 2015 (\$1,728.30 instead of \$1,728.70) and the period December 1, 2017 to September 15, 2018 (\$1,153.30 instead of \$1,153.50). The Board has recalculated his amount of overpayment using the correct numbers by following the same steps used by OWCP, and it finds that he received an overpayment in the amount of \$28,764.77.

The Board therefore finds that appellant received prohibited dual benefits totaling \$28,764.77, thus creating an overpayment of compensation in that amount for the period October 1, 2014 through September 15, 2018.

### **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>9</sup> Section 10.438 of OWCP 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>10</sup>

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.<sup>11</sup>

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary 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.<sup>12</sup> 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.<sup>13</sup>

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

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<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 20 C.F.R. § 10.438.

<sup>11</sup> *Id.* at §§ 10.434-10.437.

<sup>12</sup> *Id.* at § 10.436.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018).

each additional dependent.<sup>14</sup> An individual's liquid assets include, but are not limited to, cash and the value of stocks, bonds, saving accounts, mutual funds, and certificates of deposit. Non liquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

OWCP determined that appellant was not at fault in the creation of the overpayment. It may therefore only require recovery of the overpayment if it would not defeat the purpose of FECA or be against equity and good conscience.<sup>16</sup> In order to establish that, repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.<sup>17</sup>

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. Based on his December 7, 2018 Chapter 13 bankruptcy plan, his monthly income exceeded his expenses, including, but not limited to his ordinary and necessary living expenses, by more than \$50.00. Therefore, appellant did not need substantially all of his income for ordinary and necessary living expenses.<sup>18</sup> Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether his assets do not exceed the allowable resource base.<sup>19</sup>

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>20</sup>

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<sup>14</sup> *Id.* at Chapter 6.400.4a(2).

<sup>15</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>16</sup> *See A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>17</sup> *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

<sup>18</sup> *See Supra* note 17.

<sup>19</sup> *I.J.*, Docket No. 19-1672 (issued March 10, 2020).

<sup>20</sup> *Id.*

Because appellant has not established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to establish that OWCP acted improperly by denying waiver of recovery of the 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.<sup>21</sup> Section 10.441(a) of the regulations 33 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>22</sup>

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

The Board finds that OWCP improperly required recovery of the overpayment by deducting \$356.92 from appellant's continuing compensation payments every 28 days.

Section 8124(a) of FECA provides: OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>23</sup> Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide: “The decision [of the Director of OWCP] shall contain findings of fact and a statement of reasons.”<sup>24</sup> Moreover, the Federal (FECA) Procedure Manual provides that the claims examiner's “evaluation of the evidence should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim.”<sup>25</sup>

Herein, OWCP failed to provide any discussion or explanation for how it calculated \$356.93 as the amount to be deducted from appellant's continuing compensation benefits every 28 days. The Board finds that OWCP failed to take 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, as required by OWCP's regulations stated

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<sup>21</sup> 20 C.F.R. § 10.441(a).

<sup>22</sup> *Id.*

<sup>23</sup> 5 U.S.C. § 8124(a); *see J.J.*, Docket No. 19-0448 (issued December 30, 2019); *see Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>24</sup> 20 C.F.R. § 10.126.

<sup>25</sup> *Supra* note 13 at Chapter 2.1400.5c(3)(e) (February 2013).

above.<sup>26</sup> Therefore, the Board further finds that in its March 21, 2019 decision OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision.<sup>27</sup>

Accordingly, the Board remand the case for OWCP to make findings of fact and provide reasons for its decision regarding its calculation of the amount to be deducted from appellant's continuing compensation payments every 28 days, pursuant to the standards set forth in section 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.126. After such further development as OWCP deems necessary, it shall issue a *de novo* decision on the amount of recovery.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period October 1, 2014 through September 15, 2018 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for which he was without fault, and the Board notes that it has modified OWCP's calculation, finding that appellant was overpaid in the amount of \$28,764.77. The Board further finds that it properly denied waiver of recovery of the overpayment, however, the Board finds that this case is not in posture for decision regarding the amount to be deducted from appellant's continuing compensation benefits every 28 days.

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<sup>26</sup> See *supra* note 23.

<sup>27</sup> See *J.M.*, Docket No. 18-0729 (issued October 17, 2019); *J.J.*, Docket No. 11-1958 (issued June 27, 2012).



**ORDER**

**IT IS HEREBY ORDERED THAT** the March 21, 2019 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: March 25, 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