

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

S.F., Appellant	)	
	)	
and	)	<b>Docket No. 22-1158</b>
	)	<b>Issued: April 7, 2023</b>
U.S. POSTAL SERVICE, RICHMOND	)	
PROCESSING & DISTRIBUTION CENTER,	)	
Richmond, VA, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Ann M. Reardon, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 28, 2022 appellant filed a timely appeal from a March 31, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the March 31, 2022 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 \$133,074.35, for the period March 1, 2010 through April 24, 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 OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$112.71 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On April 24, 2009 appellant, then a 62-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 2009 she sustained a low back injury when she lifted a mail tray and placed it in a location above her head while in the performance of duty. The employee's retirement coverage was indicated as under the Federal Employees Retirement System (FERS). She stopped work shortly after filing her claim. OWCP accepted appellant's claim for lumbar sprain, displacement of lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis. It paid appellant wage-loss compensation on the supplemental rolls effective June 6, 2009 and on the periodic rolls, effective August 2, 2009.<sup>4</sup> Appellant was separated from the employing establishment in December 2011.

On April 14, 2021 OWCP received a FERS/SSA dual benefits form completed by SSA, which indicated that appellant received SSA age-related retirement benefits that were attributable to her federal service commencing March 2010. SSA provided age-related retirement benefit rates with and without a FERS offset from March 2010 as follows: beginning March 2010, the SSA rate with FERS was \$1,425.50 and without FERS was \$589.60; beginning December 2010 the SSA rate with FERS was \$1,425.50 and without FERS was \$589.60; beginning December 2011 the SSA rate with FERS was \$1,476.90 and without FERS was \$610.80; beginning February 2013 the SSA rate with FERS was \$1,864.50 and without FERS was \$771.10; beginning December 2013 the SSA rate with FERS was \$1,892.40 and without FERS was \$782.60; beginning December 2014 the SSA rate with FERS was \$1,924.50 and without FERS was \$795.90; beginning December 2015 the SSA rate with FERS \$1,924.50 and without FERS was \$795.90; beginning December 2016 the SSA rate with FERS was \$1,930.20 and without FERS was \$798.20; beginning December 2017 the SSA rate with FERS was \$1,968.80 and without FERS was \$814.10; beginning December 2018 the SSA rate with FERS was \$2,023.90 and without FERS was \$836.80; and beginning December 2019 the SSA rate with FERS was \$2,056.20 and without FERS was \$850.10; beginning December 2020, the SSA rate with FERS was \$2,082.90 and without FERS was \$861.10 and beginning April 2021, the SSA rate with FERS was \$2,082.90 and without FERS was \$861.10. The bottom of the form indicated that appellant was receiving disability benefits from February 2012 through January 2013.

On April 26, 2021 OWCP prepared a FERS offset overpayment calculation worksheet, based on the benefits rates provided by SSA, wherein it noted the calculations of appellant's overpayment from March 1, 2010. It determined: for the period March 1 through November 30,

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<sup>4</sup> On November 1, 2010 appellant underwent OWCP-authorized right L5-S1 laminectomy, L5 discectomy, and S1 foraminotomy.

2010 appellant received an overpayment of \$7,578.21; for the period December 1, 2010 through November 30, 2011 appellant received an overpayment of \$10,058.36; for the period December 1, 2011 through January 31, 2012 appellant received an overpayment of \$1,770.27; for the period February 1, 2013 through November 30, 2013 appellant received an overpayment of \$10,921.98; for the period December 1, 2013 through November 30, 2014 appellant received an overpayment of \$13,354.19; for the period December 1, 2014 through November 30, 2015 appellant received an overpayment of \$13,580.41; for the period December 1, 2015 through November 30, 2016 appellant received an overpayment of \$13,617.61; for the period December 1, 2016 through November 30, 2017 appellant received an overpayment of \$13,621.32; for the period December 1, 2017 through November 30, 2018 appellant received an overpayment of \$13,894.47; for the period December 1, 2018 through November 30, 2019 appellant received an overpayment of \$14,284.34; for the period December 1, 2019 through November 30, 2020 appellant received an overpayment of \$14,552.72; and for the period December 1, 2020 through April 24, 2021 appellant received an overpayment of \$5,840.47. The total overpayment was determined to be \$133,074.35.

On April 27, 2021 OWCP advised appellant that it was adjusting her wage-loss compensation to offset the portion of her SSA age-related retirement benefits attributable to her federal service. It informed her that the portion of the SSA benefits that she earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

On December 28, 2021 OWCP notified appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$133,074.35, for the period March 1, 2010 through April 24, 2021, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits attributable to his federal service, without an appropriate offset.<sup>5</sup> It determined that she 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 payment method and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records that support income and expenses. Additionally, OWCP provided an overpayment action request form and 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 prerecoupment hearing.

On February 22, 2022 OWCP received an overpayment action request form in which appellant requested a decision based on the written evidence and waiver of recovery of the overpayment because she was found to be without fault in the creation of the overpayment. Appellant submitted a Form OWCP-20, signed on February 11, 2022, in which she listed

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<sup>5</sup> On April 26, 2021 OWCP had issued a preliminary notice advising appellant of its preliminary overpayment determination that she received an overpayment of compensation in the amount of \$133,074.35, for the period March 1, 2010 through April 24, 2021. Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review and, after a preliminary review, OWCP's hearing representative vacated the April 26, 2021 preliminary overpayment determination and remanded the case to OWCP. The hearing representative found that OWCP had not adequately explained the creation of the claimed overpayment because it had provided an overpayment calculation worksheet in its April 26, 2021 preliminary overpayment determination that was illegible. When it issued its new preliminary overpayment determination on December 28, 2021, OWCP provided overpayment calculations that were legible.

\$3,673.58 in monthly income, \$3,389.36 in monthly expenses, and \$13,891.02 in assets. The assets were held under the categories of stocks and bonds (individual retirement account), checking account balance, savings account balance, cash on hand, and personal property. Appellant provided documentation pertaining to a portion of the figures contained in the Form OWCP-20.

By decision dated March 31, 2022, OWCP finalized the preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$133,074.35, for the period March 1, 2010 through April 24, 2021, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. 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 failed to establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$112.71 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.<sup>6</sup> 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.<sup>7</sup>

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 retirement benefits that are attributable to the employee's federal service.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$133,074.35, for the period March 1, 2010 through April 24, 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.

OWCP paid appellant FECA wage-loss compensation on the supplemental rolls effective June 6, 2009 and on the periodic rolls, effective August 2, 2009. Appellant received SSA age-related retirement benefits beginning March 1, 2010. As noted, a claimant cannot receive concurrent FECA wage-loss compensation and SSA age-related retirement benefits attributable to

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<sup>6</sup> 5 U.S.C. § 8102.

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>9</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

federal service for the same period.<sup>10</sup> The information provided by SSA established that a portion of appellant's benefits were attributable to her federal service. Thus, the record establishes that she received an overpayment of FECA wage-loss compensation.<sup>11</sup>

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 appellant's specific SSA age-related retirement benefits that were attributable to federal service. It provided its rate with FERS and without FERS for specific periods from March 1, 2010 through April 24, 2021. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$133,074.35.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$133,074.35, for the period March 1, 2010 through April 24, 2021.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA<sup>13</sup> 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 recovery 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.<sup>14</sup>

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.<sup>15</sup> 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

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<sup>10</sup> *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B., id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>11</sup> *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

<sup>12</sup> *See L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

<sup>13</sup> 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>14</sup> *A.C., id.*; *see V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>15</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's 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. *Id.* at Chapter 6.400.4a(2).

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.<sup>16</sup>

According to 20 C.F.R. § 10.437 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.<sup>17</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>18</sup>

Section 10.438 of OWCP's 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 of recovery of the overpayment.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied 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 of recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>20</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As she has assets of \$13,891.02, her assets exceed the \$6,200.00 allowable resource base of a claimant without dependents.<sup>21</sup> Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.

The Board finds that appellant has not established that she was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience because she

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<sup>16</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>17</sup> 20 C.F.R. § 10.437(a), (b).

<sup>18</sup> *Id.* at § 10.437(b)(1).

<sup>19</sup> 20 C.F.R. § 10.438.

<sup>20</sup> *Id.* at § 10.436.

<sup>21</sup> *See supra* note 16.

has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>22</sup>

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

### **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.<sup>23</sup> Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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."<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$112.71 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$112.71 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$112.71 from appellant's continuing compensation payments every 28 days.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$133,074.35, for the period March 1, 2010 through April 24, 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 finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$112.71 from appellant's continuing compensation payments every 28 days.

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<sup>22</sup> See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>23</sup> *M.P.*, Docket No. 18-0902 (issued October 16, 2018); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>24</sup> 20 C.F.R. § 10.441; see *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2023  
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