

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

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<b>G.G., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0875</b>
	)	<b>Issued: November 16, 2021</b>
<b>FEDERAL JUDICIARY, U.S. DISTRICT COURT, San Antonio, TX, Employer</b>	)	
_____	)	

*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 May 17, 2021 appellant filed a timely appeal from a February 5, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$39,639.56 for the period June 1, 2015 through August 15, 2020, 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; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$306.56 from appellant's continuing compensation payments every 28 days.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on July 5, 1996 appellant, then a 48-year-old docket clerk, sustained cervical sprain, displacement of a cervical intervertebral disc without myelopathy, and a sprain of the left shoulder and upper arm when she fell from a ladder while in the performance of duty.<sup>2</sup> Appellant stopped work on January 3, 1997 and did not return. She underwent a cervical discectomy and fusion at C5-6 on February 3, 1997, a discectomy and fusion from C4-5 through C6-7 on January 14, 1998, and an acromioplasty with a partial rotator cuff debridement of the left shoulder on October 1, 1998. OWCP paid appellant wage-loss compensation for disability on the periodic rolls.

On July 28, 2020 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.

In an August 18, 2020 response, SSA provided the monthly age-related retirement benefit rates that appellant was entitled to with and without FERS effective June 2015 to December 2019. It notified OWCP that, with FERS, appellant was entitled to monthly payments of \$1,059.20 effective June 2015 and December 2015, \$1,062.30, effective December 2016, \$1,083.50 effective December 2017, \$1,113.80 effective December 2018; and \$1,131.60 effective December 2019. Without FERS, she was entitled to monthly payments of \$442.30 effective June 2015 and December 2015, \$443.60 effective December 2016, \$452.40 effective December 2017, \$465.00 effective December 2018, and \$472.40 effective December 2019.

In an August 19, 2020 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her compensation benefits. It found that appellant was entitled to net compensation after the SSA offset of \$1,388.57.

In an August 20, 2020 FERS offset calculation memorandum, OWCP calculated the FERS/SSA offset for each period from June 1, 2015 through August 15, 2020. It found that, from June 1, 2015 through November 30, 2016, appellant received an overpayment in the amount of \$11,165.21, from December 1, 2016 through November 30, 2017, she received an overpayment of \$7,444.80, from December 1, 2017 through November 30, 2018, appellant received an overpayment of \$7,594.01, from December 1, 2018 through November 30, 2019, she received an overpayment of \$7,806.99, and from December 1, 2019 through August 15, 2020, appellant received an overpayment of \$5,628.55. OWCP added the amounts to find a total overpayment of \$39,639.56.

On September 15, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$39,639.56 had been created because appellant received wage-loss compensation payments for the period June 1, 2015 through August 15, 2020 that had not been reduced to offset her SSA age-related retirement benefits attributable to her federal service. It determined that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide

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<sup>2</sup> The traumatic injury claim (Form CA-1) is not contained in the case record.

supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records, which support income and expenses. Additionally, OWCP provided an overpayment action request form and 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 precoupment hearing.

In an overpayment action request form signed October 8, 2020, appellant requested a decision based on the written evidence. She requested waiver of recovery of the overpayment. In an OWCP-20 form, appellant advised that she had monthly income of \$1,732.00 in SSA benefits and listed monthly expenses of \$4,317.78. She indicated that she had assets of \$5,630.00. Appellant submitted supporting financial documentation. In an accompanying statement, she related that she did not know that her SSA benefits when she turned 65 would affect her OWCP benefits. Appellant advised that the \$10,000.00 in a savings account currently had a balance of \$5,000.00 as she had used it to meet expenses.

By decision dated February 5, 2021, OWCP finalized its preliminary overpayment determination finding that appellant had received a \$39,639.56 overpayment of compensation for the period June 1, 2015 through August 15, 2020 because it failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP found that appellant had monthly income of \$2,958.26.<sup>3</sup> It subtracted appellant's monthly expenses of \$4,317.78 and found that she had a surplus of \$1,359.52. OWCP required recovery of the overpayment by deducting \$306.56 from her continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>4</sup> 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>5</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>6</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 retirement benefits that are attributable to the employee's federal service.<sup>7</sup> 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

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<sup>3</sup> It appears that OWCP added appellant's SSA income of \$1,131.60 to her compensation from OWCP as if it were monthly rather than every 28 days to find that she had monthly income of \$2,958.26.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> 5 U.S.C. § 8102.

<sup>6</sup> *Id.* at § 8116.

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

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>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$39,639.56 for the period June 1, 2015 through August 15, 2020 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability on the periodic rolls after she stopped work in January 1997. Appellant received SSA age-related retirement benefits beginning June 2015. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.<sup>9</sup> The information provided by SSA indicates that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. Accordingly, the Board finds that fact of overpayment has been established.<sup>10</sup>

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 June 2015 through December 2019. OWCP provided its calculations for each relevant period based on SSA's dual benefits calculation worksheet and determined that appellant received an overpayment of compensation in the amount of \$39,639.56. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period June 1, 2015 through August 15, 2020 and finds that an overpayment of compensation in the amount of \$39,639.56 was created.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA 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.<sup>12</sup>

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary 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 the beneficiary's assets do

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

<sup>9</sup> *Supra* note 6. *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>10</sup> *See L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

<sup>11</sup> *See N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>12</sup> 5 U.S.C. § 8129.

not exceed a specified amount as determined by OWCP.<sup>13</sup> 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.<sup>14</sup> Also, 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.<sup>15</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>16</sup>

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>17</sup>

### ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision regarding 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.<sup>18</sup>

In its final overpayment determination, OWCP improperly found that appellant's monthly income of \$2,958.26 exceeded her monthly expenses of \$4,317.78 by \$1,359.52. In fact, appellant's reported expenses exceed her income. However, OWCP failed to consider whether appellant's assets 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.<sup>19</sup> Consequently, it remains unclear whether recovery of the overpayment would defeat the purpose of FECA.<sup>20</sup>

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<sup>13</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2)(3) (September 2020).

<sup>14</sup> *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>15</sup> *See supra* note 13 at Chapter 6.400.4(a)(2) (September 2020).

<sup>16</sup> *Id.* at Chapter 6.400.4(b)(3).

<sup>17</sup> 20 C.F.R. § 10.437(a)(b).

<sup>18</sup> *Id.* at § 10.436.

<sup>19</sup> *See supra* note 13 at Chapter 6.400.4(a)(2) (September 2020).

<sup>20</sup> *See V.B.*, Docket No. 20-0976 (issued January 26, 2021).

For the above reasons, the case shall be remanded for OWCP to obtain updated financial information and properly determine whether appellant is entitled to waiver of recovery of the overpayment. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision on the issue of waiver of recovery of the overpayment.<sup>21</sup>

**CONCLUSION**

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$39,639.56 from June 1, 2015 through August 15, 2020 for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The Board further finds that this case is not in posture for decision regarding waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 5, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 16, 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

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<sup>21</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.