

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

| | | |
|------------------------------------|---|-----------------------------|
| _____ |) | |
| B.B., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0711 |
| |) | Issued: May 21, 2021 |
| DEPARTMENT OF THE TREASURY, |) | |
| INTERNAL REVENUE SERVICE, |) | |
| Sacramento, CA, Employer |) | |
| _____ |) | |

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

Case Submitted on the Record

ORDER REVERSING CASE

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

On February 10, 2020 appellant filed a timely appeal from an October 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-0711.¹

On April 13, 1993 appellant, then a 42-year-old group secretary, filed an occupational disease claim (Form CA-2) alleging that she developed extended overuse tendinitis due to factors of her federal employment, including repetitive motions using a computer. OWCP accepted the claim for tenosynovitis of the right hand and wrist, right rotator cuff syndrome, right rotator cuff tear or rupture of right shoulder, right carpal tunnel syndrome, and right trigger finger. Appellant stopped work on April 12, 1993 and did not return. OWCP paid her wage-loss compensation on the periodic rolls as of June 16, 2002.

¹ The Board notes that OWCP received additional evidence following the October 29, 2019 decision. 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.*

A notification of personnel action (Form SF-50) dated September 27, 2002 documented that appellant was removed from employment, effective August 30, 1997. The form noted her service computation date as February 15, 1986 and indicated that her retirement plan was "(1) K."

On December 4, 2018 OWCP forwarded a Federal Employees' Retirement System (FERS)/Social Security Administration (SSA) dual benefits calculation transmittal to SSA to obtain information as to whether an offset of FECA compensation benefits was required.

On January 30, 2019 OWCP received from SSA a January 22, 2019 FERS/SSA dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since 2016. The form showed appellant's SSA benefit rates with and without a FERS offset. Beginning May 2016, the SSA rate with FERS was \$867.19 and without FERS was \$442.90, beginning December 2016, the SSA rate with FERS was \$871.00 and without FERS was \$444.00, beginning December 2017, the SSA rate with FERS was \$888.00 and without FERS was \$453.00, and beginning December 2018, the SSA rate with FERS was \$912.50 and without FERS was \$465.50.

OWCP completed a FERS offset calculation worksheet on February 27, 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 May 1, 2016 to March 2, 2019, resulting in a total overpayment amount of \$14,726.51. The form indicated that, from May 1, 2016 through November 30, 2017, appellant received an overpayment in the amount of \$2,998.35, from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$5,138.08, from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$5,234.34, and from December 1, 2018 through March 2, 2019, she received an overpayment in the amount of \$1,355.74.

In a March 1, 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 March 27, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$14,726.51 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period May 1, 2016 through March 2, 2019 to offset her SSA age-related retirement benefits that were attributable to federal service. It also determined that she was with fault in the creation of the overpayment because she failed to provide information she knew, or should have known, to be material. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised appellant that she could request a waiver of the overpayment. It further requested that she 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, OWCP further notified appellant 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 prerecoumment hearing.

On April 23, 2019 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment

and argued that she was not at fault because she did not understand that she had to notify OWCP when she turned 66, she had answered OWCP's questions every 18 months regarding her status to the best of her ability.

Appellant completed and returned the Form OWCP-20 and reported total monthly income of \$10,631.00 and total monthly expenses of \$6,508.70. She provided copies of financial documentation including mortgage statements, bank statements, and tax returns.

A prerecoupment hearing was held on August 15, 2019. On September 27, 2019 appellant submitted additional financial information regarding her income and expenses.

By decision dated October 29, 2019, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$14,726.51 for the period May 1, 2016 through March 2, 2019, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. The hearing representative found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment and ordered recovery of the overpayment by deducting \$375.00 every 28 days from appellant's continuing compensation payments.

The Board finds that OWCP has not met its burden of proof to establish that appellant received an overpayment of compensation.

OWCP determined that appellant received an overpayment of compensation during the period May 1, 2016 to March 2, 2019, because she concurrently received FECA compensation and SSA age-related retirement benefits without an appropriate offset. The case record, however contains a Form SF-50 dated September 27, 2002, which indicates that she was removed from employment as of August 30, 1997. It therefore remains unclear whether appellant was covered under a federal retirement annuity program during the period of the overpayment.

As OWCP has not established that appellant received an overpayment of compensation during the period May 1, 2016 to March 2, 2019, the Board finds that OWCP has not met its burden of proof.²

² In light of the Board's findings regarding the fact and amount of overpayment, the remaining issues of waiver and recovery of the overpayment are rendered moot.

IT IS HEREBY ORDERED THAT the October 29, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 21, 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