

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

_____)
A.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. CUSTOMS & BORDER PROTECTION,)
San Diego, CA, Employer)
_____)

**Docket No. 22-0281
Issued: September 26, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 14, 2021 appellant filed a timely appeal from a September 22, 2021 merit decision and a November 30, 2021 nonmerit 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 to consider the merits of this case.

¹ The Board notes that, following the November 30, 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.*

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$24,839.41³ for the period July 1, 2019 through August 14, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the by deducting \$909.00 from appellant's continuing compensation payments every 28 days; and (4) whether it properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On October 26, 2000 appellant, then a 47-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on October 16, 2000 she injured her back when she slipped and fell when walking down a ramp while in the performance of duty. She did not initially stop work. OWCP accepted the claim for lumbosacral sprain. It later expanded acceptance of the claim to include herniated disc at L4-5 and authorized surgery.

Appellant stopped work on July 25, 2001 due to the authorized spine surgery and OWCP paid wage-loss compensation on the daily rolls beginning on that date. It paid wage-loss compensation benefits on the periodic rolls beginning August 25, 2021.⁴

In a July 6, 2015 letter, OWCP advised appellant to notify it upon her receipt of SSA retirement benefits. It also advised appellant that section 8116(d)(2) of FECA (5 U.S.C. § 8116(d)(2)) required that a claimant's continuing compensation benefits be reduced if he or she began receiving SSA retirement benefits based on his or her age and federal service under the Federal Employees Retirement System (FERS). OWCP noted that it was notifying appellant of this requirement as she was approaching 62 years of age, the minimum age at which an individual is eligible to receive SSA retirement benefits. It further noted that failure to report receipt of such retirement benefits to OWCP could result in an overpayment of compensation, which could be subject to recovery. Consequently, if appellant had been approved for SSA retirement benefits, or were currently receiving SSA retirement benefits, she was to contact OWCP immediately so that it could begin the process of making any necessary adjustments to her compensation benefits.

On August 4, 2021 OWCP forwarded to SSA a FERS/SSA dual benefits calculation form. It listed the computation period as July 13, 2002 to present. On August 11, 2021 SSA completed the form and indicated that appellant had received SSA age-related retirement benefits effective July 2019. The FERS/SSA dual benefits form indicated that beginning July 2019, the SSA rate

³ OWCP's claims examiner indicated that the overpayment was in the amount of \$24,839.14; however, this appears to be a typographical error as the record supports that the overpayment totaled \$24,839.41.

⁴ By decision dated September 26, 2003, OWCP reduced appellant's wage-loss compensation effective October 5, 2003 as the constructed position of probation officer represented her wage-earning capacity. It determined that she retained a 30 percent wage-earning capacity.

without a FERS offset was \$1,925.90 and with a FERS offset was \$971.40; beginning December 2019, the SSA rate without a FERS offset was \$1,956.70 and with a FERS offset was \$986.90; and beginning December 2020, the SSA rate without a FERS offset was \$1,982.10 and with a FERS offset was \$999.70.

On August 16, 2021 OWCP prepared a FERS offset overpayment calculation worksheet, based on the form SSA completed, wherein it noted the calculation of appellant's overpayment from July 1, 2019 through August 14, 2021. It determined that, during the period July 1 through November 30, 2019, she received an overpayment in the amount of \$4,814.46; for the period December 1, 2019 through November 30, 2020, she received an overpayment in the amount of \$11,701.54; and for the period December 1, 2020 through August 14, 2021, she received an overpayment in the amount of \$8,323.41. The total overpayment was determined to be \$24,839.41.

In a letter dated August 17, 2021, OWCP notified appellant that she had been receiving a prohibited dual benefit. It noted that the SSA had confirmed that a portion of her SSA age-related retirement benefits were attributed to her years of federal service as an employee under FERS and that portion required an offset of her FECA compensation benefits, in the amount of \$982.40 every 28 days. OWCP indicated that, to account for her SSA offset, appellant's FECA wage-loss compensation would be adjusted to reflect a new net compensation amount of \$3,635.93 effective August 15, 2021.

On August 19, 2021 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$24,839.41 had been created because the FERS/SSA offset was not applied to payments for the period July 1, 2019 through August 14, 2021 creating a prohibited dual benefit. It determined that appellant was without fault in the creation of the overpayment. OWCP requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request waiver of recovery of the overpayment. It further requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. It provided an overpayment action request form and further notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.⁵

On August 24, 2021 OWCP received appellant's overpayment action request form. Appellant requested that OWCP make a decision based on the written evidence. She further requested waiver because she was found to be without fault in the creation of the overpayment. Appellant provided a letter asserting that it would be unfair if she was penalized for making decisions while relying on information provided to her by the government. The remaining three

⁵ In an August 24, 2021 memorandum of telephone call (Form CA-110), appellant indicated that she did not want to complete the financial section of the OWCP-20 as she was not claiming hardship, she was claiming that she had informed OWCP and therefore, was without fault.

pages of documents submitted were illegible. A completed Form OWCP-20 and financial documentation were not received.

By decision dated September 22, 2021, OWCP finalized the August 14, 2021 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$24,839.41 because it had failed to offset her compensation payments for the period July 1, 2019 through August 14, 2021 by the portion of her SSA benefits that were attributable to federal service. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$909.00 every 28 days from appellant's continuing compensation payments.

On October 4, 2021 appellant again requested waiver of recovery of the overpayment. She noted that she was not given an opportunity to submit legible copies of the August 24, 2021 documentation. Appellant also provided a summary of her financial information listing monthly expenses totaling \$6,046.48. She also submitted other documentation, including loan documents, bank statements, tax forms, and copies of bills, and a partially completed Form OWCP-20 and additional financial information. Appellant further indicated, "Original appeal uploaded but not legible. Decision made without viewing my documents."

By decision dated November 30, 2021, OWCP denied appellant's request for reconsideration finding that her request was untimely filed and she had not demonstrated clear evidence of error in its September 22, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ 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.⁷

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related benefits that are attributable to federal service of the employee.⁸ 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

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *E.R.*, Docket No. 21-0133 (issued November 15, 2021); *M.R.*, Docket No. 20-1622 (issued June 30, 2021); *S.S.*, Docket No. 19-1945 (issued March 25, 2021); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

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 compensation in the amount of \$24,839.41 for the period July 1, 2019 through August 14, 2021, for which she was without fault, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset.

As noted, a claimant cannot receive concurrent FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period without an appropriate offset.¹⁰ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to her federal service from July 1, 2019 through August 14, 2021. Consequently, the fact of overpayment has been established.

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 documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided age-related retirement benefits rates with and without FERS during the specific period July 1, 2019 through August 14, 2021. OWCP provided its calculation for each relevant period based on a FERS offset calculation worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period July 1, 2019 through August 14, 2021 and finds that an overpayment of compensation in the amount of \$24,839.41 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall 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."¹¹

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.¹²

⁹ FECA Bulletin No. 97-09 (issued February 3, 1997); *see M.S.*, Docket No. 20-0068 (issued May 14, 2021).

¹⁰ *Id.*; *see D.W.*, Docket No. 20-1533 (issued May 27, 2021); *M.R.*, Docket No. 20-0427 (issued October 30, 2020); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹¹ 5 U.S.C. § 8129.

¹² *A.C.*, *supra* note 10; *see Robert Atchison*, 41 ECAB 83, 87 (1989).

Section 10.438 of OWCP 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.¹³

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹⁴

Section 10.436 provides that 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 current 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 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 \$50.00.¹⁶

ANALYSIS -- ISSUE 2

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

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.¹⁷ Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP, but failed to do so.

In its preliminary overpayment determination dated August 19, 2021, OWCP explained the importance of providing the completed Form OWCP-20 along with supporting financial documentation. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. As she did not submit a completed Form OWCP-20 with supporting financial documentation of her income, assets, and expenses, OWCP

¹³ 20 C.F.R. § 10.438.

¹⁴ *Id.* at §§ 10.434-10.437.

¹⁵ *Id.* at § 10.436.

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁷ *Supra* note 15.

could not determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.¹⁸

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

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 \$909.00 from appellant's continuing compensation payments every 28 days.

While appellant requested waiver of recovery of the overpayment, she did not complete the Form OWCP-20 and the documentation provided was partially illegible. OWCP's regulations provide that the overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²²

When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²³ The Federal (FECA) Procedure Manual provides that, in these instances, OWCP should set the rate of recovery

¹⁸ *D.C.*, Docket No. 19-0118 (issued January 15, 2020); *see S.B.*, Docket No. 16-1795 (issued March 2, 2017).

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 *Supra* note 13 at § 10.438. *See also A.F.*, Docket No. 19-0054 (issued June 12, 2019).

²³ *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²⁴

The record reflects that on August 17, 2021 OWCP notified appellant that her FECA wage-loss compensation had been adjusted based on the information provided by SSA regarding the amount of her age-related retirement benefits attributable to her federal service. It advised that her new net FECA wage-loss compensation payments would be \$3,635.93, effective August 15, 2021. The Board notes that 25 percent of \$3,635.93 is \$909.00. The Board therefore finds that OWCP properly required recovery of the overpayment by deducting \$909.00 from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 4

Section 8128(a) of FECA vests OWCP with discretionary authority to review an award for or against compensation.²⁵ OWCP's regulations provide standards to be met before a request for reconsideration of the merits of a given claim is granted.²⁶ A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁷ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).²⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.²⁹

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.³⁰ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of

²⁴ *Supra* note 16 at Chapter 6.500.8(c)(1) (September 2018); *F.B.*, Docket No. 21-0680 (issued February 23, 2022); *D.H.*, Docket No. 20-1064 (issued December 14, 2020).

²⁵ 5 U.S.C. § 8128(a).

²⁶ 20 C.F.R. § 10.606(b).

²⁷ *Id.* at § 10.607(a). According to OWCP procedures, the one-year period of requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. *Supra* note 16 at Chapter 2.1602.4a (September 2020).

²⁸ *Id.* at Chapter 2.1602.4b (September 2020).

²⁹ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³⁰ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

OWCP.³¹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.³²

However, section 10.440(b) of OWCP's regulations specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that section 8128(a) of FECA does not apply to such a final overpayment determination.³³

ANALYSIS -- ISSUE 4

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On October 4, 2021 appellant again requested waiver of recovery of the overpayment and submitted other documentation, including loan documents, bank statements, tax forms, copies of bills, and a partially completed Form OWCP-20. With these submissions appellant noted, "Original appeal uploaded but not legible. Decision made without viewing my documents."

By decision dated November 30, 2021, OWCP treated her request for waiver of recovery of the overpayment as a request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to establish clear evidence of error.

Section 10.440(b) of OWCP's regulations, however, specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that 5 U.S.C. § 8128(a) does not apply to such a final overpayment determination.³⁴ The Board finds that OWCP erred in applying 5 U.S.C. § 8128(a) and its associated regulations in its November 30, 2021 decision. Therefore, the Board shall reverse OWCP's November 30, 2021 decision.³⁵

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$24,839.41 for the period July 1, 2019 through August 14, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. The Board further

³¹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 14 at Chapter 2.1602.5 (September 2020).

³² *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

³³ 20 C.F.R. § 10.440(b).

³⁴ *See id.*

³⁵ *See generally*, *J.B.*, Docket No. 20-0923 (issued February 12, 2021); *E.H.*, Docket No. 19-0016 (issued October 20, 2020); *P.J.*, Docket No. 19-1479 (issued May 8, 2020); *Charles E. Nance*, 54 ECAB 447 (2003). The Board notes that section 10.438(b) of OWCP's regulations relative to requesting waiver of recovery provides: "(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished." 20 C.F.R. § 10.438(b). *See also* Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 6.400.2e(2) (September 2018).

finds that OWCP properly denied waiver of recovery of the overpayment and that it properly required recovery of the overpayment by deducting \$909.00 from appellant's continuing compensation payments every 28 days. The Board also finds that OWCP improperly determined that appellant's request for reconsideration of a final overpayment determination was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2021 decision of the Office of Workers' Compensation Programs is affirmed. The November 30, 2021 decision of the Office of Workers' Compensation is reversed.

Issued: September 26, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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