

<sup>2</sup> The Board notes that following the September 13, 2019 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.*

through June 22, 2019, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits, without 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 \$399.31 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On March 13, 1998 appellant, then a 50-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained lower back, neck, and left jaw pain when she stepped with her right foot onto plastic tie straps and fell to the floor, landing on her left hip and shoulder, while in the performance of duty. OWCP initially accepted the claim for right rotator cuff tear, and later expanded the acceptance of the claim to include mild cervical and lumbar strains, herniated discs at the L3-4, L5-S1, and C5-6 levels, displacement of cervical and lumbar intervertebral discs without myelopathy, aftercare for healing traumatic fracture of vertebra, joint stiffness, urinary incontinence, anterior cervical discectomy and fusion at C5-6, left L3-4 lumbar hemilaminectomy and discectomy, and L5-S1 decompression. It assigned the claim OWCP File No. xxxxxx551.<sup>3</sup> OWCP paid appellant compensation on the periodic rolls effective June 16, 2002.

A June 26, 2002 Notification of Personnel Action (PS Form 50) listed appellant's retirement coverage as the Federal Employees Retirement System (FERS). On EN1032 forms dated April 27, 2015, April 6, 2016, and March 27, 2017, appellant replied "No" as to whether she was in receipt of SSA benefits as a part of an annuity for federal service. On EN1032 forms dated March 21, 2018 and March 16, 2019 she indicated that she was in receipt of SSA benefits.

On April 3, 2019 OWCP requested information from SSA regarding appellant's potential receipt of FERS/SSA dual benefits.

On April 29, 2019 OWCP received a completed FERS/SSA dual benefits form from SSA dated April 24, 2019, wherein SSA calculated appellant's SSA age-related retirement benefit rates with and without a FERS offset. The form indicated that the SSA rate with FERS was \$1,568.10 effective March 2015 and December 2015, \$1,572.80 effective December 2016, \$1,604.20 effective December 2017, and \$1,649.10 effective December 2018. The form further indicated that the SSA rate without FERS was \$757.30 effective March 2015 and December 2015, \$759.50 effective December 2016, \$774.60 effective December 2017, and \$796.20 effective December 2018.

OWCP completed a FERS offset overpayment calculation worksheet on July 15, 2019. It determined the 28-day FERS offset amount for the days in each period and computed a total

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<sup>3</sup> Under OWCP File No. xxxxxx143, appellant's claim was accepted for a rotator cuff sprain of shoulder and upper arm that occurred on January 28, 1999. She returned to full-time restricted-duty work on January 3, 2000. Following an absence for military leave from June 3, 2000 through June 11, 2000, appellant began working six hours per shift. She was again released to full-time restricted-duty work effective January 12, 2001. Appellant was absent from work to attend military training to become a warrant officer from January 21 through March 1, 2001. She returned to full-time restricted-duty work in March 2001 and again began performing six hours of restricted-duty work on or around May 5, 2001. Appellant stopped work effective June 9, 2001 as she was totally disabled.

overpayment of \$42,638.67. This form indicated: from March 1 through November 30, 2015, appellant received an overpayment of compensation in the amount of \$7,350.66; from December 1, 2015 through November 30, 2016, she received an overpayment of compensation in the amount of \$9,783.06; from December 1, 2016 through November 30, 2017, she received an overpayment of compensation in the amount of \$9,786.41; from December 1, 2017 through November 30, 2018, she received an overpayment of compensation in the amount of \$9,982.55; and from December 1, 2018 through June 22, 2019, she received an overpayment of compensation in the amount of \$5,735.99.

In a letter dated July 16, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of her SSA age-related retirement benefits attributable to federal service, her FECA wage-loss compensation had been adjusted.

On August 14, 2019 OWCP notified appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$42,638.67 as she had received FECA wage-loss compensation benefits for the period March 1, 2015 through June 22, 2019 that had not been reduced by the portion of her SSA age-related retirement benefits attributable to her federal service, and that this portion of her SSA benefit was a prohibited dual benefit. It further advised her of its preliminary determination that she was without fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. Additionally, it provided an overpayment action request form and notified her 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 precoupment hearing. No response was received.

By decision dated September 13, 2019, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$42,638.67 because the SSA/FERS offset was not applied to FECA payments for the period March 1, 2015 through June 22, 2019. It further found that she was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, because she had not submitted any evidence in response to the preliminary overpayment determination. OWCP required repayment of the overpayment by deducting \$399.31 from appellant's continuing compensation benefits beginning September 15, 2019.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee

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<sup>4</sup> 5 U.S.C. § 8102(a).

is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.<sup>6</sup> 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.<sup>7</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$42,638.67 during the period March 1, 2015 through June 22, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without appropriate offset.

The record indicates that, while appellant was receiving wage-loss compensation under FECA, she also received SSA age-related retirement benefits attributable to her federal service during the relevant period. A claimant cannot receive both compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>8</sup> Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of SSA 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. The SSA provided the SSA rate with FERS and without FERS for specific periods from March 1, 2015 through June 22, 2019. OWCP provided its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period March 1, 2015 through June 22, 2019 in its August 14, 2019 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2015 through June 22, 2019 and finds that an overpayment of compensation in the amount of \$42,638.67 was created.<sup>9</sup>

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<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *See D.M.*, Docket No. 19-1369 (issued June 30, 2020).

<sup>9</sup> *See L.W. supra* note 6; *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.<sup>10</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.<sup>11</sup>

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.<sup>12</sup> Section 10.436 provides that 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 expense, 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>13</sup> For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.<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>

## **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 of recovery of the overpayment 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

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<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> 20 C.F.R. § 10.438.

<sup>12</sup> *Id.* at §§ 10.434-10.437.

<sup>13</sup> *Id.* at § 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>14</sup> *Id.*

<sup>15</sup> *Id.*

conscience. However, appellant had the responsibility to provide financial information to OWCP,<sup>16</sup> but failed to do so.

In its preliminary overpayment determination, dated August 14, 2019, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. It advised her that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant did not provide the requested Form OWCP-20 or submit any financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine her eligibility for waiver, 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>17</sup>

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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 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 hardship.<sup>18</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$399.31 from appellant's continuing compensation every 28 days.

The record supports that, in requiring repayment of the overpayment by deducting \$399.31 from appellant's compensation payments every 28 days, OWCP took into consideration that appellant had not submitted the requested financial information as well as the other factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting

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<sup>16</sup> *Id.* at § 10.438; *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

<sup>17</sup> 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>18</sup> *Id.*

hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$399.31 from appellant's continuing compensation every 28 days.<sup>19</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$42,638.67 for the period March 1, 2015 through June 22, 2019, for which she was without fault, as she 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 \$399.31 from her continuing compensation payments every 28 days.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).