

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

J.M., Appellant)

and)

**DEPARTMENT OF THE AIR FORCE, AIR)
EDUCATION AND TRAINING COMMAND,)
RANDOLPH AIR FORCE BASE, JOINT BASE)
SAN ANTONIO, TX, Employer)**

**Docket No. 21-1253
Issued: February 23, 2022**

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 August 18, 2021 appellant filed a timely appeal from an August 2, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the August 2, 2021 decision, OWCP received additional evidence. 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 \$25,976.56 for the period August 1, 2013 through February 27, 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 it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting either \$450.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

OWCP accepted that on February 29, 1992 appellant, then a 44-year-old carpenter, sustained lumbar spondylosis with radiculopathy, lumbar sprain, thoracic or lumbosacral neuritis or radiculitis, adjustment disorder with depressed mood, and unspecified migraine with intractable migraine while in the performance of duty.³ It paid him wage-loss compensation for total disability beginning April 24, 1992.

On January 27, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA for completion.

On February 5, 2021 SSA completed the FERS/SSA dual benefits form and provided appellant's SSA age-related retirement benefit rates with FERS and without FERS from August 2013 until December 2020. It indicated that, beginning August 2013, appellant's SSA rate with FERS was \$1,127.30 and without FERS was \$1,000.50, beginning December 2013, his rate with FERS was \$1,290.30 and without FERS was \$1,015.50, beginning December 2014 and 2015, his rate with FERS was \$1,312.20 and without FERS was \$1,032.70, beginning December 2016, his rate with FERS was \$1,316.10 and without FERS was \$1,035.70, beginning December 2017, his rate with FERS was \$1,342.40 and without FERS was \$1,056.40, beginning December 2018, his rate with FERS was \$1,379.90 and without FERS was \$1,085.90, beginning December 2019, his rate with FERS was \$1,401.90 and without FERS was \$1,103.20, and beginning December 2020, his rate with FERS was \$1,420.10 and without FERS was \$1,117.50.

OWCP completed a FERS offset overpayment calculation form on March 8, 2021. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period from August 1, 2013 until February 27, 2021. OWCP found that, from August 1 through November 30, 2013, appellant received an overpayment of \$1,089.15, from December 1, 2013 through November 30, 2014, he received an overpayment of \$3,306.66, from December 1, 2014 through November 30, 2015, he received an overpayment of \$3,363.21, from December 1, 2015 through November 30, 2016, he received an overpayment of \$3,372.43, from December 1, 2016 through November 30, 2017, he received an overpayment of \$3,374.04, from December 1, 2017 through November 30, 2018, he received an overpayment of \$3,441.43, from December 1, 2018 through November 30, 2019, he received an overpayment of \$3,537.69, from December 1, 2019 through November 30, 2020, he received an overpayment of \$3,604.09, and from December 1,

³ The claim for a traumatic injury (Form CA-1) is not contained in the case record.

2020 through February 27, 2021, he received an overpayment of \$887.85. Based on these figures, OWCP calculated a total overpayment in the amount of \$25,976.56.

In a May 12, 2021 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his compensation benefits. It found that, with the SSA offset, he was entitled to net compensation every 28 days of \$2,114.68.

In a preliminary overpayment determination dated June 28, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$25,976.56 because his wage-loss compensation benefits had not been reduced for the period August 1, 2013 through February 27, 2021 by the portion of his SSA age-related retirement benefits 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 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 and canceled checks, pay slips, and any other records supporting 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 prerecoupment hearing.

In a July 17, 2021 overpayment action request from, received by OWCP on July 30, 2021, appellant requested a decision based on the written evidence. He submitted a completed OWCP-20 form and a bank statement for the period June 1 through 30, 2021.

By decision dated August 2, 2021, OWCP finalized its finding that appellant had received an overpayment of compensation in the amount of \$25,976.56 for the period August 1, 2013 through February 27, 2021 because it had failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It denied waiver of recovery of the overpayment. OWCP found that appellant had not responded to its preliminary overpayment determination. It required recovery of the overpayment by deducting \$450.00 from his continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁴ 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

⁴ *Supra* note 1.

⁵ 5 U.S.C. § 8102.

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 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$25,976.56 for the period August 1, 2013 through February 27, 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.

OWCP paid appellant wage-loss compensation for total disability beginning April 24, 1992. Appellant received SSA age-related retirement benefits beginning August 1, 2013. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.⁹ The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to his federal service. Accordingly, the Board finds that fact of overpayment has been established.¹⁰

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 from August 2013 through December 2020. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment of compensation in the amount of \$25,976.56. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period August 1, 2013 through February 27, 2021 and finds that an overpayment of compensation in the amount of \$25,976.56 was created.¹¹

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 *Supra* note 8. *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

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

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

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.¹²

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.¹³ 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 \$50.00.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision with regard to whether OWCP properly denied waiver of recovery of the overpayment.

¹² 5 U.S.C. § 8129.

¹³ 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 6.400.4a.(2) (September 2020).

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

¹⁵ *See supra* note 14 at Chapter 6.400.4a.(2).

¹⁶ *Id.* at Chapter 6.400.4b.(3).

¹⁷ 20 C.F.R. § 10.437(a)-(b).

In the case of *William A. Couch*,¹⁸ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its August 2, 2021 decision, OWCP found that appellant had not responded to its preliminary overpayment determination. However, the record reflects that on July 30, 2021 it received his overpayment action request form and a completed Form OWCP-20. Appellant documented his income, expenses, and assets and submitted financial information. OWCP failed to review the information that he submitted and, thus, failed to discuss all of the relevant evidence of record received prior to issuing the final overpayment decision on August 2, 2021.¹⁹

On remand, OWCP shall review all evidence of record and, following any further development as it deems necessary, it shall issue a *de novo* decision.²⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$25,976.56 for the period August 1, 2013 through February 27, 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 the case is not in posture for decision with regard to whether OWCP properly denied waiver of recovery of the overpayment.

¹⁸ 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

¹⁹ *See W.M.*, Docket No. 21-0316 (issued July 23, 2021); *E.T.*, Docket No. 19-1977 (issued February 22, 2021); *Order Remanding Case, S.H.*, Docket No. 19-1582 (issued May 26, 2020). OWCP's procedures provide, "All evidence submitted should be reviewed and discussed in the decision. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

²⁰ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 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 in accordance with this decision of the Board.

Issued: February 23, 2022
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