



through October 14, 2017 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 \$707.33 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On February 16, 2010 appellant, then a 66-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained pain in his neck and upper back radiating into his left shoulder causally related to factors of his federal employment, including casing mail and driving with the left arm while delivering mail. He stopped work on February 16, 2010. OWCP accepted the claim for a temporary aggravation of cervical degenerative joint disease. It subsequently expanded its acceptance of the claim to include a sprain of the shoulder and upper arm at the left rotator cuff and a complete left rotator cuff rupture. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls, effective February 16, 2010, and on the periodic rolls, effective July 4, 2010.

On October 6, 2017 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA for completion.<sup>3</sup>

On October 19, 2017 SSA completed the FERS/SSA dual benefits form, reporting appellant's monthly age-related retirement benefit rates with and without FERS from May 2009 through December 2016. SSA indicated that effective May and December 2009, appellant's SSA rate with FERS was \$1,517.90 and without FERS was \$970.40, effective January and December 2010, his rate with FERS was \$1,548.30 and without FERS was \$971.50, effective December 2011, his rate with FERS was \$1,604.00 and without FERS was \$1,006.40, effective December 2012, his rate with FERS was \$1,631.20 and without FERS was \$1,023.40, effective December 2013, his rate with FERS was \$1,655.60 and without FERS was \$1,038.70, effective December 2014 and 2015, his rate with FERS was \$1,683.70 and without FERS was \$1,056.30, and effective December 2016, his rate with FERS was \$1,688.70 and without FERS was \$1,059.50.

On November 6, 2017 OWCP advised appellant that it was reducing his wage-loss compensation, effective October 15, 2017, by the amount of his SSA benefits attributable to his federal service. It indicated that it would offset \$580.80 from his continuing compensation benefits every 28 days.

On a FERS offset overpayment calculation worksheets, OWCP calculated the amount that it should have offset from appellant's compensation for each period from February 16, 2010 through October 14, 2017. It found that, from February 16 through November 30, 2010, appellant received an overpayment of \$5,490.83, from December 1, 2010 through November 30, 2011, he received an overpayment of \$6,958.86, from December 1, 2011 through November 30, 2012, he received an overpayment of \$7,209.80, from December 1, 2012 through November 30, 2013, he

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<sup>3</sup> In a May 26, 2010 claim for compensation (Form CA-7), the employing establishment advised that appellant had retirement coverage under FERS.

received an overpayment of \$7,313.64, from December 1, 2013 through November 30, 2014, he received an overpayment of \$7,423.14, from December 1, 2014 through November 30, 2015, he received an overpayment of \$7,549.48, from December 1, 2015 through November 30, 2016, he received an overpayment of \$7,570.17, and from December 1, 2016 through October 14, 2017, he received an overpayment of \$6,616.97. Based on these figures, OWCP calculated the total overpayment amount of \$56,132.89.

In a preliminary overpayment determination dated June 30, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$56,132.89 because his benefits had not been reduced for the period February 16, 2010 through October 14, 2017 by the portion of SSA retirement benefits attributable to his federal service.<sup>4</sup> 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 precoupment hearing.

In an overpayment action request form dated July 1, 2021, appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review. He requested waiver of recovery of the overpayment.

On a Form OWCP-20 dated July 15, 2021, appellant reported his total monthly income as \$5,862.32 and his monthly expenses as \$4,680.60. He indicated that he had assets in cash totaling \$756.01 in bank accounts and owned a camp trailer and truck worth approximately \$7,000.00 and \$8,500.00 respectively. Appellant submitted supporting financial documentation.

A telephonic hearing was held on November 17, 2021. At the hearing, appellant indicated that he had approximately \$115,000.00 in a Thrift Savings Plan (TSP). He related that he had around \$1,100.00 to \$1,200.00 more income than expenses each month. Appellant advised that repaying the overpayment would create a hardship because of his age.

By decision dated December 28, 2021, OWCP's hearing representative finalized the finding that appellant received an overpayment of \$56,132.89 for the period February 16, 2010 through October 14, 2017 because OWCP failed to offset his compensation payments by the

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<sup>4</sup> In a March 31, 2021 preliminary overpayment determination, OWCP found that appellant had received an overpayment of wage-loss compensation in the amount of \$61,377.13 for the period May 1, 2009 through October 14, 2017 because it had failed to offset SSA retirement benefits due to his federal service. Following a preliminary review, by decision dated May 26, 2021, an OWCP hearing representative set aside the preliminary determination, noting that he had received schedule award compensation rather than wage-loss compensation from March 4 through May 30, 2019 under a separate OWCP file number. The hearing representative instructed OWCP to issue a new preliminary overpayment determination with the correct period and amount of the overpayment.

portion of his SSA age-related retirement benefits that were attributable to his federal service.<sup>5</sup> He found that appellant was without fault in the creation over the overpayment, but denied waiver of recovery of the overpayment as his assets exceed the resource, but denied waiver of recovery of the overpayment. The hearing representative required repayment of the overpayment by deducting \$707.33 from his continuing compensation payments every 28 days.

By decision dated January 12, 2022, OWCP again finalized that appellant had received a \$56,132.89 overpayment of compensation from February 16, 2010 through October 14, 2017 because he had received wage-loss compensation and SSA retirement benefits without the appropriate offset. It found that he was without fault in the creation of the overpayment, but was not entitled to waiver of recovery of the overpayment. OWCP indicated that it would recover the overpayment by deducting \$707.33 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>6</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>7</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 benefits that are attributable to the employee's federal service.<sup>8</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>9</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$56,132.89 for the period February 16, 2010 through October 14, 2017 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.

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<sup>5</sup> In setting forth the issue, OWCP's hearing representative indicated that the overpayment of compensation was \$16,846.93 rather than \$56,132.89; however, from the context of the decision, it is apparent that this is a typographical error.

<sup>6</sup> 5 U.S.C. § 8102.

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

OWCP paid appellant wage-loss compensation for total disability, effective February 16, 2010. Appellant received SSA age-related retirement benefits beginning May 2009. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.<sup>10</sup> 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.<sup>11</sup>

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 May 2009 through December 2016. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$56,132.89. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period February 16, 2010 through October 14, 2017 and finds that an overpayment of compensation in the amount of \$56,132.89 was created.<sup>12</sup>

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

Section 8129(b) of FECA provides: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> Also, assets must

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<sup>10</sup> *Supra* note 8. See *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>11</sup> See *L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

<sup>12</sup> See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</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, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). 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>15</sup> *Id.* at Chapter 6.400.4a(3); *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

OWCP's regulations provide 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 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.<sup>19</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>20</sup> In order to establish that recovery of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.<sup>21</sup> OWCP considered the financial information appellant reported on his completed OWCP-20 form and at the hearing to determine if recovery of the overpayment would defeat the purpose of FECA.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his assets exceed the allowable resource base. He indicated that he had \$115,000.00 in his TSP,<sup>22</sup> which exceeds the relevant resource base of \$10,300.00 for an individual with a spouse as provided in OWCP's procedures. Because he has not met the second prong of

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<sup>16</sup> *Supra* note 14 at Chapter 6.400.4a(2).

<sup>17</sup> *Id.* at Chapter 6.400.4b(3).

<sup>18</sup> 20 C.F.R. § 10.437(a)(b).

<sup>19</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>20</sup> *See J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.S.*, 59 ECAB 350 (2008).

<sup>21</sup> *D.M.*, Docket No. 19-1311 (issued February 4, 2020); *supra* note 14.

<sup>22</sup> Savings in a TSP account are included in the asset base. *See H.R.*, Docket No. 22-0003 (issued March 3, 2022); *S.C.*, Docket No. 17-0762 (issued March 19, 2018); *supra* note 14 at Chapter 6.400.4b(3).

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.<sup>23</sup>

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>

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

On appeal appellant asserts that his compensation has been reduced due to OWCP's failure to promptly discover its error. However, the fact that he was without fault in the creation of the overpayment does not relieve him from liability for repayment of the overpayment of compensation.<sup>25</sup> As explained, OWCP properly denied waiver as recovery would not defeat the purpose of FECA or be against equity and good conscience.

### **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>26</sup>

Section 10.441 of OWCP's regulations<sup>27</sup> provides that, 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 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.<sup>28</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$707.33 every 28 days from appellant's continuing compensation payments.

OWCP gave due regard to the financial information submitted, as well as the factors set forth in 20 C.F.R. § 10.44 and found that this method of recovery would minimize resulting

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<sup>23</sup> See *R.A.*, Docket No. 20-1311 (issued January 26, 2022).

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

<sup>25</sup> See *R.S.*, Docket No. 20-0624 (issued February 9, 2022); *M.G.*, Docket No. 19-0424 (issued July 1, 2019).

<sup>26</sup> *Id.* at § 10.441; see *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>27</sup> *Id.* at § 10.441(a).

<sup>28</sup> *Id.*; see *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

hardship. The Board finds that OWCP properly required recovery of the overpayment by deducting \$707.33 every 28 days from appellant's continuing compensation benefits.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$56,132.89 for the period February 16, 2010 through October 14, 2017 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 Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$707.33 from appellant's continuing compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2022  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board