

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

_____)	
L.E., Appellant)	
)	
and)	Docket No. 21-0777
)	Issued: November 15, 2021
DEPARTMENT OF VETERAN AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, New Orleans, LA, 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 March 17, 2021 appellant filed a timely appeal from a December 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$13,150.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset for the period November 1, 2016 through August 15, 2020; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether

¹ 5 U.S.C. § 8101 *et seq.*

OWCP properly required recovery of the overpayment by deducting \$468.19 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.² The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 6, 1998 appellant, then a 44-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her knees, back, and neck when she assisted a patient into bed while in the performance of duty. She stopped work on May 7, 1998.³ On June 18, 1998 OWCP initially accepted appellant's claim for right knee sprain. It later expanded the accepted conditions to include right knee medial meniscus tear. Appellant underwent OWCP-authorized right knee arthroplasty on September 2, 1998. OWCP paid her wage-loss compensation on the daily, periodic, and supplemental rolls for disability. On April 30, 2002 it granted appellant a schedule award for 42 percent permanent impairment of the right lower extremity. The period of the award ran for 120.96 weeks from December 26, 2001 to April 20, 2004. Thereafter, OWCP paid appellant wage-loss compensation for disability on the supplemental and periodic rolls.

On June 24, 2020 SSA forwarded a completed Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in November 2016 appellant's SSA rate with FERS was \$810.00 and without FERS was \$390.00; beginning in December 2016 her SSA rate with FERS was \$812.00 and without FERS was \$391.00; beginning in December 2017 there was no FERS offset because she received disability benefits; beginning in November 2018 her SSA rate with FERS was \$908.00 and without FERS was \$437.00; beginning in December 2018 her SSA rate with FERS was \$934.00 and without FERS was \$449.00; and beginning in December 2019 her SSA rate with FERS was \$949.00 and without FERS was \$456.00.

On August 12, 2020 OWCP resent a FERS/SSA dual benefits calculation form to SSA. It requested that SSA verify whether appellant received SSA disability benefits and if her disability was for that period only.

On August 19, 2020 SSA forwarded a completed FERS/SSA dual benefits calculation form to OWCP. The form indicated that beginning in November 2016 appellant's SSA rate with FERS was \$810.50 and without FERS was \$450.30; beginning in December 2016 her SSA rate with FERS was \$812.90 and without FERS was \$451.60; beginning in November 2018 her SSA rate with FERS was \$908.20 and without FERS was \$460.60; beginning in December 2018 her SSA rate with FERS was \$934.20 and without FERS was \$473.40; and beginning in December 2019 her

² Docket No. 05-590 (issued September 12, 2005).

³ On June 12, 1998 appellant's employment was terminated by the employing establishment.

SSA rate with FERS was \$939.10 and without FERS was \$480.90. The form indicated that from August 2017 through October 2018 appellant was entitled to receive disability benefits.

OWCP, by letter dated September 11, 2020, notified appellant that her compensation would be offset by the portion of her SSA age-related retirement benefits attributable to her federal service.

In a preliminary overpayment determination dated September 11, 2020, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$13,150.41 because her wage-loss compensation benefits had not been reduced for the period November 1, 2016 through August 15, 2020 by the portion of her SSA benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$13,150.41. OWCP further advised appellant of its preliminary overpayment determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. Additionally, it notified her that she could request a telephone conference, a final decision based on the written evidence, or a precouplement hearing. OWCP allotted 30 days for appellant to respond.

On October 7, 2020 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. She indicated that she was requesting waiver of recovery of the overpayment because she relied on written information given to her by OWCP and other governmental agencies to correctly calculate her payments. In an accompanying Form OWCP-20 of even date, appellant reported monthly income of \$5,127.00, including SSA benefits of \$2,759.00 and FECA compensation benefits of \$2,368.00. She also reported monthly expenses of \$1,190.00 for rent or mortgage; \$700.00 for food; \$150.00 for clothing; \$550.00 for utilities; \$1,600.00 for other expenses; \$200.00 for a credit card; and \$545.00 for a car loan, totaling \$4,935.00. Additionally, appellant reported funds of \$200.00 in a checking account. She submitted financial documentation including a bank statement and bills.

OWCP, by decision dated December 17, 2020, finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$13,150.40 for the period November 1, 2016 through August 15, 2020, for which she was not at fault, because her FECA compensation payments were not offset by the portion of her SSA age-related retirement benefits attributable to her federal service. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery because the evidence of record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP found that, based on monthly bills submitted, appellant listed monthly expenses totaling \$3,078.95. It further found that she received \$6,360.47 in monthly deposits based on a bank statement. OWCP concluded that appellant's monthly income of \$6,360.47 exceeded her monthly expenses of \$3,078.95 by \$3,281.52, and thus, she was not entitled to waiver on the basis of defeating the purpose of FECA. It required recovery of the overpayment by deducting \$468.19 from her 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 duty.⁴ However, section 8116 also 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 When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.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 \$13,150.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period November 1, 2016 to August 15, 2020.

In its December 17, 2020 decision, OWCP found that an overpayment of compensation was created for the period November 1, 2016 to August 15, 2020. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss 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 beginning November 1, 2016. OWCP, however, neglected to offset her FECA benefits until August 15, 2020. Accordingly, the Board finds that it properly determined that appellant received

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

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

⁹ 5 U.S.C. § 8116(d)(2); *see W.C.*, Docket No. 20-1241 (issued February 9, 2021); *R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

an overpayment of wage-loss compensation for the period November 1, 2016 through August 15, 2020.

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were 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. The SSA provided appellant's SSA rates with FERS and without FERS for the period November 1, 2016 through August 15, 2020. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period November 1, 2016 through August 15, 2020 and finds that an overpayment of compensation in the amount of \$13,150.41, was created.¹⁰

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.¹¹ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹²

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.¹³ 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 \$50.00.¹⁴

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

¹⁰ See *W.C., id.; M.S.*, Docket No. 18-0740 (issued February 4, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹¹ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; see *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹² *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 20 C.F.R. § 10.436. 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 6.400.4a (3) (September 2018).

¹⁴ Federal (FECA) Procedure Manual *id.* at Chapter 6.400.4(a)(3) (September 2018).

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.¹⁵ 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 that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁶

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.¹⁷

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. Evidence of record reveals that appellant received an income of \$6,360.47 per month and that she had monthly expenses of \$3,078.95. As appellant's monthly income exceeds her monthly expenses by more than \$50.00, in this case, \$3,281.52, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁸ 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.¹⁹

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 \$13,150.41 overpayment.

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

¹⁶ FECA Procedure Manual, *supra* note 14 at Chapter 6.400.4c(3) (September 2018).

¹⁷ 20 C.F.R. § 10.436.

¹⁸ *Id.* at § 10.437(a), (b).

¹⁹ *M.R.*, Docket No. 20-1622 (issued June 30, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

LEGAL PRECEDENT -- ISSUE 3

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 facts, so as to minimize any hardship.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$468.19 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$468.19, OWCP explained how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.²¹ Thus, it did not abuse its discretion in setting the rate of recovery.²² The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$468.19 every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$13,150.41, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period November 1, 2016 through August 15, 2020. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$468.19 every 28 days from her continuing compensation payments.

²⁰ 20 C.F.R. § 10.441(a). *See also* *L.B.*, Docket No. 11-2076 (issued August 29, 2012); *G.B.*, Docket No. 11-1568 (issued February 15, 2012).

²¹ *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

²² *F.K.*, *id.*; *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed,

Issued: November 15, 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