

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

P.R., Appellant)	
)	
and)	Docket No. 21-1183
)	Issued: January 25, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Sacramento, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 29, 2021 appellant, through counsel, filed a timely appeal from July 2 and 19, 2021 merit decisions 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 July 19, 2021 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 \$24,801.33 for the period August 1, 2013 through October 10, 2020, 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 \$250.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 16, 2008 appellant, then a 56-year-old transportation security screening supervisor, filed a traumatic injury claim (Form CA-1) alleging that on September 7, 2007 she sustained posterior tibial tendon dysfunction of the left ankle standing on a cement floor while in the performance of duty.⁵ OWCP adjudicated her claim as an occupational disease and accepted left tibial tendinitis. Appellant sustained intermittent periods of disability until April 7, 2010, when she resumed modified work. On July 31, 2012 the employing establishment terminated her modified position. OWCP paid appellant wage-loss compensation on the periodic rolls, effective August 1, 2012.

By decision dated September 26, 2013, OWCP reduced appellant's compensation benefits effective that date after finding that she had the capacity to earn wages of \$394.00 per week in the constructed position of surveillance system monitor. By decision dated July 3, 2014, an OWCP hearing representative affirmed the September 26, 2013 loss of wage-earning capacity (LWEC) determination.

Appellant appealed to the Board. By decision dated February 2, 2015, the Board affirmed the July 3, 2014 decision.⁶

On August 28, 2020 OWCP sent a FERS/SSA dual benefits form to SSA for completion.

In a September 10, 2020 response, SSA provided its monthly age-related retirement benefit rates that appellant was entitled to with and without FERS from August 2013 until December 2019. It notified OWCP that, with FERS, she was entitled to a monthly payment of \$1,346.40 effective August 2013, \$1,366.50 effective December 2013, \$1,389.70 effective December 2014, \$1,393.90 effective December 2016, \$1,421.70 effective December 2017, \$1,461.40 effective December 2018, and \$1,484.80 effective December 2019. Without FERS,

⁴ Docket No. 14-1876 (issued February 2, 2015).

⁵ A claim for compensation (Form CA-7) dated August 18, 2009 indicates that appellant's retirement coverage was under the Federal Employees' Retirement System (FERS).

⁶ *Supra* note 4.

appellant was entitled to a monthly payment of \$1,073.20 effective August 2013, \$1,089.30 effective December 2013, \$1,107.70 effective December 2014, \$1,111.10 effective December 2016, \$1,133.20 effective December 2017, \$1,164.90 effective December 2018, and \$1,183.50 effective December 2019.

OWCP completed a FERS offset overpayment calculation form on October 7, 2020. It calculated the amount that it should have offset from appellant's wage-loss compensation for each period August 1, 2013 until October 10, 2020. OWCP found that, from August 1 through November 30, 2013, appellant received an overpayment of \$1,098.80; from December 1, 2013 through November 30, 2014, she received an overpayment of \$3,335.54; from December 1, 2014 through November 30, 2016, she received an overpayment of \$6,795.89; from December 1, 2016 through November 30, 2017, she received an overpayment of \$3,402.92; from December 1, 2017 through November 30, 2018, she received an overpayment of \$3,471.51; from December 1, 2018 through November 30, 2019, she received an overpayment of \$3,567.77; and from December 1, 2019 through October 10, 2020, she received an overpayment of \$3,128.88. Based on these figures, it calculated the total overpayment amount of \$24,801.33.

In an October 7, 2020 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her compensation benefits. It found that, with the SSA offset, she was entitled to net compensation every 28 days of \$1,317.59.

On January 11, 2021 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$24,801.33 had been created because appellant received wage-loss compensation payments for the period August 1, 2013 through October 10, 2020 that had not been reduced to offset her SSA age-related retirement benefits attributable to her 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 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 financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records which support income and expenses. Additionally, OWCP provided an overpayment action request form and 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.

In an overpayment action request form dated January 29, 2021, appellant requested waiver of recovery of the overpayment and a precoupment hearing before a representative of OWCP's Branch of Hearings and Review.

On February 6, 2021 appellant again requested a precoupment hearing and waiver of recovery of the overpayment, indicating that she had relied upon written information provided by SSA and OWCP. In an attached OWCP-20 form, she listed monthly income of \$2,795.06 and monthly expenses of \$1,014.00. Appellant did not submit the supporting financial documentation.

In an undated statement received by OWCP on April 27, 2021, counsel contended that an SSA offset did not apply in appellant's case as she was receiving compensation based on a LWEC determination. He further contended that OWCP should have reduced the offset in proportion to the reduction in her wage-loss compensation due to the LWEC determination.

A telephonic hearing was held on April 28, 2021.

By decision dated July 2, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received a \$24,801.33 overpayment of compensation for the period August 1, 2013 through October 10, 2020 because OWCP failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. He further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as she had not provided documentation supporting her claimed expenses. OWCP's hearing representative required recovery of the overpayment by deducting \$325.00 from appellant's continuing compensation payments every 28 days.

By decision dated July 19, 2021, OWCP again found that appellant had received a \$24,801.33 overpayment of compensation for the period August 1, 2013 through October 10, 2020 because OWCP failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It denied waiver of recovery of the overpayment and required recovery of the overpayment by deduction \$250.00 from her continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,801.33 for the period August 1, 2013 through October 10,

⁷ *Supra* note 2.

⁸ 5 U.S.C. § 8102.

⁹ *Id.* at § 8116.

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

¹¹ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

2020, 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 case record establishes that appellant received SSA age-related retirement benefits beginning August 2013. OWCP paid her wage-loss compensation for total disability from August 1 until September 26, 2013 and paid her wage-loss compensation for partial disability based on her LWEC on the periodic rolls effective September 26, 2013. As noted, a claimant cannot receive FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period without an appropriate offset.¹² Accordingly, the Board finds that fact of overpayment has been established.¹³

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 the SSA rates with FERS and without FERS for specific periods August 2013 through December 2019. OWCP set forth its calculations of the amount that should have been offset during each relevant period based on the information provided by SSA and determined that appellant received an overpayment in the amount of \$24,801.33. The Board has reviewed OWCP's calculation of dual benefits received by her for the period August 1, 2013 through October 10, 2020 and finds that an overpayment of compensation in the amount of \$24,801.33 was created.¹⁴

On appeal, counsel contends that the SSA offset did not apply because appellant was not receiving wage-loss compensation from OWCP because she was paid based on her LWEC. However, while appellant paid at a reduced rate due to the LWEC, the record establishes that she was in receipt of wage-loss compensation during the claimed period. Counsel further contends that the SSA offset should have been reduced proportionally to her LWEC. However, he failed to provide legal citations in support of this argument.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA 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.¹⁶

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary 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 the beneficiary's assets do

¹² See *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹³ See *L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹⁴ See *J.T.*, Docket No. 21-0010 (issued September 30, 2021); *N.B.*, Docket No. 20-0727 (issued January 26, 2021).

¹⁵ *Supra* note 13.

¹⁶ 5 U.S.C. § 8129.

not exceed a specified amount as determined by OWCP.¹⁷ 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 \$50.00.¹⁸ Also, 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.¹⁹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificate of deposits.²⁰

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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²¹

ANALYSIS -- ISSUE 2

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

As OWCP found appellant not at 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.²² Appellant, however, has the responsibility to provide the appropriate financial information and documentation to OWCP.²³

In its preliminary overpayment determination, dated January 11, 2021, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial information, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. Appellant submitted a completed OWCP-20 form, but failed to provide the supporting financial documentation necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁴

¹⁷ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2), (3) (September 2020).

¹⁸ *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹⁹ *See supra* note 17 at Chapter 6.400.4(a)(2) (September 2020).

²⁰ *Id.* at Chapter 6.400.4(b)(3).

²¹ 20 C.F.R. § 10.437(a)(b).

²² *Id.* at § 10.436.

²³ *Id.* at § 10.438. *See E.S.*, Docket No. 20-0919 (issued February 8, 2021).

²⁴ *J.C.*, Docket No. 20-1062 (issued January 4, 2021); *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

Accordingly, as appellant did not submit the required information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁵

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.²⁶

Section 10.411 of OWCP's regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later 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.”²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$250.00 from appellant's continuing compensation payments every 28 days.

As discussed, appellant did not provide the necessary financial documentation to support her reported income and expenses. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁸ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁹

As appellant did not submit the financial documentation to OWCP as requested, the Board finds that OWCP properly required recovery of the \$24,801.33 overpayment of compensation at the rate of \$250.00 every 28 days from her continuing compensation payments.³⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,801.33 for the period August 1, 2013 through October 10, 2020, for which she was without fault, because she concurrently received FECA wage-loss

²⁵ *J.C., id.*

²⁶ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁷ *Id.* at § 10.441(a).

²⁸ *Id.* at § 10.438.

²⁹ *E.M.*, Docket No. 19-0857 (issued December 31, 2019); *supra* note 17 at Chapter 6.500.2 (September 2018).

³⁰ *See J.A.*, Docket No. 19-1946 (issued July 13, 2020); *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

compensation 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 \$250.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2021 decision of the Office of Workers' Compensation Programs is affirmed and the July 2, 2021 decision is affirmed as modified to reflect recovery of the overpayment.

Issued: January 25, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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