

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

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<b>T.N., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0164</b>
	)	<b>Issued: November 23, 2021</b>
<b>DEPARTMENT OF VETERANS AFFAIRS, VA</b>	)	
<b>MEDICAL CENTER, Washington, DC,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Timothy Shea, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 28, 2019 appellant, through counsel, filed a timely appeal from a May 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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.

<sup>2</sup> Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted to establish that OWCP improperly denied waiver of recovery of the overpayment. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$34,976.44 for the period July 1, 2014 through March 2, 2019 for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$204.63 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>5</sup> The facts and circumstances as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 10, 1993 appellant, then a 45-year-old file room clerk, filed an occupational disease claim (Form CA-2) alleging that her chronic asthmatic condition was aggravated as a result of renovation near her duty station, the temporary x-ray file room.<sup>6</sup> She indicated that she first realized her condition was related to her federal employment on August 10, 1993. Appellant was placed on administrative leave until August 16, 1993. On October 18, 1993 she returned to her regular-duty station and experienced a severe asthmatic attack due to an unknown odor. Appellant stopped work on that date. On October 22, 1993 she elected to receive Office of Personnel Management (OPM) benefits. On March 31, 1998 OWCP accepted her claim for temporary aggravation of asthma. It then authorized wage-loss compensation.

In a letter dated June 9, 2010, OWCP advised appellant that her continuing compensation benefits must be reduced if she began receiving SSA retirement benefits based on her age and federal service.

On July 8, 2012 SSA informed appellant that she owed \$20,674.00 due to an overpayment of SSA benefits. On August 20, 2013 it advised appellant that her monthly benefit was \$796.70 and that it was withholding \$79.60 a month. On August 22, 2013 SSA found that appellant owed \$19,498.20 due to an overpayment and that the overpayment would be repaid by September 2015. In a December 11, 2013 letter, SSA informed appellant that it was reviewing her overpayment

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the May 13, 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 additional evidence for the first time on appeal. *Id.*

<sup>5</sup> Docket No. 95-2729 (issued July 29, 1997).

<sup>6</sup> Appellant began her federal employment at the employing establishment on January 8, 1984.

decision and would reinstate her benefits in the amount of \$727.20. In 2013, appellant repaid \$5,305.60 in SSA benefits. She received a cost-of-living adjustment (COLA) increase in January 2014 resulting in SSA benefits of \$727.20. On June 6, 2014 SSA indicated that beginning December 2013 her full monthly SSA benefit was \$808.60. In a letter dated August 10, 2014, it addressed her disability benefits noting that, beginning in July 2013, it was not reducing these benefits because of her age.

In a February 23, 2015 letter, SSA informed appellant that her benefits would be reduced to \$645.30 based on payment of Medicare Part B insurance premiums beginning April 2015. On July 4, 2015 it indicated her SSA benefits would be increased to \$822.00 a month. On August 24, 2015 SSA found that appellant had been overpaid SSA benefits in the amount of \$14,581.60 and that it would withhold \$417.00 to recover this overpayment from her monthly SSA benefits.

On March 28, 2017 SSA informed appellant that her date of entitlement to SSA benefits was July 1994. It provided her monthly SSA benefits with cost-of-living adjustments from 1994 through January 2017 and noted that she was currently receiving \$824.00 a month.

In letters dated July 3, 2018, SSA indicated that appellant's overpayment of SSA benefits had been recovered and that she would receive benefits in the amount of \$841.00 or \$727.20 a month beginning August 2018.

On January 7, 2019 OWCP forwarded a Federal Employees Retirement System (FERS)/(SSA) dual benefits calculation form to the SSA to determine whether an offset of compensation benefits was required.

On January 30, 2019 OWCP received from SSA a completed FERS/SSA dual benefits calculation form dated January 22, 2019, which reported that appellant had been in receipt of age-related retirement benefits since July 2014. The form listed her SSA age-related retirement benefit rates with FERS and without FERS as follows: beginning July 2014, the monthly SSA rate with FERS was \$808.00 and without FERS was \$201.00; beginning December 1, 2014 through November 30, 2016, appellant's SSA rate with FERS was \$822.00 and without FERS was \$204.00; beginning December 1, 2016, appellant's SSA rate with FERS was \$824.00, and without FERS was \$205.00; beginning December 1, 2017, appellant's SSA rate with FERS was \$841.00, and without FERS was \$209.00; beginning December 1, 2018, appellant's SSA rate with FERS was \$864.00 and without FERS was \$215.00.

OWCP completed a FERS offset calculation worksheet on March 1, 2019. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from July 1, 2014 through March 2, 2019, resulted in a total overpayment of \$34,976.44. OWCP related: from July 1 through November 30, 2014, appellant received an overpayment in the amount of \$3,061.68; from December 1, 2014 through November 30, 2015, she received an overpayment in the amount of \$7,436.37; from December 1, 2015 through November 30, 2016, appellant received an overpayment in the amount of \$7,456.75; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$7,448.41; from December 1, 2017 through November 30, 2018, appellant received an overpayment in the amount of \$7,604.84; and from December 1, 2018 through March 2, 2019 she received an overpayment in the amount of \$1,968.40.

In a March 15, 2019 letter, OWCP informed appellant that she had been receiving dual FERS and SSA age-related retirement benefits without an appropriate offset. It further informed her that her FECA wage-loss compensation benefits must be adjusted based on the FERS portion of SSA benefits that were attributable to federal service. OWCP indicated that appellant's FECA benefits would be reduced by \$599.08 to \$1,354.92 every 28 days.

On March 26, 2019 OWCP notified appellant of its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$34,976.44 for which she was without fault, because it failed to reduce her FECA wage-loss compensation for the period July 1, 2014 through March 2, 2019 to offset her SSA age-related retirement benefits attributable to federal service. It requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation to determine a reasonable repayment schedule and advised that she could request waiver of recovery. It 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, OWCP provided appellant with an overpayment action request form and notified her that within 30 days of the date of the letter, she could request a final decision based on the written record or a prerecoument hearing.

On April 26, 2019 appellant, through counsel, requested a decision based on the written evidence as well as waiver of recovery of the overpayment. She asserted that OWCP should waive recovery of the overpayment as she was without fault and as OWCP failed to timely determine that the overpayment had occurred.

OWCP received a completed Form OWCP-20 dated April 22, 2019, wherein appellant advised that she had monthly income of \$3,353.60 including her SSA benefits of \$864.60, her spouse's SSA benefits of \$643.00 as well as FECA and other unspecified household benefits of \$1,946.00.<sup>7</sup> She listed monthly expenses of \$200.00 for housing, \$200.00 for food, \$80.00 for clothing, \$105.64 for health insurance, and \$453.02 for utilities, miscellaneous household expenses, medical and dental expenses, automobile expenses, and personal necessities. Appellant also included \$608.00 for property taxes. She listed debts paid by monthly installments totaling \$1,602.96 per month as well as Medicare costs of \$1,464.00, which yielded total monthly expenses of \$4,713.62. Appellant listed her assets totaling \$92.99, including \$74.00 in a checking account and \$18.99 in a savings account.

Appellant provided financial documentation supporting that she paid property taxes, as well as credit card payments, utilities, and life/medical insurance costs. She further submitted a bill that indicated that she paid \$4.29 per month for a newspaper. Appellant provided checking and savings account statements.

By decision dated April 26, 2019, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$34,976.44 for the period July 1, 2014 through March 2, 2019. It found appellant without fault in the creation of the overpayment, but denied waiver of recovery. OWCP required recovery of

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<sup>7</sup> The Board notes that appellant's FECA benefits were reduced from \$1,954.00 to \$1,354.92. Appellant did not list the specific source of the additional \$591.08 in household income.

the overpayment by deducting \$204.63 from appellant's continuing compensation payments every 28 days.

On May 3, 2019 OWCP issued a final overpayment decision, which superseded the April 26, 2019 decision. It found that appellant had received an overpayment of compensation in the amount of \$34,976.44 for the period July 1, 2014 through March 2, 2019 for which she was without fault. OWCP denied waiver of recovery, finding that appellant had monthly income of \$3,453.60 and monthly expenses of \$1,291.88 including food, clothing, utilities, and monthly credit card payments such that her monthly income exceeded her monthly expenses by \$2,111.72, which was more than the \$50.00 allotted amount. Therefore, it determined that the evidence of record was insufficient to establish that recovery would defeat the purpose of FECA. OWCP further found that there was no evidence that appellant gave up a valuable right or changed in position for the worse such that recovery of the overpayment would be against equity and good conscience. It required recovery of the overpayment by deducting \$204.63 from appellant's continuing compensation payments every 28 days.

### **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>8</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>9</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 benefits that are attributable to the employee's federal service.<sup>10</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>11</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period July 1, 2014 through March 2, 2019 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset.

Appellant received FECA wage-loss compensation from July 1, 2014 through March 2, 2019 while she continued to receive age-related retirement benefits from SSA. As previously

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<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8116.

<sup>10</sup> 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>11</sup> FECA Bulletin No. 97-09 (February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

noted, OWCP is required 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>12</sup> The fact and the period of overpayment are, therefore, established.

The Board further finds, however, that the case is not in posture for decision with regard to the amount of the overpayment.<sup>13</sup> OWCP determined that appellant received an overpayment of compensation from July 1, 2014 through March 2, 2019 because she received compensation from OWCP and SSA age-related retirement benefits without an appropriate offset. The case record, however, contains contradictory evidence from SSA regarding the actual amount that appellant received in SSA age-related retirement benefits during the FERS/SSA dual benefits period from July 1, 2014 through March 2, 2019. In letters dated July 8, 2012, August 22, 2013, and August 24, 2015, SSA reported that appellant had outstanding overpayments of SSA benefits of \$20,674.00, \$19,498.20, and \$14,581.60, respectively, and informed her that it would withhold a portion of her ongoing SSA age-related retirement benefits to collect these overpayment amounts. These 2012, 2013, and 2015 letters suggest that appellant received reduced SSA age-related retirement benefits for a portion of the dual benefits period from July 1, 2014 through March 2, 2019, because the 2012, 2013, and 2015 SSA overpayments were recouped by reducing her ongoing SSA age-related retirement benefits.

The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.<sup>14</sup> With respect to the amount of the overpayment, the Board finds that OWCP has not adequately explained how the overpayment was determined in light of the discrepancies in the evidence provided by SSA as to the actual amounts of SSA age-related retirement benefits received by appellant during the period July 1, 2014 through March 2, 2019, as there is evidence in the record that a portion of her ongoing SSA age-related retirement benefits made during the dual benefits period were withheld in recompense for prior SSA overpayments. As such, OWCP has not established the amount of the overpayment in question.<sup>15</sup>

On remand OWCP shall seek clarification from SSA regarding the actual amount of SSA age-related retirement benefits that appellant received during the FERS/SSA dual benefit period July 1, 2014 through March 2, 2019. It shall then determine the amount of the overpayment of compensation and 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.

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period July 1, 2014 through March 2, 2019, because she concurrently

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<sup>12</sup> *Supra* note 10.

<sup>13</sup> *D.D.*, Docket No. 20-1172 (issued September 29, 2021); *L.H.*, Docket No. 20-0115 (issued September 4, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> *See D.D.*, *supra* note 13.

received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The Board further finds, however, that the case is not in posture for decision with regard to the amount of the overpayment.<sup>16</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 23, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> In light of the Board's disposition in Issue 1, Issues 2 and 3, the issues of waiver and recovery of the overpayment are rendered moot.