

<sup>2</sup> The Board notes that, following the January 14, 2020 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

without fault, because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for this period 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 \$514.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On August 1, 2002 appellant, then a 59-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a perforated right ear drum, with intermittent bleeding, due to the lifting duties of his federal employment. He had stopped work on January 31, 2002. OWCP accepted appellant's claim for permanent aggravation of preexisting chronic otitis media and fistula formation of the right ear. It paid him wage-loss compensation for disability from work on the supplemental rolls commencing October 15, 2002 and on the periodic rolls commencing August 10, 2003.<sup>3</sup>

In July 2008, appellant retired from the employing establishment under the Federal Employees Retirement System (FERS).

On November 4, 2019 OWCP received a completed FERS/SSA dual benefits form completed by SSA on October 30, 2019. SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service commencing July 1, 2008.<sup>4</sup> SSA provided age-related retirement benefit rates with FERS, and without FERS, for specific periods commencing in July 1, 2008. Beginning July 1, 2008, the SSA rate with FERS was \$1,298.00 and without FERS was \$557.30. Beginning December 1, 2008 the SSA rate with FERS was \$1,373.20 and without FERS was \$589.60. Beginning December 1, 2011 the SSA rate with FERS was \$1,422.60 and without FERS was \$610.80. Beginning December 1, 2012 the SSA rate with FERS was \$1,446.70 and without FERS was \$621.10. Beginning December 1, 2013 the SSA rate with FERS was \$1,468.40 and without FERS was \$630.40. Beginning December 1, 2014 the SSA rate with FERS was \$1,493.30 and without FERS was \$641.10. Beginning December 1, 2016 the SSA rate with FERS was \$1,497.70 and without FERS was \$643.00. Beginning December 1, 2017 the SSA rate with FERS was \$1,527.60 and without FERS was \$655.80. Beginning December 1, 2018 the SSA rate with FERS was \$1,570.30 and without FERS was \$674.10.

In a letter dated November 14, 2019, OWCP informed appellant that it would begin deducting the portion of his SSA age-related retirement benefits attributable to his federal service from his 28-day periodic compensation beginning November 10, 2019.

In a November 14, 2019 FERS offset overpayment calculation based on the benefit rates provided by SSA, OWCP calculated a \$113,311.83 overpayment of compensation for the period July 1, 2008 through November 9, 2019.

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<sup>3</sup> On February 19, 2003 appellant underwent OWCP authorized middle ear exploration surgery.

<sup>4</sup> It was noted that appellant had received FECA disability benefits through June 2008.

On November 15, 2019 OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$113,311.83 had been created because it failed to reduce his wage-loss compensation payments for the period July 1, 2008 through November 9, 2019 to offset his SSA age-related retirement benefits that were attributable to federal service. 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, pay slips, and any other records to support income and expenses. Additionally, it further notified him 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.

On December 10, 2019 OWCP received appellant's overpayment action request form in which he contended that an overpayment had not occurred and requested waiver of recovery of the claimed overpayment. Appellant requested that OWCP make a decision on the record regarding the claimed overpayment. He submitted an overpayment recovery questionnaire, completed on December 10, 2019, in which he listed monthly income of \$8,184.00 (comprised of \$1,434.00 in SSA benefits and \$6,750.00 in Veterans Administration and FECA benefits) and monthly expenses of \$6,718.00 (comprised of \$2,250.00 for mortgage/rent, \$1,200.00 for food, \$100.00 for clothing, \$1,244.00 for utilities, \$411.00 for loan payments, and \$1,513.00 for miscellaneous expenses). Appellant indicated that he had \$62,720.00 in assets in a savings account.<sup>5</sup> He also listed assets of \$2,437.00 in a checking account and \$120.00 in cash in hand.

On January 14, 2020 OWCP held a telephone conference with appellant regarding his monthly income and expenses. During the conference, appellant reported monthly income of \$8,398.96 (comprised of \$1,434.00 in SSA benefits, \$4,177.00 in Veterans Administration benefits, and \$2,787.96 in FECA benefits) and monthly expenses of expenses of \$6,324.00 (comprised of \$2,250.00 for mortgage/rent, \$1,200.00 for food, \$100.00 for clothing, \$1,244.00 for utilities, and \$1,530.00 for miscellaneous expenses).

By decision dated January 14, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment in the amount of \$113,311.83 for the period July 1, 2008 through November 9, 2019 because he concurrently received SSA age-related retirement benefits FECA wage-loss compensation without an appropriate offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP determined that the overpayment was not subject to waiver because appellant's assets clearly exceeded his allowable resource base and, therefore, he would not experience financial hardship in repaying overpayment. It also indicated that, during the January 14, 2020 telephone conference, he reported monthly income of \$8,398.96,<sup>6</sup> and monthly expenses of expenses of \$6,324.00, noting that he had not submitted supporting documentation.

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<sup>5</sup> Appellant noted that these savings account assets came from "loan equity" obtained in August 2019, which he intended to use to construct a two-bedroom home addition for rental purposes.

<sup>6</sup> OWCP inadvertently referenced the \$8,184.00 figure that appellant had listed on his December 10, 2019 overpayment recovery questionnaire, rather than the updated figure of \$8,398.96 provided on January 14, 2020.

OWCP required recovery of the overpayment by deducting \$514.00 from appellant's continuing compensation payments every 28 days.

### **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>7</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>8</sup>

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.<sup>9</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 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>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$113,311.83, for which he was without fault, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2008 through November 9, 2019, without an appropriate offset.

Commencing October 15, 2002 OWCP paid appellant wage-loss compensation for total disability due to his accepted injury. Commencing July 1, 2008 appellant received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.<sup>11</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to his federal service. As OWCP neglected to offset his FECA wage-loss compensation benefits for the period July 1, 2008 through November 9, 2019, the Board finds that the fact and period of the overpayment have been established.<sup>12</sup>

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA age-related retirement benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific

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<sup>7</sup> 5 U.S.C. § 8102.

<sup>8</sup> *Id.* at § 8116.

<sup>9</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>10</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>11</sup> *See id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>12</sup> *Id.*

amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided appellant's SSA rate with FERS and without FERS for specific periods commencing July 1, 2008. OWCP provided its calculations outlined in a FERS offset calculation worksheet regarding the amount that it should have offset for each relevant period based on the SSA worksheet. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$113,311.83, thereby creating an overpayment of compensation in that amount.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>14</sup> Section 8129 of FECA<sup>15</sup> 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery 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.<sup>16</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her 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.<sup>17</sup> An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401 (k)), jewelry, and artwork.<sup>18</sup>

According to 20 C.F.R. § 10.437 recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience

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<sup>13</sup> See A.S., Docket No. 19-0171 (issued June 12, 2019).

<sup>14</sup> See L.D., Docket No. 18-1317 (issued April 17, 2019); P.J., Docket No. 18-0248 (issued August 14, 2018); Robert Atchison, 41 ECAB 83, 87 (1989).

<sup>15</sup> 5 U.S.C. § 8129(1)-(b); A.C., *supra* note 12; see D.C., Docket No. 17-0559 (issued June 21, 2018).

<sup>16</sup> A.C., *id.*; see V.T., Docket No. 18-0628 (issued October 25, 2018).

<sup>17</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that 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. *Id.* at Chapter 6.400.4a(2).

<sup>18</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

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.<sup>19</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>20</sup>

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 of recovery of the overpayment.<sup>21</sup>

### **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.<sup>22</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. As appellant has assets of \$65,277.00, his assets well exceed the allowable resource base of a claimant, like himself, who has a spouse and another dependent, *i.e.*, \$11,500.00.<sup>23</sup> Because he has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet ordinary and necessary living expenses.

The Board also finds that appellant has not established that he was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>24</sup>

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<sup>19</sup> 20 C.F.R. § 10.437(a), (b).

<sup>20</sup> *Id.* at § 10.437(b)(1).

<sup>21</sup> 20 C.F.R. § 10.438.

<sup>22</sup> *Id.* at § 10.436.

<sup>23</sup> *See supra* note 19.

<sup>24</sup> *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

The Board thus finds that OWCP properly denied 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.<sup>25</sup> 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."<sup>26</sup> When an individual fails to provide the 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.<sup>27</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$514.00 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$514.00 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. OWCP followed minimum collection guidelines by requiring installments large enough to collect the full debt promptly. The Board, therefore, finds that OWCP properly required recovery of the overpayment by deducting \$514.00 from appellant's continuing compensation payments every 28 days.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$113,311.83, for which he was without fault, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2008 through November 9, 2019, without an 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 \$514.00 every 28 days from his continuing compensation payments.

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<sup>25</sup> *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>26</sup> 20 C.F.R. § 10.441; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>27</sup> *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board