

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 22-0846
)	Issued: September 9, 2022
DEPARTMENT OF VETERANS AFFAIRS,)	
BOB STUMP DEPARTMENT OF VETERANS)	
AFFAIRS MEDICAL CENTER, Prescott, AZ,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 2022 appellant, through counsel, filed a timely appeal from a May 6, 2022 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 an 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 May 6, 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 \$7,954.01 for the period March 1, 2018 through August 17, 2019, 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 \$203.95 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On October 2, 1997 appellant, then a 45-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 1997 she injured her back when lifting and transferring a patient while in the performance of duty. OWCP accepted the claim for lumbar sprain and displacement of a lumbar intervertebral disc without myelopathy. On October 29, 2001 appellant underwent a discectomy and fusion at L4-5 and L5-S1. On November 5, 2001 she underwent a lumbar discectomy.

Appellant sustained intermittent periods of total and partial disability from employment. OWCP paid her wage-loss compensation based on her wage-earning capacity beginning June 4, 2007. Appellant subsequently stopped work on March 27, 2018 and did not return.

On June 24, 2019 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA for completion.⁴

On July 6, 2019 SSA completed the FERS/SSA dual benefits form and provided appellant's monthly benefits with and without FERS for the period March through December 2018. SSA indicated that effective March 2018, appellant's SSA rate with FERS was \$1,136.60 and without FERS was \$691.70, and effective December 2018, her SSA rate with FERS was \$1,168.40 and without FERS was \$711.00.

In a FERS offset overpayment calculation form completed September 5, 2019, OWCP calculated the amount that it should have offset from appellant's compensation for each period from March 1, 2018 through August 17, 2019. It found that, from March 1 through November 30, 2018, appellant received an overpayment of \$4,033.43 and from December 1, 2018 through August 17, 2019, she received an overpayment of \$3,920.57. Based on these figures, OWCP calculated the total overpayment amount of \$7,954.01.

In correspondence dated September 5, 2019, OWCP advised appellant that it was reducing her wage-loss compensation by the portion of her SSA benefits attributable to her federal service.

On September 12, 2019 OWCP notified appellant of its preliminary overpayment determination that she had received a \$7,954.10 overpayment of compensation for the period March 1, 2018 through August 17, 2019 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It further advised her of its preliminary determination that she was without fault in the creation of the

⁴ On a June 11, 2007 claim for compensation (Form CA-7), the employing establishment indicated that appellant had FERS as her retirement system.

overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised her that she could request waiver of recovery of the overpayment. Additionally, it provided an overpayment action request form and notified appellant 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 prerecoupment hearing.

On September 20, 2019 appellant requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. In an overpayment recovery questionnaire dated October 8, 2019, she provided her monthly income and expenses. Appellant noted that she only received wage-loss compensation for partial disability. She provided supporting financial information.

Following a preliminary review, by decision dated January 3, 2020, OWCP's hearing representative vacated the September 1, 2019 preliminary overpayment determination. The hearing representative found that OWCP had not sufficiently explained how it calculated the amount of the overpayment.

On March 24, 2020 OWCP notified appellant of its preliminary overpayment determination that she had received a \$7,954.10 overpayment of compensation from March 1, 2018 through August 17, 2019 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP noted that it had previously received appellant's completed October 2019 OWCP-20 form and her attached 90-pages of supporting documentation and that it would use that information to evaluate waiver and determine a reasonable rate of recovery of the overpayment. It indicated that she could submit a new OWCP-20 form. OWCP again informed appellant that she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing within 30 days.

In an OWCP-20 form dated April 13, 2020, appellant requested waiver of recovery of the overpayment. She asserted that she had informed OWCP of her SSA benefits and was not aware that she was being overpaid.

By decision dated May 6, 2022, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$7,954.02 for the period March 1, 2018 through August 17, 2019 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It explained how it had calculated the amount of the overpayment. OWCP further found that appellant was without fault in the creation over the overpayment but denied waiver of recovery of the overpayment. It determined that she had not responded to its March 24, 2020 preliminary overpayment determination with a completed OWCP-20 form or provided any financial documentation supporting her waiver request. OWCP required repayment of the overpayment by deducting \$203.95 from appellant's 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.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 OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,954.01 for the period March 1, 2018 through August 17, 2019, 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.

OWCP paid appellant wage-loss compensation for partial disability on the periodic rolls beginning June 4, 2007. Appellant received SSA age-related retirement benefits beginning March 1, 2018. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.⁹ The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. Accordingly, the Board finds that fact of overpayment has been established.¹⁰

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits 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 appellant's SSA age-related retirement benefit rates with FERS and without FERS from March through December 2018. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$7,954.01. The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period March 1, 2018 through August 17, 2019 and finds that an overpayment of compensation in the amount of \$7,954.01 was created.¹¹

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

⁹ *Supra* note 7. *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹⁰ *See L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹¹ *See J.S.*, Docket No. 22-0369 (issued June 7, 2022); *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹² provides that an overpayment must be recovered 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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must 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

According to 20 C.F.R. § 10.436, 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 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's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid 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.¹⁵

Section 10.437 provides that recovery of an overpayment is 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 her position for the worse.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on the issue of whether OWCP properly denied waiver of recovery of the overpayment.

In its March 24, 2020 preliminary overpayment determination, OWCP advised appellant that it would use her October 2019 OWCP-20 form and the attached 90 pages of financial documentation to evaluate the issues of waiver and reasonable rate of recovery of the overpayment. However, in its May 6, 2022 decision, it denied waiver of recovery after finding that she had not responded to its March 24, 2020 preliminary overpayment determination with a completed OWCP-20 form or any supporting evidence. OWCP failed to consider appellant's previously

¹² *Supra* note 2.

¹³ *I.R.*, Docket No. 22-0088 (issued May 5, 2022); *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹⁴ 20 C.F.R. § 10.436. OWCP procedures provide that a claimant is deemed to need substantially all his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(2) and (3) (September 2020).

¹⁵ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁶ 20 C.F.R. § 10.437(b)(1).

submitted October 2019 completed OWCP-20 form and supporting documentation as indicated. Additionally, the Board has held that OWCP must rely on current financial information when determining eligibility for waiver and recovery of an overpayment.¹⁷ OWCP's regulations provide that waiver is possible when the individual from whom recovery is sought needs substantially all of his or her "current income" to meet "current ordinary and necessary living expenses."¹⁸ OWCP should have requested that appellant submit updated financial information and financial documentation prior to its decision denying waiver of recovery.¹⁹ Consequently, the case will be remanded for OWCP to obtain updated financial information from appellant. After this and other such development as deemed necessary, OWCP shall issue a *de novo* decision.²⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,954.01 for the period March 1, 2018 through August 17, 2019, 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 finds that the case is not in posture for decision on the issue of whether OWCP properly denied waiver of recovery of the overpayment.

¹⁷ See *M.B.*, Docket No. 20-0573 (issued August 23, 2021); *C.S.*, Docket No. 17-2013 (issued April 11, 2018); *I.P.*, Docket No. 12-1683 (issued January 25, 2013); *Ronald E. Smith*, 36 ECAB 652 (1985).

¹⁸ 20 C.F.R. § 10.436(a).

¹⁹ *M.B.*, *supra* note 17; see also *Frank C. Leone*, Docket No. 02-1146 (issued September 2, 2003).

²⁰ In view of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 9, 2022
Washington, DC

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

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

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