

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

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<b>M.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0815</b>
	)	<b>Issued: November 22, 2022</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Uhrichsville, OH, Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 May 3, 2022 appellant, through counsel, filed a timely appeal from a March 31, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>3</sup>

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<sup>1</sup> 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 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the March 31, 2022 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 \$13,880.29 for the period July 1, 2020 through September 11, 2021 for which he was without fault because he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, 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 \$548.00 every 28 days from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On September 17, 1985 appellant, then a 31-year-old part-time flexible clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 1985 he experienced low back pain radiating into his right leg after lifting a mail sack while in the performance of duty. Appellant stopped work on September 17, 1985. OWCP accepted the claim for sacroiliac strain, lumbar disc displacement, thoracic lumbar neuritis or radiculitis, and herniated disc L5-S1. It authorized a spinal fusion on September 24, 1986 and lumbar laminectomy and discectomy at L5-S1 on March 14, 1989. He returned to light-duty work and sustained accepted recurrences of total disability on August 16, 1986, February 17, 1989, and September 12, 2002. On September 3, 2003 OWCP expanded acceptance of the claim to include right lumbar radiculopathy. It paid wage-loss compensation on the supplemental rolls beginning on October 21, 2002 and on the periodic rolls beginning on April 18, 2004.<sup>4</sup>

On August 25, 2021 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

On September 18, 2021 OWCP received from SSA a completed FERS/SSA dual benefit form, which reported that appellant had been in receipt of SSA age-related retirement benefits since July 2020. Beginning July 2020, appellant's monthly SSA rate with FERS was \$2,011.10 and without FERS was \$1,057.90. Beginning December 2020, appellant's monthly SSA rate with FERS was \$2,037.20 and without FERS was \$1,071.60.

On September 21, 2021 OWCP issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$13,880.29 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period July 1, 2020 through September 11, 2021. It noted that SSA had confirmed that a portion of his SSA age-related retirement benefits were attributed to his federal service as an employee, which required an offset of his FECA wage-loss compensation benefits through September 11, 2021 when his monthly compensation for wage loss was adjusted. OWCP explained that it had calculated the overpayment of compensation by determining the difference

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<sup>4</sup> By decision dated July 22, 2009, OWCP issued a loss of wage-earning capacity determination (LWEC), finding that appellant had the capacity to earn wages in the constructed position of telephone information clerk and reduced his compensation benefits. In decisions dated January 19 and March 26, 2010, OWCP's hearing representative reversed the July 22, 2009 LWEC. OWCP again paid appellant wage-loss compensation on the periodic rolls beginning February 14, 2010.

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. The FERS offset overpayment calculation worksheet indicated that OWCP had utilized a 28-day FERS offset amount of \$879.88 for the period July 1 through November 30, 2020 and \$891.32 for the period December 1, 2020 through September 11, 2021. Using these figures, OWCP calculated that the total overpayment amount was \$13,880.29. It found appellant without fault in the creation of the overpayment. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or request a precoupment hearing.

On September 5, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review and further requested waiver of recovery of the overpayment. The precoupment hearing took place on January 14, 2022.

Appellant provided a Form OWCP-20 dated October 5, 2021, which listed his monthly income as \$1,638.80 in SSA benefits, \$905.04 in Department of Veterans Affairs benefits, and \$3,236.00 in FECA benefits for a total monthly income of \$5,669.84. He listed his monthly expenses as housing of \$900.00, food \$450.00, clothing \$200.00, and utilities of \$378.00. Appellant indicated that his car payments totaled \$436.00 per month, with insurance of \$174.00 per month. He also reported three credit cards with minimal monthly payments of \$125.00, \$339.82, and \$972.00. Appellant concluded that he had a total of \$3,315.27 in monthly expenses. He also reported \$327.42 in his checking account. Appellant did not provide financial documents supporting his reported income, assets, and expenses.

By decision dated March 31, 2022, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$13,880.29 for the period July 1, 2020 through September 11, 2021. She determined that appellant was without fault in the creation of the overpayment. The hearing representative denied waiver of recovery of the overpayment and required recovery by withholding \$548.00 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.<sup>5</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>6</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 benefits that are attributable to the

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

employee's federal service.<sup>7</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>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,880.29 for the period July 1, 2020 through September 11, 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.

In its March 31, 2022 decision, OWCP found that an overpayment of compensation was created for the period July 1, 2020 through September 11, 2021. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to federal service during the period July 1, 2020 through September 11, 2021.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. SSA provided their age-related retirement benefit rates with FERS and without FERS for the period July 1, 2020 through September 11, 2021. OWCP calculated the amount of overpayment for each relevant period based on a FERS offset overpayment calculation worksheet.

The Board has reviewed the benefits received by appellant for the period July 1, 2020 through September 11, 2021 and finds that an overpayment of compensation in the amount of \$13,880.29 was created.<sup>10</sup>

### **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.<sup>11</sup>

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<sup>7</sup> 20 C.F.R. § 10.421(d); *S.R.*, Docket No. 20-0818 (issued June 28, 2022); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

<sup>9</sup> 5 U.S.C. § 8116(d)(2); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

<sup>10</sup> *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>11</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>12</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>13</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>14</sup>

Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>15</sup>

OWCP's regulations provide 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. The information is also used to determine the repayment schedule, if necessary.<sup>16</sup> Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>17</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 conscience.<sup>18</sup> OWCP considered appellant's financial information, as reported, to determine if

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<sup>12</sup> A.C., Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>13</sup> 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one 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) (September 2020).

<sup>14</sup> *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

<sup>15</sup> 20 C.F.R. § 10.437(a)-(b).

<sup>16</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>17</sup> *Id.* at § 10.438(b).

<sup>18</sup> 20 C.F.R. § 10.436.

recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary and necessary living expenses. Based on appellant's Form OWCP-20 and the evidence of record, his monthly income exceeded his ordinary and necessary living expenses by more than \$50.00. Therefore, the evidence does not establish that recovery would defeat the purpose of FECA.<sup>19</sup>

Additionally, appellant did not submit evidence to substantiate that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment he gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not be against equity and good conscience.<sup>20</sup>

As such, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>21</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP's regulations 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.<sup>22</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$548.00 every 28 days from appellant's continuing compensation payments.

In setting the recovery rate at \$548.00, OWCP explained how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.<sup>23</sup> The Board, therefore, finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$548.00 every 28 days.

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<sup>19</sup> *S.R.*, *supra* note 7; *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>20</sup> *N.J.*, *supra* note 14; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>21</sup> *S.R.*, *supra* note 7; *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

<sup>22</sup> 20 C.F.R. § 10.441(a); *A.F.*, *supra* note 11; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>23</sup> *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$13,880.29 for the period July 1, 2020 through September 11, 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 \$548.00 every 28 days from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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