

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,343.18 for the period January 1, 2019 through November 7, 2020 for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 16, 2014 appellant, then a 58-year-old medical support assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained low back strain, pelvic pain, and leg pain causally related to factors of her federal employment. OWCP accepted the claim for neck sprain. It subsequently expanded the acceptance of appellant's claim to include lumbar sprain, an aggravation of degenerative lumbar spondylolisthesis, and an aggravation of degeneration of the lumbar or lumbosacral intervertebral disc at L4-5. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective August 10, 2014, and on the periodic rolls, effective September 16, 2018. The employing establishment noted Federal Employees Retirement System (FERS) as appellant's retirement system.

On November 13, 2019 OWCP sent a FERS/SSA dual benefits form to SSA for completion.

On December 18, 2019 SSA completed the FERS/SSA dual benefits form and reported appellant's monthly benefits with and without FERS from January to December 2019. SSA indicated that, effective January 2019, appellant's SSA rate with FERS was \$1,674.30 and without FERS was \$236.80 and, effective December 2019, her rate with FERS was \$1,701.00 and without FERS was \$240.50.

On November 8, 2020 appellant elected to receive retirement benefits under FERS, effective November 8, 2020, in lieu of workers' compensation benefits under FECA.

In a FERS offset overpayment calculation form completed March 4, 2021, OWCP calculated the amount that it should have offset from appellant's compensation for each period January 1, 2010 through November 7, 2020. It found that, from January 1 through November 30, 2019, she received an overpayment of \$15,828.30 and from December 1, 2010 through November 7, 2020, she received an overpayment of \$16,514.88. Based on these figures, OWCP calculated that appellant received a total overpayment of \$32,343.18.

In a preliminary overpayment determination dated March 4, 2021, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$32,343.18 for the period January 1, 2019 through November 7, 2020 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It further advised her of its preliminary determination that she 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 her that she could request waiver of recovery of the overpayment. It further requested that she 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, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In a March 12, 2021 overpayment action request form, appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. In an OWCP-20 form dated March 28, 2021, she indicated that she had monthly income of \$2,623.04 and monthly expenses of \$2,578.66. Appellant further listed assets of \$114,307.28, including \$105,341.85 in a savings account.

A telephonic hearing was held on July 29, 2021. Appellant testified that she had not changed her position in reliance on the overpaid amount. She advised that she could repay \$200.00 per month as recovery of the overpayment. OWCP's hearing representative noted that appellant had not submitted supporting financial documentation and advised that she could submit such evidence within 30 days.

By decision dated October 13, 2021, OWCP's hearing representative finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$32,343.18 for the period January 1, 2019 through November 7, 2020 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset.⁴ She found that appellant was without fault in the creation over the overpayment, but denied waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment by submitting payments in the amount of \$200.00 per month.

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.⁵ 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.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 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

⁴ OWCP's hearing representative indicated that the overpayment was for \$32,343.13; however, this appears to be a typographical error as the record supports that the overpayment totaled \$32,343.18.

⁵ 5 U.S.C. § 8102

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).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,343.18 for the period January 1, 2019 through November 7, 2020, for which she was without fault, because she 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 on the periodic rolls beginning September 16, 2018. Appellant received SSA age-related retirement benefits beginning January 1, 2019. As noted, a claimant cannot concurrently receive 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 her 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 appellant's SSA age-related retirement benefit rates with FERS and without FERS from January to December 2019. 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 \$32,343.18. The Board has reviewed OWCP's calculation of dual benefits received by her for the period January 1, 2019 through November 7, 2020 and finds that an overpayment of compensation in the amount of \$32,343.18 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹² 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 the overpayment. OWCP must 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

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.¹⁴ An individual's liquid assets

⁹ *Id.* 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).

¹² *Supra* note 2.

¹³ *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹⁴ 20 C.F.R. § 10.436. OWCP procedures provide that a claimant is deemed to need substantially all his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly

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.¹⁵

Section 10.437 provides that recovery of an overpayment is 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

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.¹⁷ In order to establish that recovery of the overpayment would defeat the purpose of FECA, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the established limit as determined by OWCP procedures.¹⁸

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because her stated assets exceed the allowable resource base. She indicated that she had assets of \$114,307.28, including a savings account balance of \$105,341.85. As this exceeds the relevant resource base of \$10,300.00 for an individual with a spouse as provided in OWCP's procedures, appellant has not shown that waiver of recovery would defeat the purpose of FECA.¹⁹ Because she 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 she needs substantially all of her current income to meet ordinary and necessary living expenses.²⁰

The Board also finds that appellant has not established that she was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience because

expenses by more than \$50.00. Its 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) and (3) (September 2020).

¹⁵ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁶ 20 C.F.R. § 10.437(b)(1).

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

¹⁸ *D.M.*, Docket No. 19-1311 (issued February 4, 2020); *supra* note 15.

¹⁹ *Supra* note 15.

²⁰ *See R.A.*, Docket No. 20-1311 (issued January 26, 2022).

she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.²¹

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

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$32,343.18 for the period January 1, 2019 through November 7, 2020, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2022
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²¹ *R.A., id.; L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569 (1989).