

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

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<b>M.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0694</b>
	)	<b>Issued: November 22, 2022</b>
<b>DEPARTMENT OF THE ARMY, SIERRA</b>	)	
<b>ARMY DEPOT, Herlong, CA, Employer</b>	)	
_____	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 31, 2022 appellant filed a timely appeal from a March 18, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,438.19, for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 18, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.*

(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 \$421.50 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On October 31, 2001 appellant, then a 51-year-old packer, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 2001 she sustained bruises and cuts to her wrists and legs when she got out of a forklift, and her boot became caught on hanging ribbon material, causing her to fall while in the performance of duty. OWCP accepted her claim for bilateral hand sprains; bilateral wrist and hand contusions; sprain of other part of right wrist and hand; unspecified arthropathy of the left hand; other postprocedural status on the left hand; and pain in left hand joint. Appellant stopped work on October 2, 2002. OWCP paid her wage-loss compensation for continuing disability from work on the supplemental rolls commencing October 3, 2002 and on the periodic rolls commencing October 6, 2002. The case record contains documentation demonstrating that appellant elected to receive FECA compensation instead of compensation under the Federal Employees Retirement System (FERS) or the Civil Service Retirement System (CSRS).

On August 4, 2020 OWCP received a FERS/SSA dual benefits form completed by SSA on July 16, 2020, which indicated that appellant received SSA age-related retirement benefits that were attributable to federal service commencing August 1, 2012. SSA provided age-related retirement benefit rates with and without a FERS offset as follows: beginning August 1, 2012, the SSA rate with FERS was \$726.90 and without FERS was \$542.10; beginning December 1, 2012 the SSA rate with FERS was \$739.30 and without FERS was \$551.30; beginning December 1, 2013 the SSA rate with FERS was \$750.40 and without FERS was \$559.50; beginning December 1, 2014 the SSA rate with FERS was \$763.10 and without FERS was \$569.00;<sup>3</sup> beginning July 1, 2016 the SSA rate with FERS was \$945.60 and without FERS was \$754.60; beginning December 1, 2016 the SSA rate with FERS was \$948.40 and without FERS was \$756.80; beginning December 1, 2017 the SSA rate with FERS was \$967.30 and without FERS was \$771.90; beginning December 1, 2018 the SSA rate with FERS was \$994.30 and without FERS was \$793.50; and beginning December 1, 2019 the SSA rate with FERS was \$1,010.20 and without FERS was \$806.10.

On August 18, 2020 OWCP prepared a FERS offset overpayment calculation worksheet, based on the benefits rates provided by SSA, wherein it noted the calculations of appellant's overpayment for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020. It determined that: for the period August 1 through November 30, 2012 appellant received an overpayment of \$743.26; for the period December 1, 2012 through November 30, 2013 appellant received an overpayment of \$2,262.20; for the period December 1, 2013 through November 30, 2014 appellant received an overpayment of \$2,297.09; for the period December 1, 2014 through June 30, 2015 appellant received an overpayment of \$1,356.57;<sup>4</sup> for

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<sup>3</sup> The document indicated that, due to appellant being placed back on SSA disability benefits from July 1, 2015 through June 30, 2016, there were no applicable SSA age-related retirement benefit rates for this period.

<sup>4</sup> The document indicated that there was no overpayment for the period July 1, 2015 through June 30, 2016.

the period July 1 through November 30, 2016 appellant received an overpayment of \$963.40; for the period December 1, 2016 through November 30, 2017 appellant received an overpayment of \$2,305.52; for the period December 1, 2017 through November 30, 2018 appellant received an overpayment of \$2,351.24; for the period December 1, 2018 through November 30, 2019 appellant received an overpayment of \$2,416.22; and for the period December 1, 2019 through August 15, 2020 appellant received an overpayment of \$1,742.70. The total overpayment was determined to be \$16,438.19.

On August 19, 2020 OWCP advised appellant that it was adjusting her wage-loss compensation to offset the portion of her SSA age-related retirement benefits attributable to her federal service. It informed her that the portion of the SSA benefits that she earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

In a preliminary overpayment determination dated August 21, 2020, OWCP notified appellant of its preliminary finding that she received an overpayment of compensation in the amount of \$16,438.19 for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020, because she concurrently received SSA age-related retirement benefits attributable to her federal service 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 rate of recovery, and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and other records in order to support 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 final decision based on the written evidence, or a precoupment hearing.

On September 11, 2020 OWCP received an overpayment action request form, signed on September 2, 2020, in which appellant requested waiver of recovery of the overpayment. Appellant submitted a Form OWCP-20, signed on September 3, 2020 listing her monthly income of \$4,880.03 including \$2,260.60 in SSA benefits, \$1,344.90 in Department of Veterans Affairs disability benefits, and \$1,274.53 in CSRS benefits. She listed her monthly expenses of \$1,105.35 for rent, \$539.34 for food, \$200.00 for clothing, \$500.44 for utilities, \$559.83 for solar cell financing, and \$250.10 for credit payment resulting in a total of \$3,065.06 in monthly expenses. Appellant listed assets of \$10.00 cash on hand, \$2,707.49 in a checking account, and \$705.33 in a savings account, resulting in total assets of \$3,422.82.

By decision dated March 18, 2022, OWCP finalized the preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$16,438.19, for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery because her monthly income exceeded her monthly expenses by more than \$50.00. The financial documents

and other information submitted by appellant showed that she had \$7,396.70 in monthly income,<sup>5</sup> \$3,065.06 in monthly expenses, and \$3,422.82 in assets. OWCP also determined that recovery of the overpayment would be made by deducting \$421.50 from her 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 retirement benefits that are attributable to the employee's federal service.<sup>8</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>9</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,438.19, for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

OWCP paid appellant wage-loss compensation for continuing total disability due to her accepted employment injury. The case record establishes that, appellant was concurrently receiving wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to her federal service, without an appropriate offset. A claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to

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<sup>5</sup> OWCP indicated that appellant had neglected to include \$2,516.67 in monthly FECA benefits on her financial questionnaire.

<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).

federal service for the same period.<sup>10</sup> Accordingly, the Board finds that fact of overpayment has been established.<sup>11</sup>

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received a dual benefits calculation form from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. Based upon this information, OWCP created a FERS offset overpayment calculation worksheet calculating a total overpayment amount. SSA provided its rates with FERS and without FERS for specific periods between August 1, 2012 and August 15, 2020. OWCP properly calculated the overpayment amount for each relevant period based on SSA's worksheet.

The Board thus finds that appellant received prohibited dual benefits in the amount of \$16,438.19 for the periods August 1, 2012 through June 30, 2015 and July 1, 2016 through August 15, 2020, without an appropriate offset.<sup>12</sup>

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

Section 8129 of FECA<sup>13</sup> provides that an overpayment must 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery 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.<sup>14</sup>

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.<sup>15</sup> 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

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<sup>10</sup> *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B., id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>11</sup> *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

<sup>12</sup> *See L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>13</sup> 5 U.S.C. § 8129(1)-(b); *A.C.*, *supra* note 10; *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>14</sup> *A.C.*, *id.*; *see V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>15</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, *Initial 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).

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.<sup>16</sup>

According to 20 C.F.R. § 10.437 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.<sup>17</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>18</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 of recovery of the overpayment.<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>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As properly determined by OWCP, her monthly income exceeds her monthly ordinary and necessary expenses by approximately \$4,331.64. The evidence of record reflects that appellant had \$7,396.70 in monthly income, \$3,065.06 in monthly expenses, and \$3,422.82 in assets. As her current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.<sup>21</sup> Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is

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<sup>16</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>17</sup> 20 C.F.R. § 10.437(a)-(b).

<sup>18</sup> *Id.* at § 10.437(b)(1).

<sup>19</sup> *Id.* at § 10.438.

<sup>20</sup> *Id.* at § 10.436.

<sup>21</sup> *See supra* note 15.

unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets exceed the allowable resource base.

The Board 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 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.<sup>22</sup>

The Board thus 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.<sup>23</sup> Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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>24</sup> When an individual fails to provide the requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.<sup>25</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$421.50 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by \$421.50 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$421.50 from her continuing compensation payments every 28 days.

### **CONCLUSION**

OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,438.19, for the periods August 1, 2012 through June 30, 2015 and July 1, 2016

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<sup>22</sup> See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>23</sup> *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>24</sup> 20 C.F.R. § 10.441; see *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>25</sup> *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995).

through August 15, 2020, 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 further finds that OWCP properly denied her request for waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$421.50 from her continuing compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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