

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

_____)	
M.B., Appellant)	
)	
and)	Docket No. 20-1578
)	Issued: March 25, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
JOHN F. KENNEDY INTERNATIONAL)	
AIRPORT, Jamaica, NY, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2020 appellant filed a timely appeal from a July 30, 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.

¹ The Board notes that, following the July 30, 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.*

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) appellant received an overpayment of wage-loss compensation in the amount of \$9,330.69 from February 1, 2018 through May 25, 2019 for which she was without fault because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits 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 \$300.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On May 7, 1999 appellant, then a 47-year-old commodity team aide, filed a traumatic injury claim (Form CA-1) alleging that on May 6, 1999 she strained her right hand and wrist while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx830, for tenosynovitis of the right hand.³ It subsequently expanded the acceptance of the claim to include bilateral carpal tunnel syndrome. OWCP paid appellant wage-loss compensation for total disability on the periodic rolls.⁴

On March 4, 2019 SSA provided OWCP with a Federal Employees Retirement System (FERS)/SSA dual benefit calculation form. The form indicated that, with FERS, appellant was entitled to a monthly payment of \$1,570.00 effective February 2018 and \$1,613.50 effective December 2018. Without her federal service contributions, she was entitled to a monthly payment rate of \$985.00, effective February 2018, and \$1,012.50 effective December 2018.

In a payment plate dated June 3, 2019, OWCP indicated that it was offsetting the amount of SSA age-related retirement benefits attributable to appellant's federal service under FERS beginning May 26, 2019.

OWCP completed a FERS offset calculation form on June 3, 2019. It calculated the amount that it should have offset from appellant's wage-loss compensation from February 1, 2018 through May 25, 2019. OWCP found that, effective February 1, 2018, the monthly offset was \$585.00, or \$540.00 every 28 days and, effective December 1, 2018, the monthly offset was \$601.00, or \$554.77 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from February 2, 2018 to May 25, 2019 to find the amount that it had overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset a total of \$9,330.69 from her wage-loss compensation.

On June 4, 2019 OWCP notified appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$9,330.69 because it had

³ A request for personnel action form (SF-52) dated December 13, 2002 indicated that appellant's retirement coverage was FERS.

⁴ OWCP also accepted appellant's occupational disease claim (Form CA-2), filed on November 8, 2000, for left carpal tunnel syndrome under OWCP File No. xxxxxx524, which it administratively combined with the current file, No. xxxxxx830, with the latter serving as the master file.

failed to reduce her wage-loss compensation benefits for the period February 1, 2018 through May 25, 2019 by the portion of her SSA benefits that were attributable to federal service. It further advised her of its preliminary overpayment determination that she was without fault in creating the overpayment of compensation. OWCP informed appellant that she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing within 30 days of the date of the letter.

On July 1, 2019 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She indicated that she had submitted SSA information to OWCP.

Following a preliminary review, by decision dated September 12, 2019, OWCP's hearing representative set aside OWCP's preliminary overpayment determination. She found that there was no evidence of record establishing that appellant had FERS retirement coverage. The hearing representative also instructed OWCP to confirm that the date of injury, May 6, 1999, was the applicable date of her pay rate for compensation purposes.

On September 26, 2019 the employing establishment advised that appellant had stopped work following her employment injury on June 10, 1999, and that her salary on that date was the same as on her date of injury.

On December 4, 2019 OWCP notified appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$9,330.69 because it had failed to reduce her wage-loss compensation benefits for the period February 1, 2018 through May 25, 2019 by the portion of her SSA age-related retirement benefits that were attributable to federal service. It provided its calculation of the overpayment of compensation and further advised her of its preliminary overpayment determination that she was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it 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 prerecoupment hearing.

On January 2, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver, contending that she was without fault in the creation of the overpayment. In a Form OWCP-20, appellant provided her monthly income as \$1,478.00 from SSA. She listed monthly expenses of \$874.99 for housing, \$200.00 for food, approximately \$375.00 for utilities, and approximately \$336.00 to \$400.00 in other expenses. Appellant submitted supporting financial documentation, including copies of bank statements and bills, which showed minimum monthly credit card expenses of \$630.00. She also submitted documentation showing a \$26.00 business loan and a payment to her insurance company of \$123.84 per month. Appellant advised that she had \$33,000.00 in her Thrift Savings Plan (TSP) and listed other assets in stocks and bonds of \$901.00.

A telephonic prerecoupment hearing was held on May 15, 2020.

By decision dated July 30, 2020, OWCP's hearing representative finalized the preliminary overpayment determination. She found that appellant was without fault in the creation of the

\$9,330.69 overpayment of compensation, but denied waiver of recovery of the overpayment. The hearing representative noted that appellant had a monthly income of \$1,478.00 from SSA plus \$1,581.30 from OWCP, for a total monthly income of \$3,059.30. She discussed appellant's monthly expenses listed on appellant's Form OWCP-20 and noted that documentation supported monthly minimum credit card payments of \$656.00 a month, a payment of \$26.00 per month for a business loan, and \$123.84 to the insurance company, which left \$1,059.47 in income over expenses. The hearing representative also noted that appellant had assets of \$33,000.00 in her TSP and \$901.54 in investments. She required recovery of the overpayment by deducting \$300.00 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.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 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.⁷ 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 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 -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$9,330.69 for the period February 1, 2018 through May 25, 2019 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset.

OWCP paid appellant wage-loss compensation for total disability following her injury. Beginning February 2, 2018, she received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.⁹ Consequently, fact of overpayment has been established.

⁵ *Supra* note 2 at § 8102(a).

⁶ *Id.* at § 8116.

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

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

⁹ *Supra* note 6. *See D.M.*, Docket No. 19-1369 (issued June 30, 2020).

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits 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 the SSA rates with FERS and without FERS for specific periods from September 1, 2016 through December 7, 2019. OWCP provided its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period February 1, 2018 through May 25, 2019.

The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period February 1, 2018 through May 25, 2019 and finds that an overpayment of compensation in the amount of \$9,330.69 was created.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹¹ provides that an overpayment must be recovered 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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹²

According to 20 C.F.R. § 10.436, 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 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.¹³ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid 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 TSP or 401(k)), jewelry, and artwork.¹⁴

Section 10.437 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

¹⁰ See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

¹¹ *Supra* note 2.

¹² *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹³ 20 C.F.R. § 10.436. OWCP procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that 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)(2) and (3) (September 2018).

¹⁴ *Id.* at Chapter 6.400.4b(3)(a), (b).

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 her position for the worse.¹⁵

ANALYSIS -- ISSUE 2

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

As OWCP found appellant not at 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

OWCP's hearing representative found that appellant's monthly income was \$3,059.30 per month. She indicated that subtracting the monthly expenses listed on the OWCP-20 form of \$874.99 for housing, \$200.00 for food, \$375.00 for utilities, \$336.00 to \$400.00 in miscellaneous expenses, an additional \$656.00 in documented credit card expenses, \$123.84 for an insurance payment, and \$26.00 for a business loan, yielded discretionary income of \$1,059.47. The Board notes, however, that subtracting appellant's monthly expenses accepted by OWCP's hearing representative from her monthly income yields discretionary income of \$403.47. However, as her monthly income exceeds her ordinary and necessary living expenses by more than \$50.00, the Board finds that she does not need substantially all of her income for ordinary and necessary living expenses. Additionally, appellant has \$33,000.00 in her TSP account, an amount that exceeds the allowable resource base of \$6,200.00 for an individual as provided in OWCP's procedures.¹⁷

Appellant has not established that she was entitled to waiver of recovery of the overpayment on the basis of defeating the purpose of FECA.¹⁸ There is also no evidence to support that she gave up a valuable right or changed her position for the worse, in reliance on her FECA compensation. Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.¹⁹

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.²⁰

On appeal appellant contends that her bank statement supported that her monthly bills were \$2,892.55 and that she had only approximately \$44.81 in discretionary income a month. As

¹⁵ 20 C.F.R. § 10.437(b)(1).

¹⁶ *Id.* at § 10.436.

¹⁷ See *supra* note 13 at Chapter 6.400.4.a(2) (September 2018); *T.D.*, Docket No. 20-0972 (issued January 28, 2021).

¹⁸ See *R.D.*, Docket No. 19-1598 (issued April 17, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

¹⁹ *Id.*

²⁰ *Id.*

discussed, however, her assets exceed the allowable resource base, and thus she has not established that recovery of the overpayment would defeat the purpose of FECA.²¹

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.²²

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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 the 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 hardship.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation every 28 days.

The record supports that, in requiring repayment of the overpayment by deducting \$300.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information she submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation every 28 days.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of wage-loss compensation in the amount of \$9,330.69 from February 1, 2018 through May 25, 2019 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits 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 \$300.00 every 28 days from appellant's continuing compensation payments

²¹ *T.D.*, *supra* note 17; *N.B.*, Docket No. 20-0727 (issued January 26, 2021).

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

²³ *Id.*

²⁴ *See J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

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