

without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts of the case as presented in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On September 8, 2004 appellant, then a 50-year-old postmaster, filed an occupational disease claim (Form CA-2) alleging that, on or before November 19, 2002, while at work, he experienced back pain when he lifted tubs and large bags of mail during a detail assignment which got progressively worse. OWCP accepted the claim for a herniated L4-5 disc, intractable lumbar radiculopathy, and postlaminectomy instability.⁴ It paid appellant wage-loss compensation on the supplemental rolls effective January 27, 2005, and on the periodic rolls effective May 10, 2009.

Appellant retired from the employing establishment effective August 29, 2014 and relocated to California. He elected to continue to receive FECA wage-loss compensation benefits.

On April 15, 2021 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits form. It requested appellant's SSA age-related retirement benefit rates with and without FERS offset as of December 2015.

On May 13, 2021 OWCP received the completed dual benefits form, wherein SSA reported SSA age-related retirement benefit rates with a FERS offset and without a FERS offset. Beginning December 2019, the SSA rate with FERS was \$2,257.50 and without FERS was \$195.10. Beginning December 2020, the SSA rate with FERS was \$2,286.80 and without FERS was \$197.60. SSA noted that appellant had received disability benefits from July 2009 through November 2019.

In a FERS offset overpayment calculation worksheet dated June 9, 2021, OWCP used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods and calculated a total overpayment in the amount of \$36,800.11. It found that, during the period December 1, 2019 through November 30, 2020, appellant received an overpayment in the amount of \$24,884.78 and for the period December 1, 2020 through May 22, 2021, he received an overpayment in the amount of \$11,915.33.

In a letter dated June 9, 2021, OWCP advised appellant that he had been receiving a prohibited dual benefit. It noted that the SSA had confirmed that a portion of his SSA age-related retirement benefits were attributed to his years of federal service as an employee under the FERS retirement program and that portion required an offset of his FECA compensation benefits. OWCP indicated that, to account for his SSA offset, appellant's FECA wage-loss compensation would be adjusted.

³ Docket No. 17-1972 (issued July 24, 2018); *Order Remanding Case*, Docket No. 06-1224 (issued October 6, 2006).

⁴ OWCP subsequently expanded acceptance of the claim to include displacement of lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis or radiculitis, and lumbar postlaminectomy syndrome.

On June 9, 2021 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$36,800.11 for the period December 1, 2019 through May 22, 2021 because the SSA/FERS offset was not applied to payments for this period. It determined 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 recovery method, and advised him that he could request a waiver of recovery of the overpayment. It 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 he failed to furnish the requested financial information within 30 days. It further notified him that, within 30 days of the date of the letter, he could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On July 2, 2021 OWCP received a completed Form OWCP-20, wherein appellant requested a prerecoupment hearing and further requested waiver of the recovery of the overpayment because he was found to be without fault in its creation. Appellant reported total monthly income of \$3,883.00, including \$2,100.00 in SSA benefits, \$1,583.00 in annuity payments, and \$200.00 from operating a boat charter business. He listed \$3,656.00 in monthly expenses, including \$1,433.00 in rent or mortgage, \$350.00 for food, \$200.00 for clothing, \$600.00 for utilities, \$200.00 in miscellaneous expenses, \$400.00 in monthly credit card payments, and \$473.00 in combined boat and car insurance. Appellant noted that the boat, valued at \$280,000.00, was his residence. He listed assets of \$92,000.00 in an annuity account and \$900.00 in a checking account.

During the hearing, conducted by telephone on October 14, 2021, appellant contended that recovery of the overpayment would cause severe financial hardship as his ordinary and necessary living expenses exceeded his monthly income by \$400.00. He noted that he had taken out a personal loan to afford food and miscellaneous expenses.

Following the prerecoupment hearing, appellant provided an additional list of monthly expenses totaling \$4,055.12: \$493.86 in debt repayment; \$231.33 for an automobile lease; \$107.23 automotive insurance; \$1,231.73 boat docking fee; \$115.54 boat bottom cleaning; \$299.00 boat insurance; \$755.54 boat maintenance, repair, and fuel; \$100.19 for a storage unit; \$421.00 for food; \$30.71 to rent a post office box and to pay postage; \$146.01 for telephone and internet service; \$30.23 for medical insurance; and \$92.75 in miscellaneous expenses. He provided financial documentation for some of these expenses. Appellant also submitted checking account statements.

By decision dated December 29, 2021, an OWCP hearing representative finalized the June 9, 2021 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$36,800.11 because OWCP did not offset his compensation payments for the period December 1, 2019 through May 22, 2021 by the portion of his SSA benefits that were attributable to federal service. She further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA as his monthly income exceeded his monthly expenses by more than \$50.00. The hearing representative directed recovery of the overpayment by deducting \$500.00 from his continuing compensation payments.

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.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 SSA age-related benefits that are attributable to federal service of the employee.⁷ 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.⁸

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years of age.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$36,800.11 for the period December 1, 2019 through May 22, 2021, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without 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.¹⁰ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service from December 1, 2019 through May 22, 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 its rate with FERS and without

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 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).

⁸ FECA Bulletin No. 97-09 (February 3, 1997).

⁹ 20 C.F.R. § 404.310.

¹⁰ *See supra* note 8; *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

FERS during the specific period December 1, 2019 through May 22, 2021. It provided its calculation for each relevant period based on SSA's worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 1, 2019 through May 22, 2021 and finds that an overpayment in the amount of \$36,800.11 has been established.

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 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.¹²

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.¹³

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.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

OWCP's procedures provide that the 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 and the value of stocks, bonds, saving accounts, mutual funds, and certificates of deposit. 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

¹¹ 5 U.S.C. § 8129.

¹² 20 C.F.R. § 10.438.

¹³ *Id.* at §§ 10.434-10.437.

¹⁴ *Id.* at § 10.436.

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).

immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁷

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 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 It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the documents of record, he had total current monthly income of \$3,883.00 and total monthly expenses of \$3,656.00, which left \$227.00 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.¹⁹ Additionally, his resource base included a \$92,000.00 annuity and \$900.00 in a checking account, which exceeded the resource base of \$6,200.00 for an individual as provided by OWCP's procedures.²⁰

As appellant failed to establish that, recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$36,800.11, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits for the period December 1, 2019

¹⁷ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁸ 20 C.F.R. § 10.436.

¹⁹ *V.G.*, Docket No. 20-1520 (issued September 21, 2021); *see M.C.*, Docket No. 19-0699 (issued February 12, 2020).

²⁰ *Supra* note 14.

²¹ *Supra* note 15. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *J.C.*, Docket No. 17-1791 (issued February 23, 2018); *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant is not receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act. *Id.*; *Miguel A. Muniz*, 54 ECAB 217 (2002); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

through May 22, 2021 without appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board