

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

_____)	
T.M., Appellant)	
)	
and)	Docket No. 21-0946
)	Issued: February 11, 2022
U.S. POSTAL SERVICE, GATLINBURG POST OFFICE, Gatlinburg, TN, Employer)	
_____)	

Appearances:

T. Scott Jones, Esq., 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 June 4, 2021 appellant, through counsel, filed a timely appeal from a May 21, 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 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, following the May 21, 2021 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUE

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,318.44, for which he was without fault, for the period December 1, 2014 through March 28, 2020, 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 \$563.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 26, 1991 appellant, then a 42-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained "mental and emotional stress and conflict" due to factors of his federal employment. He stopped work on February 15, 1991. OWCP accepted appellant's claim for conversion disorder and single episode of major depression. It paid him wage-loss compensation on the periodic rolls, effective December 11, 1994.

On March 6, 2020 SSA submitted a completed Federal Employees Retirement System (FERS)/SSA dual benefits form to OWCP. The form listed appellant's monthly SSA age-related retirement benefit rates beginning December 2014 with and without appellant's FERS contributions. The form reported that: beginning December 2014, his SSA rate with FERS was \$1,208.90 and without FERS was \$713.90; beginning December 2016, his SSA rate with FERS was \$1,212.00 and without FERS was \$716.00; beginning December 2017, his SSA rate with FERS was \$1,237.00 and without FERS was \$731.00; beginning December 2018, his SSA rate with FERS was \$1,271.50 and without FERS was \$751.50; and beginning December 2019, his SSA rate with FERS was \$1,291.60 and without FERS was \$762.60.

Effective March 29, 2020, OWCP adjusted appellant's compensation amount to include the offset of his SSA age-related retirement benefits attributable to his federal service.

On April 8, 2020 OWCP notified appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$32,335.88 because it had failed to reduce his wage-loss compensation benefits for the period December 1, 2014 through March 29, 2020 by the portion of his SSA age-related retirement benefits that were attributable to federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP also provided a FERS offset calculation worksheet.

On May 6, 2020 appellant requested a precouplement hearing before a representative of OWCP's Branch of Hearings and Review.

⁴ Docket No. 20-1332 (issued February 19, 2021).

By decision dated May 20, 2020, OWCP finalized the April 8, 2020 preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$32,335.88 for the period December 1, 2014 through March 29, 2020 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset. It found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$563.00 from appellant's continuing compensation payments every 28 days.

Appellant, through counsel, appealed to the Board. By decision dated February 19, 2021,⁵ the Board affirmed the May 20, 2020 overpayment decision in part, and set it aside, in part. The Board affirmed the fact and period of overpayment, finding that appellant had received an overpayment of compensation, for the period December 1, 2014 through March 28, 2020, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The Board further found, however, that OWCP had incorrectly calculated the amount of overpayment because the evidence of record established that appellant was no longer receiving dual benefits as of March 29, 2020. The Board remanded the case for recalculation of the amount of overpayment, followed by a *de novo* decision.

OWCP subsequently completed a FERS offset overpayment calculation worksheet on March 30, 2021. This form indicated that: from December 1, 2014 through November 30, 2016, appellant received an overpayment in the amount of \$11,929.96; from December 1, 2016 through November 30, 2017, appellant received an overpayment in the amount of \$5,968.35; from December 1, 2017 through November 30, 2018, appellant received an overpayment in the amount \$6,088.68; from December 1, 2018 through November 30, 2019, appellant received an overpayment in the amount of \$6,257.14; and from December 1, 2019 through March 28, 2020, appellant received an overpayment in the amount of \$2,075.31. Based on these figures, OWCP calculated the total overpayment amount of \$32,318.44.

On March 30, 2021 OWCP issued a *de novo* preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$32,318.44 because it had failed to reduce his wage-loss compensation benefits for the period December 1, 2014 through March 28, 2020, by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant submit an updated overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised him that he could request a waiver of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support his reported income and expenses. Additionally, OWCP provided an overpayment action request form and 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 prerecoument hearing.

On April 14, 2021 appellant completed an overpayment action request form and requested that OWCP issue a decision based on the written evidence. He noted his disagreement that the overpayment occurred and requested a waiver of recovery of the overpayment.

⁵ *Id.*

Appellant completed a Form OWCP-20 on April 14, 2021. He listed his monthly income as \$816.00 in SSA benefits and \$1,919.42 in “other” benefits for a total monthly income of \$2,735.42. Appellant noted that his monthly expenses included housing of \$63.00, food of \$400.00, clothing of \$150.00, utilities of \$575.00, and other expenses of \$600.00. He provided a list of other debts paid by monthly installments of \$397.00, \$341.00, and \$300.00 for total monthly expenses of \$2,826.00. Appellant indicated that he had a checking account balance of \$4,033.00 and other personal property valued at \$50,000.00, for a total of \$54,033.00.

By decision dated May 21, 2021, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$32,318.44, for the period December 1, 2014 through March 28, 2020, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. While appellant reported on the Form OWCP-20 dated April 14, 2021 that he had total monthly income of \$2,735.00, OWCP determined that he received \$2,530.42 in FECA benefits and \$816.00 in SSA benefits, for a total monthly income of \$3,346.42. OWCP determined that recovery of the overpayment would require deducting \$563.00 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.⁶ 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.⁷

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.⁸ FECA Bulletin No. 97-09 provides 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,318.44 for the period December 1, 2014 through March 28, 2020, 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.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

The Board preliminarily notes that it found in its February 19, 2021 decision that appellant received an overpayment of compensation for the period December 1, 2014 through March 28, 2020, for which he was without fault. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁰ Therefore, the Board's prior finding regarding the fact and period of the overpayment is not subject to further consideration.

On remand, by *de novo* decision dated May 21, 2021, OWCP found that appellant received an overpayment of compensation in the amount of \$32,318.44. To determine the amount of the overpayment, the portion of SSA's 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. SSA provided its rate with FERS and without FERS for specific periods from December 1, 2014 through March 28, 2020. OWCP provided its calculations of the amount that should have been offset for each relevant period based on the information provided by SSA's dual benefits form and determined that appellant received an overpayment in the amount of \$32,318.44.

The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period December 1, 2014 through March 28, 2020 and finds that an overpayment of \$32,318.44 was created.¹¹

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.¹² Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹³

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.¹⁴ An individual is deemed to need

¹⁰ *T.C.*, Docket No. 21-0612 (issued December 2, 2021); *T.W.*, Docket No. 20-0836 (issued July 21, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998). See also 20 C.F.R. § 501.6(d).

¹¹ *J.T.*, Docket No. 21-0010 (issued September 30, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

¹² 5 U.S.C. § 8129.

¹³ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *L.S.*, 59 ECAB 350 (2008).

¹⁴ 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 6.400.4(a) (September 2020).

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 \$50.00.¹⁵

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 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.¹⁶ 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.¹⁷

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.¹⁸ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. The evidence of record demonstrated that he had total current monthly income of \$816.00 in SSA benefits and \$2,530.42 in FECA benefits for a total monthly income of \$3,346.42. Based on the financial information that appellant had provided, he had total monthly expenses of \$2,826.00. As his monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.¹⁹

On appeal, counsel argues that the reported \$816.00 in SSA income are for appellant's wife, not himself. Counsel has not, however, provided any evidence to support appellant's contention. Accordingly, the Board finds that appellant's monthly income exceeds his total monthly expenses by more than \$50.00.

¹⁵ *Id.* at Chapter 6.400.4(a)(3) (September 2020).

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

¹⁷ *Supra* note 14 at Chapter 6.400.4(c)(3) (September 2020).

¹⁸ *Supra* note 11.

¹⁹ *See V.G.*, Docket No. 20-1520 (issued September 21, 2021); *see also M.C.*, Docket No. 19-0699 (issued February 12, 2020).

As appellant failed to establish that, recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁰

Section 10.441(a) of OWCP's regulations²¹ 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 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."²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$563.00 every 28 days from appellant's continuing compensation payments.

The record supports that, in requiring repayment of the overpayment by deducting \$563.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information he submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$563.00 from his continuing compensation every 28 days.²³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$32,318.44, for the period December 1, 2014 through March 28, 2020, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$563.00 every 28 days from his continuing compensation payments.

²⁰ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²¹ *Id.* at § 10.441(a).

²² *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²³ *See J.R.*, Docket No. 17-181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 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