

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

_____)	
R.S., Appellant)	
)	
and)	Docket No. 21-1314
)	Issued: June 9, 2022
DEPARTMENT OF AGRICULTURE, PLANT)	
PROTECTION & QUARANTINE,)	
Los Angeles, CA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2021 appellant filed a timely appeal from a July 7, 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

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,671.96 for the periods October 1, 2012 through

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

August 31, 2015 and September 1, 2016 through November 9, 2019, 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; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$471.16 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On September 26, 1996 appellant, then a 46-year-old office automation clerk, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition due to factors of her federal employment. She stopped work in 1996. OWCP accepted the claim for depressive disorder and prolonged depressive reaction. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls as of June 16, 2002.

On October 3, 2019 OWCP contacted SSA to obtain information regarding appellant's potential receipt of dual benefits.

On October 28, 2019 OWCP received from SSA an October 27, 2019 completed Federal Employees Retirement System (FERS)/SSA dual benefits form which indicated that appellant had been in receipt of SSA age-related retirement benefits since October 2012. The form showed appellant's SSA age-related retirement benefit rates with and without a FERS offset. Beginning October 2012, the SSA rate with FERS was \$651.30, and without FERS was \$564.90; beginning December 2012, the SSA rate with FERS was \$662.30, and without FERS was \$574.50; beginning December 2013, the SSA rate with FERS was \$672.20, and without FERS was \$583.10; beginning December 2014, the SSA rate with FERS was \$683.60, and without FERS was \$593.00; beginning September 2016, the SSA rate with FERS was \$1,070.40, and without FERS was \$903.90; beginning December 2016, the SSA rate with FERS was \$1,073.90, and without FERS was \$906.60; beginning December 2017, the SSA rate with FERS was \$1,095.60, and without FERS was \$924.70; and beginning December 2018, the SSA rate with FERS was \$1,125.60, and without FERS was \$950.50.

In a November 26, 2019 letter, OWCP advised appellant that she had been receiving dual FERS and SSA age-related retirement benefits without an appropriate offset. It further informed her that her FECA wage-loss compensation benefits must be adjusted based on the FERS portion of SSA age-related retirement benefits that were attributable to federal service. OWCP explained that appellant's compensation payments would be offset by the portion of her SSA age-related retirement benefits attributable to her federal service, resulting in a new net compensation payment of \$1,816.37, every 28 days.

In a FERS offset overpayment calculation worksheet dated May 17, 2021, OWCP found that appellant had received an overpayment in the amount of \$10,765.13 during the period October 1, 2012 to November 9, 2019. It found that from October 1 to November 30, 2012 appellant received an overpayment in the amount of \$173.75; from December 1, 2012 to November 30, 2013 she received an overpayment in the amount of \$1,056.49; from December 1, 2013 to November 30, 2014 she received an overpayment in the amount of \$1,072.14; from December 1, 2014 to August 31, 2016 she received an overpayment in the amount of \$1,911.56;

from September 1 to November 30, 2016 she received an overpayment in the amount of \$499.50; from December 1, 2016 to November 30, 2017 she received an overpayment in the amount of \$2,009.51; from December 1, 2017 to November 30, 2018 she received an overpayment in the amount of \$2,056.43; from December 1, 2018 to November 9, 2019 she received an overpayment in the amount of \$1,985.75.

On May 17, 2021 OWCP issued a preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$10,765.13, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.³ It explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA benefit rates with and without FERS for each period, and then multiplying that amount by the number of days in each period. OWCP also found that appellant was without fault in the creation of the overpayment. It requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation to determine a reasonable repayment schedule and advised that she could request waiver of recovery. OWCP further requested that appellant 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 provided an overpayment action request form and notified appellant that within 30 days of the date of the letter, she could request a final decision based on the written record, or a prerecoumpment hearing.

On June 17, 2021 OWCP received a completed Form OWCP-20, wherein appellant requested waiver of recovery of the overpayment. Appellant argued that she relied upon misinformation, that she could not have reasonably known that an improper payment occurred, and that it would be against equity and good conscience to require her to repay the overpayment. She listed monthly income of \$999.00 in SSA benefits and \$1,885.00 in other benefits, for total monthly income of \$2,884.00.⁴ Appellant listed monthly expenses and debts being paid by monthly installments totaling \$2,848.00. In response to the question regarding assets, she listed \$10.00 cash on hand, a \$100.00 checking account balance, and a \$100.00 savings account balance, for a total of \$250.00. Appellant submitted an SSA document and a checking account statement dated May 31, 2021, but did not provide any other accompanying financial documentation.

OWCP revised the FERS offset overpayment calculation worksheet on July 7, 2021. It explained that appellant did not receive SSA age-related retirement benefits from September 1, 2015 through August 31, 2016, and the preliminary overpayment determination incorrectly included this period. OWCP determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from October 1, 2012 through November 9, 2019, which resulted in a total overpayment of \$9,671.96. It determined that from October 1 through November 30, 2012, appellant received an overpayment in the amount of \$173.75; from

³ In a letter dated April 23, 2021, the employing establishment confirmed a appellant's retirement was covered under FERS.

⁴ The overpayment memorandum noted that appellant's 28-day OWCP compensation amount of \$1,884.65 x 13 cycles per 12 months, resulted in monthly OWCP compensation of \$2,041.70, plus the monthly SSA payment of \$999.00, for total monthly income of \$3,040.70.

December 1, 2012 through November 30, 2013, she received an overpayment in the amount of \$1,056.49; from December 1, 2013 through November 30, 2014, she received an overpayment in the amount of \$1,072.14; from September 1, 2015 through August 31, 2016, no overpayment (she did not receive SSA age-related retirement benefits); from September 1 through November 30, 2016, she received an overpayment in the amount of \$499.50; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$2,009.51; from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$2,056.43; and from December 1, 2018 through November 9, 2019, she received an overpayment in the amount of \$1,985.75. OWCP added the overpayment amounts for each period and determined that it should have offset a total of \$9,671.96 from appellant's wage-loss compensation.

By decision dated July 7, 2021, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$9,671.96 for the periods October 1, 2012 through August 31, 2015 and September 1, 2016 through November 9, 2019, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It explained that appellant did not receive SSA age-related retirement benefits for the period September 1, 2015 to August 31, 2016, and the preliminary overpayment determination, should not have included an offset amount of \$1,093.17 for this period. After subtracting this amount from the \$10,765.13 amount in the preliminary overpayment determination, it explained that the correct amount of the overpayment was \$9,671.96. OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. It required recovery of the overpayment by deducting \$471.16 every 28 days from his continuing compensation payments.

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 that OWCP 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 benefits 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

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,671.96, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the periods October 1, 2012 through August 31, 2015 and September 1, 2016 through November 9, 2019, without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving compensation for wage-loss under FECA, she also was receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage-loss under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that during the periods October 1, 2012 through August 31, 2015 and from September 1, 2016 through November 9, 2019, appellant received SSA age-related retirement benefits that were attributable to federal service, while she also received FECA benefits that were not reduced by an appropriate offset. Consequently, fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's 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. SSA provided its rate with FERS and without FERS for specific periods from October 1, 2012 through August 31, 2015 and from September 1, 2016 through November 9, 2019. OWCP provided its calculations for each relevant period based on the age-related retirement rates as reported by SSA which show that appellant received an overpayment in the amount of \$9,671.96. The Board thus finds that appellant received prohibited dual benefits for the periods October 1, 2012 through August 31, 2015 and September 1, 2016 through November 9, 2019.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹¹ Thus, a finding that appellant was without fault does not automatically result in waiver 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.¹²

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current

⁹ *D.M.*, Docket No. 21-0230 (issued December 14, 2021); *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 7; *L.J.*, *supra* note 7.

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² *L.S.*, 59 ECAB 350 (2008).

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.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

Section 10.437 of OWCP's implementing regulations provides that 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 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.¹⁵ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.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

While appellant submitted a completed Form OWCP-20 on June 17, 2021, and a bank checking statement dated May 31, 2021, she failed to furnish sufficient financial documentation to support her income and expenses. OWCP found that she did not provide all of the requested information regarding income, expenses, debts, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

¹³ 20 C.F.R. § 10.436. OWCP's procedures provide that the 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 (3) (September 2020).

¹⁴ Federal (FECA) Procedure Manual, *id.* at Chapter 6.400.4a(3) (September 2020).

¹⁵ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 6.400.4c(3) (September 2020).

¹⁷ 20 C.F.R. § 10.436.

The Board finds that OWCP properly found that absent complete documentation of appellant's expenses and assets the evidence was insufficient to establish that recovery of the overpayment would defeat the purposes of FECA or be against equity and good conscience.¹⁸

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.¹⁹

Section 10.441(a) of OWCP's regulations²⁰ provides in pertinent part:

"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 soon as the error is discovered or his or her attention is called to 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."²¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$471.16 every 28 days from appellant's continuing compensation payments.

OWCP gave due regard to the information submitted, as well as the factors set forth in 20 C.F.R. § 10.441, and found that this method of recovery would minimize resulting hardship.²² The Board, therefore, finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$471.16 every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,671.96 for the periods October 1, 2012 through August 31, 2015 and September 1, 2016 through November 9, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board also finds that OWCP properly denied waiver of recovery

¹⁸ *J.W.*, Docket No. 20-0857 (issued March 24, 2021).

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

²⁰ *Id.* at § 10.441(a).

²¹ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²² *J.R.*, Docket No. 21-0485 (issued December 10, 2021); *M.B.*, Docket No. 20-1578 (issued March 25, 2021).

of the overpayment and properly required recovery of the overpayment by deducting \$471.16 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 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