

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

S.R., Appellant)	
)	
and)	Docket No. 20-1416
)	Issued: September 8, 2022
U.S. POSTAL SERVICE, CORONA CITRUS)	
POST OFFICE, Corona, 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 July 13, 2020 appellant filed a timely appeal from a January 28, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 The Board notes that during the pendency of this appeal, OWCP issued a July 20, 2020 decision, which set aside the January 28, 2020 decision due to a technical error regarding the interest rate and again finalized the June 5, 2019 preliminary overpayment determination, with an increased interest rate. As the Board and OWCP may not simultaneously have jurisdiction over the same issue, the July 20, 2020 OWCP decision is null and void. *See L.F.*, Docket No. 19-1275 (issued October 29, 2020); *Terry L. Smith*, 51 ECAB 182 (1999); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 28, 2020 decision, appellant submitted additional evidence to OWCP. 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 \$95,751.85, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period October 1, 2014 through May 25, 2019 without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$738.46 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 11, 2011 appellant, then a 66-year-old postal distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed low back pain due to factors of her federal employment.⁴ She indicated that the activities that she believed contributed to her condition were lifting buckets and trays of mail, pushing heavy equipment full of mail and parcels, twisting and turning, and sorting mail on a daily basis. OWCP accepted appellant's claim for lumbar intervertebral disc displacement without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, aggravation of spondylolisthesis, degeneration disc, aggravation of spinal stenosis, and aggravation of sacroiliitis. It paid appellant wage-loss compensation on the supplemental rolls effective April 27, 2011 and on the periodic rolls effective July 3, 2011. On October 31, 2012 appellant returned to part-time modified-duty work for four hours per day. On August 28, 2013 she stopped work again when the employing establishment could no longer accommodate her work restrictions and OWCP paid her wage-loss compensation for total disability effective that date.

Appellant voluntarily retired from federal employment, effective October 31, 2014.

In a March 13, 2019 memorandum of telephone call (Form CA-110), appellant informed an OWCP claims examiner that her husband had passed away 2½ years ago, and that she was receiving her husband's SSA benefits.

On March 13, 2019 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

On May 6, 2019 OWCP received a completed FERS/SSA dual benefits form from SSA. The form indicated that appellant received SSA age-related retirement benefits as of October 2014 and provided SSA age-related benefit rates with FERS offset from October 2014 to December 2018. Beginning October 2014, the SSA rate with FERS was \$2,025.10 and without FERS was \$360.30. Beginning December 2014, the SSA rate with FERS was \$2,059.40 and without FERS was \$366.40. Beginning December 2015, the SSA rate with FERS was \$2,059.40 and without FERS was \$366.40. Beginning December 2016, the SSA rate with FERS was \$2,065.50 and without FERS was \$367.40. Beginning December 2017, the SSA rate with FERS

⁴ Under OWCP File No. xxxxxx776, OWCP accepted appellant's January 26, 2010 occupational disease claim (Form CA-2) for left shoulder sprain, left lateral epicondylitis, left elbow sprain, left carpal tunnel syndrome, and left ligament tear. This claim has been administratively combined with the current claim under OWCP File No. xxxxxx981 with the latter claim serving as the master file.

was \$2,106.70 and without FERS was \$374.70. Beginning December 2018, the SSA rate with FERS was \$2,165.50 and without FERS was \$385.10.

Beginning May 26, 2019, OWCP adjusted appellant's wage-loss compensation to include the offset of her SSA age-related retirement benefits attributable to her federal service. OWCP notified her of this change on May 29, 2019.

OWCP completed a FERS offset overpayment calculation worksheet on May 29, 2019. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment in the amount of \$95,751.85. This form indicated that from October 1 through November 30, 2014 appellant received an overpayment in the amount of \$3,347.89, from December 1, 2014 through November 30, 2015 she received an overpayment in the amount of \$20,371.81, from December 1, 2015 through November 30, 2016 she received an overpayment in the amount of \$20,427.63, from December 1, 2016 through November 30, 2017 she received an overpayment in the amount of \$20,433.18, from December 1, 2017 through November 30, 2018 she received an overpayment in the amount of \$20,841.10, and from December 1, 2018 through May 25, 2019 she received an overpayment in the amount of \$10,330.23.

In a preliminary overpayment determination dated June 5, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$95,751.85 because it had failed to reduce her wage-loss compensation payments for the period October 1, 2014 through May 25, 2019 to offset her SSA age-related retirement benefits that were attributable to federal service. It determined 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 payment method, provided an overpayment action request form, and advised her that she could request a waiver of the overpayment. It further requested that she 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 further notified her that, within 30 days of the date of the letter, appellant could request a telephone conference, a final decision based on the written evidence, or a prerecoumment hearing.

O June 11, 2019 appellant confirmed that she was currently receiving SSA age-related retirement benefits.

On July 9, 2019 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review.

In a Form OWCP-20 completed on July 2, 2019 appellant reported a total monthly income of \$4,640.00, which included \$2,250.00 in SSA benefits, \$929.00 in OWCP benefits, and \$1,461.00 in rental income. She noted total monthly expenses of \$4,627.00, which included \$2,287.00 for mortgage, \$362.00 for food, \$100.00 for clothing, \$347.00 for utilities, and \$1,531.00 for "other" expenses. Appellant also indicated that she had monthly payments of \$5,350.00 to banking institutions. She reported that she had cash on hand of \$30.00, a checking account balance of \$740.00, a savings account balance of \$23,852.00, current value of stocks and bonds of \$119,000.00, and personal property value of \$6,000.00 for a total assets of \$149,622. Appellant also provided a detailed list of her specific monthly expenses, which included gardening, home security, gym membership, home cleaning, gasoline, prescription medications, and other miscellaneous expenses.

Appellant submitted a May 2019 brokerage bank statement, which indicated that she had cash and sweep balances in the amount of \$14,591.72 and mutual funds in the amount of \$104,954.65 for a total asset value of \$119,546.37.

Appellant also submitted tax documentation, including a 2018 federal tax return summary, a 2018 Internal Revenue Service (IRS) Form 1040, a 2017 IRS Form 8879, a 2017 IRS Form 1040, and a 2017 IRS Form 8965. She also submitted supporting financial documentation, including monthly mortgage statements of \$1,296.58 and \$962.54, checking account statements that showed balances of \$5,042.28, \$10,237.59, and \$7,319.97, a printout of previous bill payments for water, gas, a trash bill for \$76.38, a cellular telephone bill for \$200.42, a car insurance bill for \$109.69, a home security bill for \$30.57, an internet and telephone bill for \$210.66, credit card statements dated April and May 2018, quarterly dues coupons from January to July 2019, a health insurance bill for \$110.50, a shopping receipt for \$182.24, and a car registration receipt for \$331.00. Appellant also provided medical records, including a list of prescription records and a printout of pediatric health visits.

A telephonic hearing was held on November 13, 2019. Appellant's then-counsel noted that appellant did not dispute the fact of overpayment or the finding that she was without fault. He argued that her monthly expenses exceeded her monthly income by \$765.00. Appellant testified that she relied on her savings every month to meet her expenses. She indicated that her savings were rapidly depleting and calculated that it would be gone in 16 months.

By decision dated January 28, 2020, an OWCP hearing representative finalized OWCP's preliminary determination, finding that appellant had received an overpayment of compensation in the amount of \$95,751.85 for the period October 1, 2014 through May 25, 2019, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because, based on her submitted financial information, she had assets in excess of the resource base of \$6,200.00. OWCP required recovery of the overpayment by deducting \$738.46 every 28 days from appellant's 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

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).

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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$95,751.85, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2014 through May 25, 2019 without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period October 1, 2014 through May 25, 2019. Consequently, the 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, 2014 through May 25, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that she received an overpayment in the amount of \$95,751.85.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2014 through May 25, 2019 and finds that an overpayment of compensation in the amount of \$95,751.85 was created.¹¹

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.¹² Thus, a finding that appellant was without fault does not automatically result in waiver of the

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

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Supra* note 9.

¹¹ *See R.F.*, Docket No. 20-0159 (issued October 15, 2020); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹² 5 U.S.C. § 8129(a)-(b).

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.¹³

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 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.¹⁴ 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 \$50.00.¹⁵ Also, 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.¹⁶ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁷ Non liquid 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 Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁸

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.¹⁹ 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.²⁰

¹³ *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *L.S.*, 59 ECAB 350 (2008).

¹⁴ 20 C.F.R. § 10.436(a)(b).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁶ *Id.* at Chapter 6.400.4a(2) (September 2018).

¹⁷ *Id.* at Chapter 6.400.4b(3).

¹⁸ *Id.* at Chapter 6.400.4b(3)(a), (b).

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

²⁰ *Supra* note 16 at Chapter 6.400.4c(3) (September 2020).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.²¹

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. As noted above, even if a claimant is found without fault in the creation of the overpayment, recovery of the overpayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²²

The Board finds that 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. In the Form OWCP-20, appellant indicated that she had \$23,852.00 in her savings account and \$119,000.00 in stocks and bonds. She also provided a May 2019 brokerage bank statement, which indicated that she had cash and sweep balances in the amount of \$14,591.72 and mutual funds in the amount of \$104,954.65 for a total asset value of \$119,546.37.

As noted above, in determining whether recovery of the overpayment would defeat the purpose of FECA, OWCP considers whether assets exceed a resource base of \$6,200.00 for an individual.²³ Accordingly, the Board finds that appellant, who reported up to \$143,398.37 in assets, has not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base.²⁴ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.²⁵

The Board also 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. On appeal, she argues that the overpayment recovery would be a financial hardship. Appellant reports that she would have a new monthly deficit of \$1,077.00 for 10½ years and that she would lose \$77,562.00 to sell her home or \$14,363.00 in capital gains tax to repay the overpayment. The Board notes, however, that she has sufficient assets that could be used for repayment of the debt and to fund her budget shortfalls.²⁶ Appellant has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she has

²¹ A.C., Docket No. 18-1550 (issued February 21, 2019).

²² *Supra* note 13.

²³ *Supra* note 17.

²⁴ S.W., Docket No. 20-0363 (issued November 23, 2020); H.F., Docket No. 17-0101 (issued September 5, 2017).

²⁵ M.H., Docket No. 19-1497 (issued September 9, 2020).

²⁶ L.D., *id.*

relinquished a valuable right or changed her position for the worse in reliance on the payments which created the overpayment.²⁷

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁸

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.²⁹

Section 10.441(a) of OWCP's regulations³⁰ 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."³¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$738.46 every 28 days from appellant's continuing compensation payments.

In determining whether appellant could repay the overpayment through deductions of \$738.46 from her continuing compensation payments, OWCP took into consideration the financial information she submitted as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, while at the same time liquidating the debt in a reasonably prompt fashion.³² Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$738.46 from her compensation payments every 28 days.³³

²⁷ See *B.C.*, Docket No. 19-0629 (issued June 2, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁸ *S.W.*, Docket No. 20-0363 (issued November 23, 2020).

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

³⁰ *Id.* at § 10.441(a).

³¹ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

³² *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.F.*, Docket No. 15-0489 (issued May 11, 2015).

³³ *J.B.*, Docket No. 19-1734 (issued November 5, 2020).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$95,751.85, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period October 1, 2014 through May 25, 2019 without an appropriate offset. The Board finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$738.46 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 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