

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

---

**J.V., Appellant**

**and**

**DEPARTMENT OF ENERGY,  
SOUTHEASTERN COURIER SECTION,  
Oak Ridge, TN, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 20-0952  
Issued: February 2, 2022**

*Appearances:*  
*Marshall Stair, 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 March 23, 2020 appellant, through counsel, filed a timely appeal from a September 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

---

<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 an 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 died after the filing of this appeal. As such, a substitute appellant is required to carry the appeal forward as the Board's jurisdiction was invoked during his lifetime. See *D.V.*, Docket No. 20-1291 (issued September 14, 2021); *N.D.*, Docket No. 14-1757 (issued June 2, 2015); *Albert F. Kimbrell*, 4 ECAB 662, 666 (1952). Accordingly, appellant's spouse, E.V., is recognized by the Board as the substitute appellant for the purposes of carrying the appeal forward.

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 \$107,831.76, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 1, 2005 through August 17, 2019, 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 \$500.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On November 30, 1990 appellant, then a 50-year-old nuclear materials courier, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 1990 he felt a sharp pain in his left knee and leg when jogging during an employing establishment-sanctioned physical fitness program while in the performance of duty. OWCP accepted the claim for herniated discs at L3-4 and L4-5, and paid appellant wage-loss compensation on the periodic rolls as of June 16, 2002.

On July 11, 2019 OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA to obtain appropriate information for determination as to whether an offset of compensation benefits was required.

On July 24, 2019 OWCP received from SSA a completed FERS/SSA dual benefits form, dated July 14, 2019, which indicated that appellant had been in receipt of SSA age-related retirement benefits since November 2005. The form reported appellant's SSA age-related retirement benefit rates with and without a FERS offset. Beginning November 2005, the SSA rate with FERS was \$1,590.50, and without FERS was \$1,048.10; beginning December 2005, the SSA rate with FERS was \$1,655.70, and without FERS was \$1,091.00; beginning December 2006, the SSA rate with FERS was \$1,710.30, and without FERS was \$1,127.00; beginning December 2007, the SSA rate with FERS was \$1,749.60, and without FERS was \$1,152.90; beginning December 2008, the SSA rate with FERS was \$1,851.00 and without FERS was \$1,219.70; beginning December 2009, the SSA rate with FERS was \$1,851.00, and without FERS was \$1,219.70; beginning December 2010, the SSA rate with FERS was \$1,851.00, and without FERS was \$1,219.70; beginning December 2011, the SSA rate with FERS was \$1,917.60 and without FERS was \$1,263.60; beginning December 2012, the SSA rate with FERS was \$1,950.10, and without FERS was \$1,285.00; beginning December 2013, the SSA rate with FERS was \$1,979.30,

---

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

<sup>4</sup> The Board notes that OWCP received additional evidence following the September 30, 2019 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.*

and without FERS was \$1,304.20; beginning December 2014, the SSA rate with FERS was \$2,012.90, and without FERS was \$1,326.30; beginning December 2015, the SSA rate with FERS was \$2,012.90, and without FERS was \$1,326.30; beginning December 2016, the SSA rate with FERS was \$2,018.90, and without FERS was \$1,330.20; beginning December 2017, the SSA rate with FERS was \$2,059.20, and without FERS was \$1,356.80; and beginning December 2018, the SSA rate with FERS was \$2,116.80, and without FERS was \$1,394.70.

In an August 26, 2019 letter, OWCP informed appellant that, effective August 18, 2019, it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his 28-day periodic compensation benefits. It noted that his current monthly SSA age-related retirement benefit with FERS was \$2,116.80 and without FERS was \$1,394.70. OWCP explained that the amount of FERS/SSA dual benefit to be deducted from appellant's FECA benefits was \$722.10 per month, or \$666.55 every 28 days. It explained that his new net compensation payment would be \$1,979.21 every 28 days.

On August 26, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$10,831.76 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period November 1, 2005 through August 17, 2019, to offset his SSA age-related retirement benefits that were attributable to federal service. It explained that it had reduced his ongoing OWCP benefits for the periodic rolls cycle effective August 18, 2019, and that an overpayment occurred for the period November 1, 2005 through August 17, 2019. OWCP determined that appellant was without fault in the creation of the overpayment because he relied on misinformation given in writing and there was no evidence to demonstrate that he knew, or should have known, that an improper payment had occurred. It informed him that, if he agreed with the overpayment amount, he could make a payment online or send a check or money order for the full amount to OWCP. OWCP further informed appellant that, if he disagreed with the overpayment amount, he could submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and request waiver of recovery of the overpayment. It noted that the Form OWCP-20 required that he 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 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 precoupment hearing.

In an accompanying overpayment calculation memorandum, OWCP noted that the issue was whether appellant was overpaid compensation for the period November 1, 2005 to August 17, 2019 in the amount of \$10,831.76. It attached a FERS offset calculation worksheet, determined the 28-day FERS offset amount for the days in each period, and computed a total overpayment amount of \$107,831.76. The offset calculation worksheet indicated that from November 1 through 30, 2005, appellant received an overpayment in the amount of \$536.44; from December 1, 2005 through November 30, 2006, he received an overpayment in the amount of \$6,795.02; from December 1, 2006 through November 30, 2007, he received an overpayment in the amount of \$7,018.83; from December 1, 2007 through November 30, 2008, he received an overpayment in the amount of \$7,199.74; from December 1, 2008 through November 30, 2009, he received an overpayment in the amount of \$7,596.41; from December 1, 2009 through November 30, 2010, he received an overpayment in the amount of \$7,596.41; from December 1, 2010 through

November 30, 2011, he received an overpayment in the amount of \$7,596.41; from December 1, 2011 through November 30, 2012, he received an overpayment in the amount of \$7,891.12; from December 1, 2012 through November 30, 2013, he received an overpayment in the amount of \$8,003.13; from December 1, 2013 through November 30, 2014, he received an overpayment in the amount of \$8,123.46; from December 1, 2014 through November 30, 2015, he received an overpayment in the amount of \$8,261.84; from December 1, 2015 through November 30, 2016, he received an overpayment in the amount of \$8,284.47; from December 1, 2016 through November 30, 2017, he received an overpayment in the amount of \$8,267.10; from December 1, 2017 through November 30, 2018, he received an overpayment in the amount of \$8,451.96; and from December 1, 2018 through August 17, 2019, he received an overpayment in the amount of \$6,189.43. OWCP determined that appellant was without fault in the creation of the overpayment. It concluded that a preliminary overpayment determination was made that an overpayment had occurred for the period November 1, 2005 to August 17, 2019, in the amount of \$10,831.76.

On September 24, 2019 OWCP received a check from appellant in the amount of \$10,831.76.

By decision dated September 30, 2019, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP noted that as of the date of the decision, no response had been received to the preliminary overpayment determination and appellant had not requested waiver. It required recovery of the overpayment by deducting \$500.00 every 28 days from his 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.<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 that OWCP 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

---

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019).

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 appellant received an overpayment of compensation for the period November 1, 2005 through August 17, 2019, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

Appellant is precluded from simultaneously receiving FECA wage-loss compensation and SSA age-related retirement benefits based on his federal service.<sup>9</sup> On July 13, 2019 SSA reported that a portion of appellant's monthly retirement benefit was attributable to his federal service. Consequently, OWCP was obliged to offset his FECA wage-loss compensation by the amount of SSA age-related retirement benefits attributable to his federal service.<sup>10</sup> Therefore, the Board finds that fact of overpayment is established.

The Board further finds that this case is not in posture for decision with respect to the amount of the overpayment.

In overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.<sup>11</sup> The Board notes that in the August 26, 2019 preliminary overpayment determination, OWCP informed appellant that an overpayment of compensation in the amount of \$10,831.76 had been created because it had failed to reduce his wage-loss compensation payments for the period November 1, 2005 through August 17, 2019, to offset his SSA age-related retirement benefits that were attributable to federal service. OWCP explained that he was without fault and that the overpayment occurred because he relied on misinformation given in writing and there was no evidence to demonstrate he knew or should have known that an improper payment had occurred. In the overpayment memorandum, it also noted that the issue was whether appellant was overpaid compensation for the period November 1, 2005 to August 17, 2019 in the amount of \$10,831.76.

OWCP then completed a FERS offset calculation worksheet and computed a total overpayment amount of \$107,831.76. It concluded that appellant was without fault in the creation of the overpayment due to the complexity in benefits administration, and that there was no evidence to demonstrate that he knew, or should have known, that an improper payment had occurred. OWCP further concluded that an overpayment had occurred for the period November 1, 2005 to August 17, 2019, in the amount of \$10,831.76.

---

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also S.M.*, Docket No. 20-0152 (issued August 10, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8116(d)(2); 20 C.F.R. § 10.421(d).

<sup>11</sup> *See S.H.*, Docket No. 20-1189 (issued January 27, 2021); *R.E.*, Docket No. 19-1583 (issued May 27, 2020); *J.M.*, Docket No. 18-1505 (issued June 21, 2019); *Teresa A. Ripley*, 56 ECAB 528 (2005).

Appellant subsequently remitted a check for \$10,831.76. The full amount of the overpayment noted in the preliminary overpayment determination.

In the September 30, 2019 decision, OWCP finalized the overpayment determination and found that an overpayment in the amount of \$107,831.76 had occurred. It also noted that no response had been received to the preliminary overpayment determination. However, the Board notes that this was incorrect, as appellant responded to the preliminary overpayment determination by remitting a check in the amount of \$10,831.76.

The Board finds that OWCP has not adequately explained how the overpayment was determined in light of the above-noted discrepancies in the determination of the overpayment amount. The Board notes that OWCP did not acknowledge receipt of that check or subtract the amount remitted from the overpayment due. The Board finds that appellant might have requested a precoupment hearing, and or submitted financial documentation, if he had been clearly informed that the amount of the overpayment was \$107,831.76, rather than \$10,831.76. It is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.<sup>12</sup> As the calculation of the overpayment was unclear, the Board finds that OWCP has not met its burden of proof to establish amount of the overpayment.<sup>13</sup>

Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP shall determine the proper amount of the overpayment of compensation based on the correct rates provided by SSA for the period during which the overpayment occurred. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After this, and other such further development as necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that appellant received an overpayment of compensation, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period November 1, 2005 through August 17, 2019, without an appropriate offset. The Board also finds that the case is not in posture for decision regarding the amount of the overpayment.

---

<sup>12</sup> *See id.*

<sup>13</sup> In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 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: February 2, 2022  
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