

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

_____)	
W.W., Appellant)	
)	
and)	Docket No. 20-0860
)	Issued: March 23, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Oakland, CA, Employer)	
_____)	

Appearances:
Eddie Reyna, for the appellant¹
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 March 3, 2020 appellant, through her representative, filed a timely appeal from a September 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).²

¹ 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.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last 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 September 5, 2019, the date of OWCP's decision, was March 3, 2020. Since using March 9, 2020, 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 March 3, 2020, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Pursuant to the Federal Employees' Compensation Act³ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$64,598.71 because she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, for the period November 1, 2013 through April 27, 2019, without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 11, 2005 appellant, then a 56-year-old processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained left shoulder, hand and wrist conditions causally related to factors of her federal employment including lifting trays and working with machines. Her retirement coverage on the reverse side of the form was noted as Federal Employees Retirement System (FERS). OWCP accepted the claim for left shoulder, wrist, and hand strain on July 25, 2005. It later expanded the acceptance of appellant's claim to include left shoulder rotator cuff tendinitis and adhesive capsulitis, and left carpal tunnel syndrome. OWCP paid her compensation on the supplemental rolls from July 11, 2005 through January 19, 2008 and on the periodic rolls from January 20, 2008 through March 13, 2010. In a letter dated March 10, 2010, it notified appellant that it was increasing her disability compensation payments effective February 27, 2010 based upon total temporary disability, as the employing establishment no longer accommodated her limited-duty work restrictions. OWCP paid wage-loss compensation on the periodic rolls from March 14, 2010 through November 19, 2011. By decision dated November 16, 2011, it reduced appellant's compensation based upon her wage-earning capacity as an appointment clerk/reception clerk, and again paid her on the periodic rolls based upon her loss of wage-earning capacity.

By decision dated December 4, 2017, OWCP granted appellant a schedule award for nine percent permanent impairment of the left upper extremity, which ran from November 12, 2017 through May 27, 2018 (fraction of day).

OWCP resumed appellant's payments on the periodic rolls for her loss of wage-earning capacity as of May 28, 2018.

On April 11, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form.

On April 15, 2019 SSA completed the dual benefits calculation form, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from November 2013

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence to OWCP following the September 5, 2019 decision, 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.*

through December 2018. Beginning November 2013, the SSA rate with FERS was \$1,038.80 and without FERS was \$96.30. Beginning December 2013, the SSA rate with FERS was \$1,054.30 and without FERS was \$97.70. Beginning December 2014 and December 2015, the SSA rate with FERS was \$1,072.20 and without FERS was \$99.30. Beginning December 2016, the SSA rate with FERS was \$1,075.40 and without FERS was \$99.60. Beginning December 2017, the SSA rate with FERS was \$1,096.80 and without FERS was \$101.50. Beginning December 2018, the SSA rate with FERS was \$1,127.50 and without FERS was \$104.40.

In a May 16, 2019 letter, OWCP indicated that it determined that appellant had been receiving both FECA and FERS/SSA benefits at the same time, resulting in a dual prohibited benefit. It explained that her FECA compensation would be calculated using an SSA offset beginning May 25, 2019.

A May 16, 2019 FERS offset calculation worksheet noted each alleged period of overpayment and provided calculations, which resulted in a total overpayment to appellant of \$64,598.71 during the period November 1, 2013 through April 27, 2019. For the periods December 1, 2016 through November 30, 2017 and for December 1, 2017 through November 30, 2018, the number of days of overpayment was noted to be 365 for each period.

In a preliminary determination dated May 31, 2019, OWCP informed appellant that she received an overpayment of compensation in the amount of \$64,598.71 because the SSA/FERS offset was not applied to payments for the period November 1, 2013 through April 27, 2019. It determined that she was without fault in the creation of the overpayment because she relied on improper information given in writing by OWCP or by another government agency which she had reason to believe was connected with the administration of benefits. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method and advised her that she 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 she failed to furnish the requested financial information within 30 days. 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.

In a July 12, 2019 letter from appellant's representative, appellant requested waiver of recovery of the overpayment. In an attached Form OWCP-20 of even date, appellant indicated that her total monthly income included \$3,339.50 in SSA benefits, in addition to \$3,362.00 in income from her spouse's pension and interest. She indicated that her total monthly expenses included \$326.00 in rent or mortgage payments, including property tax; \$2,100.00 for food; \$550.00 for clothing; \$760.00 for utilities; and \$2,375.00 in other expenses. Appellant indicated that her funds included real estate with a market value of \$850,000.00 on a mortgage of \$450,000.00 under her spouse and son's names; \$250.00 cash on hand; a balance of \$371,534.00 in a checking account; and a balance of \$13,311.00 in a savings account. She provided tax returns and bank statements in support of the provided figures. Appellant contended that she was without fault and that the offset had affected her health and daily life expenses.

By decision dated September 5, 2019, OWCP finalized the May 31, 2019 preliminary determination that appellant had received an overpayment of compensation in the amount of

\$64,598.71 for the period November 1, 2013 through April 27, 2019 because it had failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to federal service. It further found that she 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 requested payment in full within 30 days.

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.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

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁷ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement 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.⁸

ANALYSIS

The Board finds that fact of overpayment has been established.

Appellant received FECA wage-loss compensation from November 1, 2013 through November 11, 2017 and from May 28, 2018 through April 27, 2019 while she continued to receive age-related retirement benefits from SSA. As noted, a claimant cannot receive concurrent compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The fact of overpayment is therefore established.

The Board further finds, however, that OWCP improperly calculated appellant's overpayment for the period November 1, 2013 through April 27, 2019. For the period November 12, 2017 through May 27, 2018, appellant received FECA schedule award payments from OWCP while she continued to receive age-related retirement benefits from SSA. OWCP's regulations provide that retirement benefits paid by the Office of Personnel Management (OPM) or SSA can be paid concurrently with schedule award compensation under FECA without a

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997).

⁹ 5 U.S.C. § 8116(d)(2); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

deduction from FECA benefits.¹⁰ Consequently, the SSA benefits appellant received during the period November 12, 2017 through May 27, 2018 were not dual benefits and should not have been included in the overpayment calculation.

On remand, OWCP shall determine the exact amount of the overpayment of compensation and the correct dates during which the overpayment occurred. It should then issue a new preliminary overpayment determination with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹¹

CONCLUSION

The Board finds that fact of overpayment has been established. The Board further finds that this case is not in posture for decision regarding the amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and this case is remanded for further proceedings consistent with this decision of the Board.

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

¹⁰ See *J.H.*, Docket No. 19-1887 (issued June 16, 2020); *K.C.*, Docket No. 19-1838 (issued May 1, 2020).

¹¹ In light of the Board's disposition of Issue 1, Issue II is rendered moot.