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J.S., Appellant)	
)	
and)	Docket No. 22-0369
)	Issued: June 7, 2022
U.S. POSTAL SERVICE, PROCESSING &)	
DISTRUBTION CENTER, Columbia, SC,)	
Employer)	
)	

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

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

JURISDICTION

On January 14, 2022 appellant, through counsel, filed a timely appeal from a December 1, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the December 1, 2021 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,185.52 for the period January 1, 2020 through April 24, 2021, 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 \$500.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 8, 2009 appellant, then a 55-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 5, 2009 he strained his lower back and right shoulder while in the performance of duty. He stopped work on October 5, 2009. OWCP accepted the claim for lumbar sprain and right shoulder sprain. It subsequently expanded the acceptance of his claim to include an aggravation of lumbar spondylosis without myelopathy and lumbar spinal stenosis. OWCP paid appellant wage-loss compensation on the supplemental rolls effective February 3, 2010 and on the periodic rolls effective November 21, 2010.

On March 1, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.⁵

On May 10, 2021 SSA completed the FERS/SSA dual benefits calculation form and provided appellant's monthly benefits with and without FERS from January to December 2020. It indicated that effective January 2020, appellant's SSA rate with FERS was \$2,143.60 and without FERS was \$1,061.80; and effective December 2020, his rate with FERS was \$2,171.40 and without FERS was \$1,075.60.

On May 12, 2021 OWCP advised appellant that it was reducing his wage-loss compensation effective April 25, 2021 by the amount of his SSA benefits attributable to his federal service. It indicated that his new net compensation every 28 days would be \$2,151.49.

In a FERS offset overpayment calculation form completed May 12, 2021, OWCP calculated the amount that it should have offset from appellant's compensation for each period from January 1, 2020 through April 24, 2021. It found that, from January 1 through November 30, 2020, appellant received an overpayment of \$11,947.35 and from December 1, 2020 through April 24, 2021, he received an overpayment of \$5,238.16. Based on these figures, OWCP calculated the total overpayment amount of \$17,185.52.

⁴ Docket No. 13-1288 (issued November 12, 2013).

⁵ On an April 14, 2010 claim for compensation (Form CA-7), the employing establishment indicated that appellant had FERS as his retirement system.

In a preliminary overpayment determination dated May 12, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$17,185.52 for the period January 1, 2020 through April 24, 2021 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. 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 prerecoupment hearing.

On May 20, 2021 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. In an overpayment action request form dated May 25, 2021, he requested waiver of recovery of the overpayment. In a OWCP-20 form of even date, appellant indicated that he had reported his SSA retirement income to OWCP. He advised that he was uncomfortable completing the OWCP-20 form due to privacy concerns.

A prerecoupment hearing was held on September 17, 2021. Appellant advised that his income was limited to his military retirement, SSA benefits, benefits from the Department of Veterans Affairs, and OWCP. He asserted that his financial information was private and noted that OWCP had caused the overpayment. The hearing representative advised appellant that she required financial information to consider waiver of recovery of the overpayment and to determine any necessary repayment schedule. Appellant indicated that he could pay \$500.00 per month for recovery of the overpayment.

By decision dated December 1, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$17,195.52 for the period January 1, 2020 through April 24, 2021 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. She found that he was without fault in the creation over the overpayment, but denied waiver of recovery of the overpayment as he had not provided the necessary financial information. The hearing representative noted that appellant had indicated that he could make a monthly payment of \$500.00 and thus required repayment of the overpayment by deducting \$500.00 from his 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.⁶ Section 8116 limits the right of an employee to receive

⁶ 5 U.S.C. § 8102.

compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁷

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.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$17,185.52 for the period January 1, 2020 through April 24, 2021, 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.

OWCP paid appellant wage-loss compensation for total disability beginning February 3, 2010. Appellant received SSA age-related retirement benefits beginning January 1, 2020. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.¹⁰ 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.¹¹

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 2020. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$17,185.52. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period January 1, 2020 through April 24, 2021 and finds that an overpayment of compensation in the amount of \$17,185.52 was created.¹²

⁷ *Id.* at § 8116.

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

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

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

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

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

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹³ 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.¹⁴

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.¹⁵ 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 TSP or 401(k)), jewelry, and artwork.¹⁶

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 her position for the worse.¹⁷

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.¹⁸ Appellant,

¹³ *Supra* note 2.

¹⁴ *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹⁵ 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 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).

¹⁶ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁷ 20 C.F.R. § 10.437(b)(1).

¹⁸ *See J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.S.*, 59 ECAB 350 (2008).

however, had the responsibility to provide the appropriate financial information and documentation to OWCP.¹⁹

In its preliminary overpayment determination dated May 12, 2021, OWCP explained the importance of providing the completed Form OWCP-20 and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Appellant submitted a May 20, 2021 OWCP-20 form, but did not provide any information about his income, expenses, or assets. He indicated that he was not comfortable providing financial information due to privacy concerns. OWCP, therefore, did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²⁰

Consequently, the Board 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.²¹

Section 10.441 of OWCP's regulations²² 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.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

While appellant requested waiver of recovery of the overpayment, he did not complete the Form OWCP-20 or otherwise provide financial information. OWCP's regulations provide that the overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁴

¹⁹ 20 C.F.R. § 10.438; *V.B.*, Docket No. 20-0976 (issued January 26, 2021).

²⁰ *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

²¹ *Id.* at § 10.441. *See M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²² *Id.* at § 10.441(a).

²³ *Id.*; *see L.G.*, Docket No. 19-1274 (issued July 10, 2020).

²⁴ *Id.* at § 10.438. *See also A.F.*, Docket No. 19-0054 (issued June 12, 2019).

When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁵ OWCP's procedures provide that, in these instances, OWCP should set the rate of recovery at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²⁶

The record reflects that appellant's continuing 28-day wage-loss compensation as of April 25, 2021 was \$2,151.49. Therefore, deducting \$500.00 every 28 days from his continuing compensation does not exceed the 25 percent repayment rate.²⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,185.52 for the period January 1, 2020 through April 24, 2021, 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 \$500.00 from appellant's continuing compensation payments every 28 days.

²⁵ See *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

²⁶ *Supra* note 15 at Chapter 6.500.8(c)(1) (September 2018); *D.H.*, Docket No. 20-1064 (issued December 14, 2020).

²⁷ See *S.M.*, Docket No. 21-0772 (issued November 30, 2021).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 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