

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

D.C., Appellant)	
)	
and)	Docket No. 21-0066
)	Issued: August 3, 2022
DEPARTMENT OF THE ARMY, DUGWAY PROVING GROUNDS, Dugway, UT, Employer)	
)	

Appearances:
Christi Anderson, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 21, 2020 appellant, through her representative, filed a timely appeal from a May 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.³

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that OWCP received additional evidence following the May 1, 2020 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$45,879.34 for the period May 1, 2009 through February 1, 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 \$544.45 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 27, 1995 appellant, then a 52-year-old physical science technician, filed an occupational disease claim (Form CA-2) alleging that on October 12, 1995 she was exposed to carbon monoxide gas causally related to factors of her federal employment. OWCP accepted the claim for toxic effects of unspecified gas, fume, or vapor and anoxic brain damage. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls as of June 16, 2002.

In a letter dated July 25, 2014, the employing establishment related that a review of appellant's file indicated that she was in the Federal Employees Retirement System (FERS) and that she was over 65 years of age and now receiving retirement benefits from SSA. It therefore requested that OWCP send an SSA/FERS form to SSA in order to inquire as to what the offset should be.

In a letter dated June 26, 2019, the employing establishment again related that a review of the claimant's file indicated that she was a FERS employee. In addition, it noted that OWCP previously faxed requests to SSA for a FERS offset transmittal, but a response could not be located in the file.

On July 25, 2019 OWCP forwarded to SSA a FERS/SSA dual benefits calculations transmittal. On November 22, 2019 it OWCP forwarded a second request to SSA.

On January 21, 2020 OWCP received a FERS/SSA dual benefit calculation transmittal from SSA setting forth appellant's SSA rate with FERS and without FERS commencing May 2009. With FERS, appellant was entitled to a monthly SSA rate of \$1,208.90 effective May 2009, \$1,208.90 effective December 2009, \$1,208.90 effective December 2010, \$1,252.40 effective December 2011, \$1,273.60 effective December 2012, \$1,292.70 effective December 2013, \$1,314.60 effective December 2014, \$1,314.60 effective December 2015, \$1,318.50 effective December 2016, \$1,344.80 effective December 2017, \$1,382.40 effective December 2018, and \$1,404.50 effective December 2019. Without FERS, he would have been entitled to a monthly SSA rate of \$876.60 effective May 2009, \$876.60 effective December 2009, \$876.60 effective December 2010, \$908.10 effective December 2011, \$923.50 effective December 2012, \$937.30 effective December 2013, \$953.20 effective December 2014, \$953.20 effective December 2015, \$956.00 effective December 2016, \$975.10 effective December 2017, \$1,002.40 effective December 2018, and \$1,018.40 effective December 2019.

On February 13, 2020 OWCP completed a FERS offset calculation form wherein it tabulated the overpayment from May 1, 2009 to February 1, 2020. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period. OWCP related: from May 1 through November 30, 2009 an overpayment of \$2,344.36; from December 1, 2009 through November 30, 2010 an overpayment of \$3,998.55; from December 1, 2010 through November 30, 2011 an overpayment of \$3,998.55; from December 1, 2011 through November 30, 2012 an overpayment of \$4,154.30; from December 1, 2012 through November 30, 2013 an overpayment of \$4,212.74; from December 1, 2013 through November 30, 2014 an overpayment of \$4,276.52; from December 1, 2014 through November 30, 2015 an overpayment of \$4,348.71; from December 1, 2015 through November 30, 2016 an overpayment of \$4,360.63; from December 1, 2016 through November 30, 2017 an overpayment of \$4,361.95; from December 1, 2017 through November 30, 2018 an overpayment of \$4,448.59; from December 1, 2018 through November 30, 2019 an overpayment of \$4,572.53; and from December 1, 2019 through February 1, 2020 an overpayment of \$801.90. It found that the overpayment totaled \$45,879.34.

On February 21, 2020 OWCP advised appellant that it was adjusting her wage-loss compensation, effective February 29, 2020, to offset the portion of her SSA age-related retirement benefits attributable to her federal service. It informed her that the portion of the SSA benefits that she earned as a federal employee was part of the FERS retirement package and that FECA did not allow for the simultaneous receipt of workers' compensation and federal retirement benefits. OWCP advised appellant that as of February 29, 2020 her new net FECA compensation payment would be \$2,115.78.

In a preliminary overpayment determination dated April 1, 2020, OWCP advised appellant of its determination that she received a \$45,879.34 overpayment of compensation for the period May 1, 2009 through February 1, 2020 because her wage-loss compensation benefits had not been reduced by her SSA age-related retirement benefits attributable to federal service. It also made a preliminary determination that she was without fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact or amount of the overpayment or request waiver of recovery of the overpayment. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine whether waiver should be granted, and if not, a reasonable repayment schedule. OWCP informed appellant that she should 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. It provided an overpayment action request form and 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. OWCP advised appellant that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days. No response was received.

By final overpayment decision dated May 1, 2020, OWCP found that appellant received an overpayment of compensation in the amount of \$45,879.34 for the period of May 1, 2009 through February 1, 2020, for which she was without fault. It also determined that although she was without fault in the creation of the overpayment, the circumstances of the case did not warrant waiver of recovery of the overpayment. OWCP noted that appellant did not respond to the preliminary overpayment determination nor request a waiver of the overpayment. It required recovery of the overpayment by deducting \$544.45 from her continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ To avoid payment of a dual benefit, FECA wage-loss compensation benefits shall be reduced by the amount of SSA benefits attributable to the employee's federal service.⁶ However, an offset is not required when the employee beneficiary is covered under the Civil Service Retirement System (CSRS) and/or her SSA age-related benefits are attributable to private sector employment.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$45,879.34 for the period May 1, 2009 through February 1, 2020, for which she was without fault, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to her federal service from May 1, 2009 through February 1, 2020. Thus, the record establishes that he received an overpayment of FECA wage-loss compensation.⁹

To determine the amount of the overpayment, the portion of the SSA benefits that were attributed to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA benefits that were attributable to federal service. SSA provided the SSA rate with FERS, and without FERS for specific periods commencing May 2009 through February 2020. OWCP provided its calculations for each relevant period based on the SSA worksheet and in its April 1, 2020 preliminary overpayment determination. No contrary evidence was provided.

⁴ *Id.* at § 8102.

⁵ *See id.* at § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ *Id.* at § 8116(d)(2); *id.* at § 10.421(d).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9c (May 2012); *see also* Chapter 2.1000.4e(2) (January 1997); A.C., Docket No. 19-0174 (issued July 9, 2019).

⁸ *Supra* note 5.

⁹ *Id.*

The Board has reviewed OWCP's calculation of benefits received by appellant for the period May 1, 2009 through February 1, 2020 and finds that an overpayment in the amount of \$45,879.34 was created.

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.¹⁰

Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

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.¹² Appellant, however, had the responsibility to provide financial information to OWCP,¹³ and she did not comply.

In its preliminary overpayment determination dated April 1, 2020, OWCP explained the importance of providing a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant, however, did not respond to this request. She did not submit a completed Form OWCP-20 or otherwise

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ 20 C.F.R. § 10.438.

¹² *Supra* note 10.

¹³ *Supra* note 11.

submit the financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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 any hardship."¹⁵ When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$544.45 from appellant's compensation payments every 28 days.

OWCP took into consideration the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Appellant failed to provide information on income, expenses, and assets, and OWCP followed minimum collection guidelines by requiring installments large enough to collect the full debt promptly. Therefore, OWCP properly required repayment of the overpayment by deducting \$544.45 from her compensation payments every 28 days.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$45,879.34 because she concurrently received SSA age-related retirement benefits while also receiving FECA wage-loss compensation for the period May 1, 2009 through February 1, 2020. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$544.45 from her continuing compensation payments every 28 days.

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.441.

¹⁶ *J.R.*, Docket No. 20-1094 (issued January 5, 2021); *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995).

¹⁷ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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