

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

N.G., Appellant)	
)	
and)	Docket No. 22-0172
)	Issued: August 15, 2022
U.S. POSTAL SERVICE, LA SALLE POST)	
OFFICE, Niagara Falls, NY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 15, 2021 appellant, through counsel, filed a timely appeal from an October 27, 2021 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 to consider 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, following the October 27, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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 \$37,213.62, for the period January 1, 2015 through April 24, 2021, for which he was without fault, because he 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 \$356.28 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On May 18, 2006 appellant, then a 49-year-old letter carrier, filed a notice of recurrence (Form CA-2a) alleging that he developed bilateral foot and ankle pain due to factors of his federal employment as a result of repetitively lifting and carrying parcels and mounting and dismounting of his vehicle on a daily basis. OWCP converted this claim to an occupational disease claim (Form CA-2) and accepted bilateral ankle arthritis. It paid appellant wage-loss compensation on the supplemental rolls from May 20 through July 8, 2006, on the periodic rolls from July 9, 2006 through August 4, 2007 and November 25, 2007 through September 27, 2008, and pursuant to a loss of wage-earning capacity determination from August 5 through November 24, 2007 and September 28, 2008 through June 18, 2022.⁴

On April 8, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.

On April 20, 2021 SSA provided a completed FERS/SSA dual benefits calculation form wherein SSA advised that, effective January 2015, appellant reached retirement age and became eligible for SSA age-related retirement benefits. It calculated his SSA age-related retirement benefit rates with FERS offset and without a FERS offset from January 2015 through December 2020. Beginning January 2015, the SSA rate with FERS was \$1,953.00 and without FERS was \$1,477.00. Beginning December 2016, the SSA rate with FERS was \$1,958.80 and without FERS was \$1,481.40. Beginning December 2017, the SSA rate with FERS was \$1,997.90 and without FERS was \$1,510.90. Beginning December 2018, the SSA rate with FERS was \$2,053.80 and without FERS was \$1,553.20. Beginning December 2019, the SSA rate with FERS was \$2,086.60 and without FERS was \$1,577.90. Beginning December 2020, the SSA rate with FERS was \$2,113.60 and without FERS was \$1,598.40.

On April 21, 2021 OWCP prepared a FERS fiscal payrate memorandum wherein it noted the calculation of appellant's SSA offset overpayment from January 1, 2015 through April 24, 2021 and computed a total overpayment amount of \$37,213.62. It determined that during the period January 1, 2015 through November 30, 2016 appellant received an overpayment in the amount of \$10,984.62. Beginning December 1, 2016 through November 30, 2017 he received an overpayment in the amount of \$5,744.54. Beginning December 1, 2017 through November 30, 2018 appellant received an overpayment in the amount of \$5,860.05. Beginning December 1,

⁴In a notification of personnel action (PS Form 50) dated September 24, 2015, the employing establishment advised that appellant voluntarily retired. The effective date of retirement was August 31, 2015. Appellant's retirement plan was listed as FERS.

2018 through November 30, 2019, he received an overpayment in the amount of \$6,023.70. Beginning December 1, 2019 through November 30, 2020, appellant received an overpayment in the amount of \$6,137.94. Beginning December 1, 2020 through April 24, 2021, he received an overpayment in the amount of \$2,462.77.

In a preliminary overpayment determination dated April 21, 2021, OWCP notified appellant of its preliminary finding that he received an overpayment of compensation in the amount of \$37,213.62 because the SSA/FERS offset was not applied to his age-related retirement benefits for the period January 1, 2015 through April 24, 2021. It determined that he 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 him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records that support income and expenses. Additionally, OWCP provided an overpayment action request form and further notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In overpayment action requests forms dated May 10 and 14, 2021, appellant requested a prerecoupment hearing. He disagreed with the overpayment and requested waiver of recovery of because he was found without fault in the creation of the overpayment. The prerecoupment hearing was held on August 10, 2021.

In a Form OWCP-20 completed on August 19, 2021, appellant reported that his total monthly income included \$2,113.00 from SSA, his wife's income of \$1,200.00, Department of Veterans Affairs (VA) benefits of \$144.14 monthly, "state" benefits of \$956.28, resulting in total monthly income of \$4,413.42. He reported expenses totaling \$1,925.00. Appellant indicated monthly expenses of \$50.00 for telephone, \$300.00 for fuel, \$1,100.00 for water, \$125.00 for electricity, \$100.00 for gas, \$200.00 for food, and \$50.00 for clothing. He further noted cash on hand of \$1,141.75, a checking account balance of \$1,073.75, and a savings account balance of \$68.28. Appellant attached statement from his family physician noting that he received \$144.14 in disability benefits from the VA. He also submitted an insurance explanation of benefits form for medical service provided on January 18, 2021.

By decision dated October 27, 2021, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$37,213.62 for the period January 1, 2015 through April 24, 2021, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$356.28 every 28 days from appellant's 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 his or her duty.⁵ 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.⁶

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.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 age-related retirement benefits 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,213.62, for the period January 1, 2015 through April 24, 2021 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

The evidence of record indicates that, while appellant was receiving FECA wage-loss compensation, he was also receiving SSA age-related retirement benefits that were attributable to his federal service without appropriate offset. A claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service commencing January 1, 2015. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.¹⁰

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to appellant's specific SSA age-related retirement benefits that were attributable to federal service. SSA provided appellant's SSA age-related retirement benefits rates with FERS and without FERS for the period January 1, 2015 through April 24, 2021. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$37,213.62.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

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

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

⁹ 20 C.F.R. § 10.421(d); *supra* note 6; *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *S.M.*, *supra* note 7.

¹⁰ *Id.*

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$37,213.62, thus, creating an overpayment of compensation in that amount for the period January 1, 2015 through April 24, 2021

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.¹¹

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 not exceed a specified amount as determined by OWCP.¹² An individual is deemed to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³

Additionally, 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.¹⁴

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. The information is also used to determine the repayment schedule, if necessary.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

¹¹ 5 U.S.C. § 8129.

¹² 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 6.400.4.a(2) (September 2020).

¹³ *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

¹⁴ 20 C.F.R. § 10.437(a) and (b).

¹⁵ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

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.¹⁶

Appellant advised on a Form OWCP-20 that he had income totaling \$4,413.42. However, he omitted his monthly FECA benefits of \$1,425.13, which brings his total income to \$5,838.55. Form OWCP-20 listed expenses as of \$50.00 for telephone, \$300.00 for fuel, \$1,100.00 for water, \$125.00 for electricity, \$100.00 for gas, \$200.00 for food, and \$50.00 for clothing. Appellant further noted cash on hand of \$1,141.75, a checking account balance of \$1,073.75, and a savings account balance of \$68.28. He did not provide any financial documentation to support his income and expenses listed on the form.

Based upon the information provided on the Form OWCP-20, appellant's household income totaled \$5,839.30 while his expenses totaled \$1,925.00. As his monthly income exceeds his monthly expenses by \$3,914.13, he does not need substantially all of his monthly income to meet current and ordinary living expenses.

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance on the payment, which created the overpayment.¹⁷ Therefore, OWCP properly denied waiver of recovery of the overpayment.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides in pertinent part: 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 the 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 factors, so as to minimize any hardship.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$356.28 from appellant's continuing compensation payments every 28 days.

¹⁶ 5 U.S.C. § 8129.

¹⁷ *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁸ 20 C.F.R. § 10.441(a); *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

The Board initially notes that appellant did not provide financial documentation to support his income and expenses prior to the final October 27, 2021 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁹ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁰

In determining whether appellant could repay the overpayment through \$356.28 deductions from continuing compensation payments, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion.²¹ The Board finds that OWCP gave due regard to the financial information provided on the overpayment recovery questionnaire and found that his monthly income exceeded monthly expenses by \$3,913.55. There is no evidence of record to establish that OWCP erred in directing recovery of the \$37,213.62 overpayment at the rate of \$356.28 from appellant's continuing compensation payments every 28 days.²²

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$37,213.62 for the period January 1, 2015 through April 24, 2021, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and

¹⁹ *Id.* at § 10.438(a).

²⁰ *See J.A.*, Docket No. 19-1946 (issued July 13, 2020); *Frederick Arters*, 53 ECAB 397 (2002); *supra* note 12 at Chapter 6.300.2 (September 2020). *Id.* at § 10.436; *id.* at Chapter 6.400.4.a(2).

²¹ *See L.F.*, Docket No. 15-0489 (issued May 11, 2015) (the Board affirmed an OWCP hearing representative's denial of waiver of recovery of an overpayment because appellant and his spouse had over \$17,000.00 in their savings account, and as such his assets exceeded the specified resource base).

²² *See J.A.*, *supra* note 20; *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

properly required recovery of the overpayment by deducting \$356.28 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board