

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

_____)	
J.R., Appellant)	
)	
and)	Docket No. 22-0464
)	Issued: April 18, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Colby, WI, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 3, 2022 appellant filed a timely appeal from an August 17, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$82,709.90, for the period December 27, 2005 through January 30, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that OWCP received additional evidence following the August 17, 2021 decision. 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.*

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 \$636.26 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 14, 2005 appellant, then a 68-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 9, 2005 she sustained injuries to her face, neck, collar bone, ribs, and back when her employing establishment vehicle was rear-ended and she was ejected from her postal vehicle while in the performance of duty. OWCP accepted the claim for mechanical complications of tracheostomy; closed fracture of ribs; fracture of other facial bones; closed fracture of the nasal bone; closed fracture of lumbar vertebra, without spinal cord injury; closed fracture of larynx and trachea; displacement of cervical intervertebral disc without myelopathy; closed fracture of mandible; scar conditions and fibrosis of skin; ptosis of the eyelid and nose, right; adhesive capsulitis of shoulder, right; and superficial injury of the eyelids and periocular area. It paid appellant wage-loss compensation on the supplemental rolls effective December 27, 2005 and on the periodic rolls effective August 6, 2006.

On September 10, 2020 OWCP contacted SSA to obtain the appropriate information to determine whether an offset of compensation benefits was required.

On October 1, 2020 OWCP received from SSA a completed Federal Employees Retirement System (FERS)/SSA dual benefits form, dated September 18, 2020, which indicated that appellant had been in receipt of SSA age-related retirement benefits since March 1, 2002. The form reported appellant's SSA age-related retirement benefit rates with and without a FERS offset: beginning March 2002, the SSA rate with FERS was \$871.90 and without FERS was \$643.30; beginning December 2002, the SSA rate with FERS was \$884.10 and without FERS was \$655.30; beginning January 2003, the SSA rate with FERS was \$917.20 and without FERS was \$655.30; beginning December 2003, the SSA rate with FERS was \$936.50 and without FERS was \$669.00; beginning January 2004, the SSA rate with FERS was \$966.30 and without FERS was \$669.00; beginning December 2004, the SSA rate with FERS was \$992.40 and without FERS was \$687.00; beginning January 2005, the SSA rate with FERS was \$1,025.90 and without FERS was \$687.00; beginning December 2005, the SSA rate with FERS was \$1,067.90 and without FERS was \$715.10; beginning January 2006, the SSA rate with FERS was \$1,105.40 and without FERS was \$715.10; beginning December 2006, the SSA rate with FERS was \$1,141.80 and without FERS was \$738.60; beginning December 2007, the SSA rate with FERS was \$1,168.10 and without FERS was \$755.60; beginning December 2008, the SSA rate with FERS was \$1,235.70 and without FERS was \$779.30; beginning December 2009, the SSA rate with FERS was \$1,235.70 and without FERS was \$779.30; beginning December 2010, the SSA rate with FERS was \$1,235.70 and without FERS was \$779.30; beginning December 2011, the SSA rate with FERS was \$1,280.20 and without FERS was \$828.00; beginning December 2012, the SSA rate with FERS was \$1,301.90 and without FERS was \$842.00; beginning December 2013, the SSA rate with FERS was \$1,321.30 and without FERS was \$854.00; beginning December 2014, the SSA rate with FERS was \$1,343.80 and without FERS was \$869.00; beginning December 2015, the SSA rate with FERS was \$1,343.80 and without FERS was \$869.00; beginning December 2016, the SSA rate with FERS was \$1,347.70 and without FERS was \$871.50; beginning December 2017, the SSA rate with FERS was \$1,374.70 and without FERS was \$889.00; beginning December 2018, the SSA rate with FERS was \$1,413.10 and without FERS was

\$913.80; and beginning December 2019, the SSA rate with FERS was \$1,435.60 and without FERS was \$928.40.

In a February 18, 2021 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-day periodic compensation benefits, effective February 27, 2021. It noted that her SSA benefit without FERS was \$928.40 and that her federal service increased her monthly Social Security benefit by \$507.20. OWCP explained that the amount of FERS/SSA dual benefits to be deducted from appellant's FECA benefits was \$507.20 per month, or \$468.18, every 28, days. It noted that her new net FECA wage-loss compensation rate would be \$2,935.83.

On February 24, 2021 OWCP issued a preliminary overpayment determination, finding that, an overpayment of compensation in the amount of \$94,754.17, had been created because it had failed to reduce appellant's wage-loss compensation payments for the period March 1, 2002 through November 30, 2020, 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 because the evidence did not support that she was aware that the receipt of full SSA retirement benefits concurrent with the disability/wage-loss compensation would result in an overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method, and advised that she could request 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, OWCP further notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing.

On March 15, 2021 OWCP received a Form OWCP-20, which appellant completed on March 4, 2021. Appellant listed her income, expenses, and assets. She also submitted detailed notes summarizing her expenses from 2005 to 2020. OWCP received financial documents supporting appellant's reported income, expenses, and assets.

By decision dated August 17, 2021, OWCP finalized the preliminary overpayment determination. It noted that, an error occurred in the preliminary overpayment determination, as the preliminary calculation was for the time period 2002 through 2021; however, appellant began receiving wage-loss compensation in 2005. OWCP completed a FERS offset overpayment calculation worksheet, determined the 28-day FERS offset amount for the days in each period, and calculated that she had received an overpayment of compensation in the amount of \$82,709.90 for the period December 27, 2005 to through January 30, 2021, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset.

The offset overpayment calculation worksheet showed that: for the period December 1, 2005 through January 1, 2006, the overpayment amount was \$58.15; for the period January 1 through December 1, 2006, the overpayment amount was \$4,297.59; for the period December 1, 2006 through December 1, 2007, the overpayment amount was \$4,851.69; for the period December 1, 2007 through December 1, 2008, the overpayment amount was \$4,977.20; for the period December 1, 2008 through December 1, 2009, the overpayment amount was \$5,251.19; for the period December 1, 2009 through December 1, 2010, the overpayment amount was \$5,251.19; for the period December 1, 2010 through December 1, 2011, the overpayment amount was

\$5,251.19; for the period December 1, 2011 through December 1, 2012, the overpayment amount was \$5,456.22; for the period December 1, 2012 through December 1, 2013, the overpayment amount was \$5,533.96; for the period December 1, 2013 through December 1, 2014, the overpayment amount was \$5,616.99; for the period December 1, 2014 through December 1, 2015, the overpayment amount was \$5,713.25; for the period December 1, 2015 through December 1, 2016, the overpayment amount was \$5,728.91; for the period December 1, 2016 through December 1, 2017, the overpayment amount was \$5,730.10; for the period December 1, 2017 through December 1, 2018, the overpayment amount was \$5,844.41; for the period December 1, 2018 through December 1, 2019, the overpayment amount was \$6,008.06; and for the period December 1, 2019 through January 30, 2021, the overpayment amount was \$7,139.82, resulting in a total overpayment amount of \$82,709.90, for the period December 27, 2005 through January 30, 2021.

OWCP also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. It noted that, as of the date of the decision, she had filed an incomplete, unsigned, and undated overpayment action request form in which she did not list her income, or provide the necessary financial documents to support her income, debt, or monthly expenses. OWCP required recovery of the overpayment by deducting \$636.46 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.³ 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.⁴

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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$82,709.90, for the period December 27, 2005 through

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

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

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

January 30, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.⁷

The evidence of record indicates that, while appellant was receiving compensation for wage loss under FECA, she also was receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage loss under FECA and SSA age-related retirement benefits attributable to federal service for the same period, without an appropriate offset.⁸ The information provided by SSA established that, during the period December 27, 2005 through January 30, 2021, appellant received SSA age-related retirement benefits that were attributable to federal service while she also received FECA benefits that were not reduced by the appropriate offset. 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 appellant's federal service. SSA provided appellant's age-related retirement benefit rates with FERS and without FERS for specific periods December 27, 2005 through January 30, 2021. OWCP provided its calculations for each relevant period based on the SSA worksheet which show that she received an overpayment in the amount of \$82,709.90. The Board thus finds that appellant received prohibited dual benefits for the period December 27, 2005 through January 30, 2021, totaling \$82,709.90.

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.⁹ Thus, a finding that appellant was without fault does not automatically result in waiver of the 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.¹⁰

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, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP

⁷ *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

⁸ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 5; *L.J.*, *supra* note 5.

⁹ 5 U.S.C. § 8129(a)-(b).

¹⁰ *L.S.*, 59 ECAB 350 (2008).

from data provided by the Bureau of Labor Statistics.¹¹ 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 \$50.00.¹²

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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision with regard to waiver of recovery of the overpayment.

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.¹⁵

In the final overpayment decision dated August 17, 2021, OWCP found that appellant had submitted an incomplete overpayment action Form OWCP-20, noting that she did not list her income, or provide the necessary financial documentation to support her income, debt, and monthly expenses. The Board, however, finds that she did list her income on the Form OWCP-20, and she also provided detailed summaries of her expenses from 2005 through 2020.

In the case of *William A. Couch*,¹⁶ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its final overpayment decision dated August 17, 2021, OWCP failed to consider and address all of the financial evidence submitted by appellant in support of waiver of recovery of the

¹¹ 20 C.F.R. § 10.436. 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹² *Id.* at Chapter 6.400.4a(3) (September 2020).

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

¹⁴ FECA Procedure Manual, *supra* note 11 at Chapter 6.400.4c(3) (September 2020).

¹⁵ 20 C.F.R. § 10.436.

¹⁶ 41 ECAB 548 (1990); *see also S.H.*, Docket No. 19-1582 (issued May 26, 2020); *R.D.*, Docket No. 17-1818 (issued April 3, 2018).

overpayment. As such, it failed to follow its procedures by properly discussing all of the evidence of record. It is crucial that OWCP address all evidence relevant to the subject matter properly submitted prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.¹⁷

The Board thus finds that this case is not in posture for decision.¹⁸ On remand, OWCP shall review all evidence of record regarding waiver and recovery of the overpayment. It shall thereafter issue a new preliminary overpayment determination. Following this, and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$82,709.90, for the period December 27, 2005 through January 30, 2021, 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 waiver and recovery of the overpayment.

¹⁷ See *C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, *id.*

¹⁸ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 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: April 18, 2023
Washington, DC

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

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

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