

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

P.L., Appellant)	
)	
and)	Docket No. 20-0709
)	Issued: March 18, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Las Vegas, NV, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 10, 2020 appellant filed a timely appeal from a January 6, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ The record also contains a November 12, 2019 overpayment decision over which the Board could exercise jurisdiction. Appellant has not contested the decision, the record indicates that she submitted a check for the full amount of the overpayment. On December 9, 2019 OWCP confirmed that the overpayment was paid in full.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 6, 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 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 \$41,726.88, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period March 1, 2015 through October 12, 2019, without an 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 \$485.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On December 13, 2013 appellant, then a 64-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2013 her left ankle gave out as she stepped from her vehicle and she fell to the ground on her left hand, in the performance of duty. Her retirement system coverage was noted on the claim form as Federal Employee Retirement System (FERS).

On March 13, 2014 OWCP accepted the claim for contusion of the left hand/wrist, contusion of the left hip, closed fracture of the navicular scaphoid bone of the left wrist. Acceptance of the claim was later expanded to include lateral epicondylitis on the right, and enthesopathy of hip region on the left, bilateral carpal tunnel syndrome, right wrist enteropathic arthropathies, other enteropathies, not elsewhere classified, and secondary osteoarthritis of the left wrist. Appellant was paid wage-loss compensation on the supplemental rolls effective January 20, 2014 and the periodic rolls, effective May 4, 2014.

On September 13, 2019 OWCP forwarded a FERS/SSA dual benefits calculation transmittal form to SSA to obtain information as to whether an offset of compensation benefits was required.

On October 7, 2019 OWCP received from SSA a completed FERS/SSA dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since March 2015. The form showed SSA benefit rates with and without a FERS offset. Beginning March 2015, the SSA rate with FERS was \$914.10 and without FERS was \$177.00, beginning December 2016, the SSA rate with FERS was \$916.70 and without FERS was \$177.50, beginning December 2017, the SSA rate with FERS was \$935.00 and without FERS was \$180.90, beginning January 2018, the SSA rate with FERS was \$939.90 and without FERS was \$180.90, and beginning December 2018, the SSA rate with FERS was \$966.20 and without FERS was \$186.00.

OWCP completed a FERS offset calculation worksheet on November 5, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period March 1, 2015 to October 12, 2019, resulting in a total overpayment amount of \$41,726.88. This form indicated that, from March 1, 2015 through November 30, 2016, appellant received an overpayment in the amount of \$15,576.30; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$8,894.77; from December 1 through 31, 2017, she received an overpayment in the amount of \$770.67; from January 1 through November 30, 2018, she received an overpayment in the amount

of \$8,357.34; and from December 1, 2018 through October 12, 2019, she received an overpayment in the amount of \$8,127.80.

In a November 6, 2019 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-day periodic compensation benefits.

On November 6, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$41,726.88 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period March 1, 2015 through October 12, 2019, to offset her SSA age-related retirement benefits that were attributable to federal service. 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, due to the complexity in benefits administration. OWCP explained that it was not able to obtain the necessary information from SSA to reduce appellant's benefits in a timely manner. It requested that she 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. OWCP further requested that appellant 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, it 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 precoupment hearing.

On December 23, 2019 OWCP received appellant's December 17, 2019 Form OWCP-20 and financial documentation including bank statements, tax returns and check receipts. Appellant reported total monthly income of \$2,808.50 and total monthly expenses of \$2,720.00. The monthly income of \$2,808.50 included \$830.00 from SSA, \$1,940.00 from FECA, and other benefits of \$38.50. The monthly expenses of \$2,720.00 included \$185.00 for rent, \$500.00 for food, \$100.00 for clothing, \$335.00 for utilities, \$1,200.00 for other expenses, and \$400.00 for the monthly payment on a bank note. Appellant noted that she had cash on hand of \$50.00, a checking account balance of \$2,000.00, and a savings account balance of \$572.00, for a total of \$2,622.00.

In a December 17, 2019 letter, appellant noted that she was never informed that she could not collect SSA because she was receiving FECA benefits. She also indicated that her husband had been very sick, had passed away, and she had many expenses due to his illness. Appellant listed expenses which included travel of \$2,700.00, physician's visits of \$900.00, herbal supplements of \$2,500.00, monthly payments of \$367.00 for a vehicle to accommodate her husband's wheelchair, a life cruiser of \$2,595.00, and funeral expenses of \$2,535.00.

By decision dated January 6, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$41,726.88 for the period March 1, 2015 through October 12, 2019, 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. OWCP noted that appellant's monthly income exceeded her expenses by \$88.50, and therefore, as her monthly income exceeded expenses by more than \$50.00, waiver was denied. It explained that, because she failed to meet the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA,

it was not necessary to consider the second prong of the test based on assets. OWCP noted that appellant's current net compensation every 28 days was \$1,940.00. Based upon this 28-day amount a monthly debt repayment at approximately 25 percent of her compensation was \$485.00. OWCP required recovery of the overpayment by deducting \$485.00 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.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 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.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,726.88 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2015 through October 12, 2019, without an appropriate offset.⁸ 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 compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period March 1, 2015 through October 12, 2019. Consequently, the 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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *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).

⁹ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 6; *L.J.*, *supra* note 6.

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 March 1, 2015 through October 12, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and determined that appellant received an overpayment in the amount of \$41,726.88. No contrary evidence was received. The Board thus finds that appellant received prohibited dual benefits for the period March 1, 2015 through October 12, 2019, totaling \$41,726.88.

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.¹⁰ Thus, a finding that appellant was without fault does not automatically result in waiver of the 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.¹¹

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.¹² 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 \$50.00.¹³

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.¹⁴ 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

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ 20 C.F.R. § 10.436.

¹² *Id.*; 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 6.400.4(a)(3) (September 2018).

¹³ *Id.*

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

that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁵

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.¹⁶

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. As her monthly income of \$2,808.50 exceeds her monthly expenses of \$2,720.000 by more than \$50.00, in this case, \$88.50, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁷ Because appellant 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 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.¹⁸

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 failed to establish that OWCP acted improperly by denying waiver of recovery of the \$41,726.88 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.¹⁹

¹⁵ *Supra* note 12 at Chapter 6.400.4(c)(3) (September 2018).

¹⁶ 20 C.F.R. § 10.436.

¹⁷ *Id.* at § 10.437(a), (b).

¹⁸ *Id.*

¹⁹ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

Section 10.441(a) of OWCP's regulations²⁰ 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.”²¹

ANALYSIS -- ISSUE 3

The Board finds that the case is not in posture for decision regarding recovery of the overpayment.

OWCP found that appellant had total monthly income of \$2,808.50 and expenses of \$2,720.00, and that her monthly income exceeded her expenses by only \$88.50. OWCP, however, has not explained how it determined the monthly recovery amount of \$485.00, nor has it addressed the relevant factors noted above in setting the rate of recovery to minimize hardship.²²

Furthermore, OWCP improperly set the rate of repayment at 25 percent of the net 28-day compensation. OWCP's regulations provide that the overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²³ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁴ The Federal (FECA) Procedure Manual provides that, in these instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²⁵

This is not a case, however, in which appellant had not provided the requested documentation, requiring OWCP to set the rate of repayment at 25 percent of the net 28-day compensation.²⁶ In this case, appellant responded to the preliminary overpayment determination and submitted detailed financial information and supporting documentation for OWCP's consideration. OWCP, however, erroneously applied a rate of repayment at 25 percent of the net

²⁰ *Id.* at § 10.441(a).

²¹ *J.K.*, Docket No. 20-1190 (issued January 8, 2021); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²² *See W.J.*, Docket No. 07-1909 (issued September 25, 2008) (OWCP abused its discretion in determining the rate of recovery where the record reflected that after the rate of recovery was added to appellant's ordinary necessary monthly expenses, her monthly income did not exceed her expenses by more than \$50.00).

²³ *Supra* note 21 at § 10.438. *See also A.F.*, Docket No. 19-0054 (issued June 12, 2019).

²⁴ *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

²⁵ *Supra* note 12 at Chapter 6.500.8(c)(1) (September 2018); *D.H.*, Docket No. 20-1064 (issued December 14, 2020).

²⁶ *See J.K.*, *supra* note 21.

28-day compensation, ordering that \$485.00 be deducted from her continuing compensation every 28 days. It should applied the appropriate standard for when the requested financial information is received in response to the preliminary overpayment determination.²⁷

The case will therefore be remanded to OWCP for further consideration of the rate of recovery of the \$41,726.88 overpayment from appellant's continued compensation benefits to be followed by a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,726.88, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period March 1, 2015 through October 12, 2019, without an appropriate offset, and that OWCP properly denied waiver of recovery of the overpayment. The Board finds that the case is not in posture for a decision as to whether OWCP properly required recovery of the overpayment by deducting \$485.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 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 development consistent with this decision.

Issued: March 18, 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

²⁷ *Supra* note 12, at Chapter 6.500.8(c)(2) (September 2018).