

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

_____)	
E.C., Appellant)	
)	
and)	Docket No. 22-0501
)	Issued: September 12, 2022
U.S. POSTAL SERVICE, GENERAL MAIL)	
FACILITY, Boston, MA, Employer)	
_____)	

Appearances:
Jacqueline Shanahan, Esq., for the appellant¹
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 February 14, 2022 appellant, through counsel, filed a timely appeal from a November 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 29, 2021 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 \$34,582.14 for the period August 1, 2016 through March 27, 2021 for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (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 \$300.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On July 2, 1993 appellant, then a 42-year-old letter sorter machine clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment, specifically performing repetitive motions over time. She indicated that she first became aware of her condition and realized its relationship to her federal employment on May 1, 1993. By decision dated September 22, 1993, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. It paid her compensation for intermittent periods of disability. On June 2, 2008 appellant stopped work again. OWCP paid her compensation on the supplemental rolls, effective that date, and on the periodic rolls, effective July 6, 2008.

In a letter dated March 18, 2019, the employing establishment advised OWCP that appellant was entitled to receive SSA retirement benefits on account of her age and requested that it review her benefits to determine whether she qualified for the Federal Employees Retirement System (FERS) offset and subsequent reduction of wage-loss compensation benefits. It also requested that OWCP contact SSA to determine if appellant was, in fact, in receipt of SSA benefits.

In an April 3, 2019 response, OWCP advised the employing establishment that appellant had reached full retirement age on August 26, 2016 and that SSA had reported that her retirement benefits were not affected by her FERS. It explained that because her federal earnings did not adjust her retirement benefits, no consideration needed to be given to apply the FECA-FERS offset to compensation.

OWCP received a FERS/SSA dual benefits form completed on June 28, 2018. The form listed appellant's monthly SSA age-related retirement benefits beginning August 2016 with and without her FERS contributions. The form reported: beginning August 2016, appellant's SSA rate with FERS and without FERS was \$1,520.20; beginning December 2016, her SSA rate with FERS and without FERS was \$1,524.70; and beginning December 2017, her SSA rate with FERS and without FERS was \$1,555.10. The SSA representative noted that "all federal earnings -- no offset applies."

In a Form CA-1032 completed on August 28, 2019, appellant responded "No" indicating that she was not receiving SSA benefits as part of an annuity for her federal employment.

In a Form CA-1032 completed on September 1, 2020, appellant responded "Yes" indicating that she was receiving SSA benefits as part of an annuity for her federal employment in the amount of \$1,525.00 per month.

On February 10, 2021 SSA submitted a completed FERS/SSA dual benefits form to OWCP. The form listed appellant's monthly SSA age-related retirement benefits beginning August 2016 with and without her FERS contributions. The form reported that: beginning August 2016, her SSA rate with FERS was \$924.90 and without FERS was \$1,520.00; beginning December 2016, her SSA rate with FERS was \$927.60 and without FERS was \$1,524.00; and beginning December 2017, her SSA rate with FERS was \$946.10 and without FERS was \$1,555.00.

On March 18, 2021 SSA submitted another FERS/SSA dual benefits form to OWCP, which listed appellant's monthly SSA age-related retirement benefits beginning December 2018 with and without her FERS contributions. The form reported that: beginning December 2018, her SSA rate with FERS was \$1,598.00 and without FERS was \$972.50; beginning December 2019, her SSA rate with FERS was \$1,624.00 and without FERS was \$988.00; and beginning December 2020, her SSA rate with FERS was \$1,645.00 and without FERS was \$1,000.80.

Effective March 28, 2021, OWCP adjusted appellant's compensation amount to include the offset of her SSA age-related retirement benefits attributable to her federal service.

On April 13, 2021 OWCP completed a FERS offset calculation form wherein it tabulated the overpayment from August 1, 2016 through March 27, 2021. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period. OWCP found that the overpayment totaled \$34,582.14.

On April 14, 2021 OWCP notified appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$34,582.14 because it had failed to reduce her wage-loss compensation benefits for the period August 1, 2016 through March 27, 2021 by the portion of her SSA age-related retirement benefits that were attributable to federal service. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant submit an updated overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method. 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. OWCP further advised appellant that she could request a waiver of the overpayment and provided an overpayment action request form. It also provided an overpayment action request form and notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On May 13, 2021 appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review.

By letter dated May 13, 2021, counsel noted her disagreement with the April 14, 2021 preliminary overpayment determination and asserted that appellant was not receiving SSA benefits until October 2019 because SSA was recouping an overpayment. She cited to 5 U.S.C. § 8116(d)(2) and FECA Bulletin No. 97-09 and argued that OWCP may only deduct FECA wage-loss compensation benefits from SSA benefits that are "actually received."

Counsel submitted a letter from SSA that informed appellant that she had received an overpayment for excess benefits for the period December 2002 through April 2010 and that her benefits would be withheld beginning March 2013 to recover the overpayment. She also submitted

a letter dated February 25, 2020 from the U.S. Railroad Retirement Board regarding her SSA payments.

In a letter dated September 3, 2021, counsel requested a final decision based on the written evidence by a representative of OWCP's Branch of Hearings and Review, in lieu of a prerecouplement hearing. She argued that appellant was not actually receiving SSA benefits until October 2019 due to an overpayment that was being recouped. Counsel also contended that some of appellant's SSA benefits were not attributable to her federal service, but were instead received under the Railroad Retirement Act (RRA). She requested that OWCP remand the case to determine an amended amount of overpayment.

OWCP received a letter dated August 23, 2021 from the U.S. Railroad Retirement Board containing information regarding appellant's monthly annuity payments.

By decision dated November 29, 2021, OWCP's hearing representative finalized the April 14, 2021 preliminary overpayment determination.

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.⁴ 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.⁵

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.⁶ FECA Bulletin No. 97-09 states 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation, for which she is without fault, because she concurrently received FECA benefits and SSA age-related retirement benefits without an appropriate offset.

Appellant completed a Form CA-1032 on September 1, 2020 and responded, "Yes" indicating that she had received retirement benefits from SSA as part of an annuity for federal service. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

SSA age-related retirement benefits attributable to federal service.⁸ The evidence of record has established that appellant received SSA age-related retirement benefits that were attributable to her own federal service during a period of time that she received FECA wage-loss compensation. The Board finds that fact of overpayment, therefore, is established.

The Board further finds, however, that this case is not in posture for decision regarding the period and amount of the overpayment.

The evidence of record does not contain evidence to support a finding that appellant was in receipt of SSA benefits attributable to her federal service beginning August 1, 2016. OWCP determined that appellant had received an overpayment of compensation based on the February 10 and March 18, 2021 dual benefits calculation forms from SSA. On the forms SSA provided appellant's SSA rate with and without FERS from August 2016 to the present. The Board finds, however, that there is conflicting information regarding whether appellant was in receipt of SSA age-related retirement benefits attributable to her federal employment, effective August 1, 2016.⁹ On April 3, 2019 OWCP advised the employing establishment that appellant had reached full retirement age on August 26, 2016. It further explained that no consideration needed to be given to apply the FECA-FERS offset to compensation and provided a FERS/SSA dual benefits form completed on June 24, 2018, which also indicated that no offset was needed. Additionally, counsel has maintained that appellant did not receive SSA age-related retirement benefits until October 2019. Given the conflicting information of record regarding when appellant began to receive SSA age-related retirement benefits, the case must be remanded to OWCP for further development of the factual evidence.¹⁰

On remand OWCP shall consult with SSA in order to determine the correct dates during which the overpayment occurred and the exact amount of the overpayment of compensation.¹¹ It should then issue a new preliminary overpayment determination, with an overpayment action request form, Form OWCP-20, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that appellant received an overpayment of compensation, 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 the case is not in posture for decision regarding the period and amount of the overpayment.

⁸ *Id.* See also *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁹ See *R.K.*, Docket No. 19-0713 (issued October 20, 2020); see also *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

¹⁰ See *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹¹ See *J.H.*, Docket No. 19-1887 (issued June 16, 2020).

¹² In light of the Board's disposition of Issue 1, Issues 2 and 3, regarding waiver and recovery of the overpayment, respectively, are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 12, 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