

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

E.A., Appellant)	
)	
and)	Docket No. 23-0183
)	Issued: July 27, 2023
U.S. POSTAL SERVICE, SAN FRANCISCO)	
NETWORK DISTRIBUTION CENTER,)	
Richmond, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 18, 2022 appellant, through counsel, filed a timely appeal from a November 4, 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 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 4, 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 \$57,743.11, for the period November 1, 2011 through April 24, 2021, for which he was without fault, because he 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 \$696.52 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On February 7, 2011 appellant, then a 62-year-old custodian, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral shoulder conditions due to factors of his federal employment including moving heavy furniture and equipment, using the buffing machine, and trash removal. He stopped work on March 9, 2011. OWCP accepted appellant's claim for bilateral shoulder rotator cuff tears. Appellant worked intermittently and OWCP paid him wage-loss compensation for intermittent periods of disability. On March 6, 2013 he returned to full-time, modified duty.⁴ Appellant stopped work again on July 17, 2016. OWCP paid him wage-loss compensation on the supplemental rolls, effective July 26, 2016, and placed him on the periodic rolls, effective February 5, 2017.

OWCP forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA on March 21, 2019 to obtain information regarding appellant's potential receipt of dual benefits.

On May 28, 2019 OWCP received a completed FERS/SSA dual benefits form from SSA dated May 28, 2019, wherein SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset beginning November 2011. Beginning November 2011, the SSA rate with FERS was \$1,154.00 and without FERS was \$392.00. Beginning December 2011, the SSA rate with FERS was \$1,195.00 and without FERS was \$407.00. Beginning January 2012, the SSA rate with FERS was \$1,208.00 and without FERS was \$407.00. Beginning December 2012, the SSA rate with FERS was \$1,229.00 and without FERS was \$413.00. The form indicated that appellant's work was suspended from January through August 2013. Beginning September 2013, the SSA rate with FERS was \$123.90 and without FERS was \$0.00. Beginning October 2013, the SSA rate with FERS was \$1,228.90 and without FERS was \$413.90. Beginning December 2013, the SSA rate with FERS was \$1,246.90 and without FERS was \$419.90. Beginning January 2014, the SSA rate with FERS was \$1,271.90 and without FERS was \$419.90. Beginning July 2014, the SSA rate with FERS was \$1,348.90 and without FERS was \$444.90. Beginning December 2014, the SSA rate with FERS was \$1,371.90 and without FERS was \$452.90. Beginning January 2015, the SSA rate with FERS was \$1,407.90 and without FERS was \$452.90. Beginning January 2016, the SSA rate with FERS was \$1,428.90 and without FERS was \$452.90. Beginning December 2016, the SSA rate with FERS was \$1,433.00 and without FERS was \$454.00. Beginning January 2017, the SSA rate with FERS was \$1,441.00 and without FERS was

⁴ By decision dated March 11, 2015, OWCP granted appellant a schedule award for 10 percent bilateral upper extremity permanent impairment. The period of the award ran for 62.4 weeks for the period December 19, 2014 through February 28, 2016.

\$454.00. Beginning December 2017, the SSA rate with FERS was \$1,470.00 and without FERS was \$463.00. Beginning December 2018, the SSA rate with FERS was \$1,511.50 and without FERS was \$475.00.

Beginning June 23, 2019, OWCP adjusted appellant's wage-loss compensation to include the offset for his SSA age-related retirement benefits attributable to his federal service.⁵

In a preliminary overpayment determination dated July 15, 2019, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$77,651.93, for the period November 1, 2011 through June 22, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It determined that he 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. It further requested that he provide supporting financial 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 notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecouplement hearing.

On August 5, 2019 appellant requested a prerecouplement hearing before OWCP's Branch of Hearings and Review. The hearing was held on November 22, 2019.

By decision dated February 6, 2020, the hearing representative set aside the July 15, 2019 preliminary overpayment determination and remanded the case for further factual development. OWCP was instructed to recalculate the amount of overpayment with regard to appellant's periods of partial disability, period of the schedule award, and any change in his receipt of SSA retirement benefits.

On July 13, 2020 OWCP received another completed FERS/SSA dual benefits form from SSA dated July 24, 2020, wherein SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset beginning November 2011. Beginning November 2011, the SSA rate with FERS was \$1,154.00 and without FERS was \$455.80. Beginning December 2011, the SSA rate with FERS was \$1,195.00 and without FERS was \$472.20. Beginning January 2012, the SSA rate with FERS was \$1,208.00 and without FERS was \$472.20. Beginning December 2012, the SSA rate with FERS was \$1,229.00 and without FERS was \$480.10. The form indicated that appellant's work was suspended from January through August 2013. Beginning September 2013, the SSA rate with FERS was \$124.00 and without FERS was \$0.00. Beginning October 2013, the SSA rate with FERS was \$1,229.00 and without FERS was \$480.10. Beginning December 2013, the SSA rate with FERS was \$1,247.00 and without FERS was \$487.30. Beginning January 2014, the SSA rate with FERS was \$1,272.00 and without FERS was \$487.30. Beginning July 2014, the SSA rate with FERS was \$1,349.50 and without FERS was \$516.90. Beginning December 2014, the SSA rate with FERS was \$1,372.50 and without FERS was \$525.60. Beginning January 2015, the SSA rate with FERS was \$1,408.30 and without FERS was \$525.60. Beginning January 2016, the SSA rate with FERS was \$1,429.00 and without FERS

⁵ A periodic rolls payment printout indicated that OWCP deducted \$956.31 from appellant's wage-loss compensation benefits.

was \$525.60. Beginning December 2016, the SSA rate with FERS was \$1,433.30 and without FERS was \$527.20. Beginning January 2017, the SSA rate with FERS was \$1,441.70 and without FERS was \$527.20. Beginning December 2017, the SSA rate with FERS was \$1,470.50 and without FERS was \$537.70. Beginning December 2018, the SSA rate with FERS was \$1,511.70 and without FERS was \$552.70. Beginning December 2019, the SSA rate with FERS was \$1,535.80 and without FERS was \$561.50.

On August 4, 2020 OWCP received another completed FERS/SSA dual benefits memorandum from SSA dated July 17, 2020, wherein SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset. Beginning November 2011, the SSA rate with FERS was \$1,154.30 and without FERS was \$392.90. Beginning December 2011, the SSA rate with FERS was \$1,195.80 and without FERS was \$407.00. Beginning December 2012, the SSA rate with FERS was \$1,229.00 and without FERS was \$413.90. Beginning December 2013, the SSA rate with FERS was \$1,247.40 and without FERS was \$420.10. Beginning December 2014, the SSA rate with FERS was \$1,372.50 and without FERS was \$427.20. Beginning December 2015, the SSA rate with FERS was \$1,408.30 and without FERS was \$427.20. Beginning December 2016, the SSA rate with FERS was \$1,433.30 and without FERS was \$428.40. Beginning December 2017, the SSA rate with FERS was \$1,470.50 and without FERS was \$437.00. Beginning December 2018, the SSA rate with FERS was \$1,511.70 and without FERS was \$449.10. Beginning December 2019, the SSA rate with FERS \$1,535.80 and without FERS was \$456.30.

On August 7, 2020 OWCP requested clarification from SSA regarding appellant's SSA age-related retirement benefit rates without and without FERS offset. It noted that the FERS/SSA dual benefits memorandums dated May 28, 2019 and June 24, and July 17, 2020 showed different amounts.

In a letter dated August 24, 2020, SSA clarified that appellant was still receiving SSA age-related retirement benefits and provided his SSA age-related retirement benefit rates with and without a FERS offset. Beginning November 2011, the SSA rate with FERS was \$1,154.30 and without FERS was \$392.90. Beginning December 2011, the SSA rate with FERS was \$1,195.80 and without FERS was \$407.00. Beginning January 2012, the SSA rate with FERS was \$1,208.50 and without FERS was \$407.00. Beginning December 2012, the SSA rate with FERS was \$1,229.00 and without FERS was \$413.90. SSA indicated that January through August 2013, work was suspended. Beginning September 2013, the SSA rate with FERS was \$124.00 and without FERS was \$0.00. Beginning October 2013, the SSA rate with FERS was \$1,229.00 and without FERS was \$413.90. Beginning December 2013, the SSA rate with FERS was \$1,247.40 and without FERS was \$420.10. Beginning January 2014, the SSA rate with FERS was \$1,272.20 and without FERS was \$420.10. Beginning July 2014, the SSA rate with FERS was \$1,349.50 and without FERS was \$420.10. Beginning December 2014, the SSA rate with FERS was \$1,372.50 and without FERS was \$427.20. Beginning January 2015, the SSA rate with FERS was \$1,408.30 and without FERS was \$427.20. Beginning January 2016, the SSA rate with FERS was \$1,429.00 and without FERS was \$427.20. Beginning December 2016, the SSA rate with FERS was \$1,433.30 and without FERS was \$428.40. Beginning January 2017, the SSA rate with FERS was \$1,441.70 and without FERS was \$428.40. Beginning December 2017, the SSA rate with FERS was \$1,470.50 and without FERS was \$437.00. Beginning December 2018, the SSA rate with FERS was \$1,511.70 and without FERS was \$449.10. Beginning December 2019, the SSA rate with FERS was \$1,535.80 and without FERS was \$456.30.

Appellant retired from federal employment due to disability, effective January 14, 2021.

On February 4, 2021 OWCP requested that SSA provide the amount of SSA age-related retirement benefit rates with and without FERS beginning January 2020.

On March 9, 2021 OWCP received a completed FERS/SSA dual benefits memorandum from SSA, wherein SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset beginning January 2020. Beginning January 2020, the SSA rate with FERS was \$1,535.80 and without FERS was \$456.30. Beginning December 2020, the SSA rate with FERS was \$1,555.70 and without FERS was \$462.20.

In a letter dated April 23, 2021, OWCP informed appellant that it had been recently determined that he was receiving SSA age-related retirement benefits as part of a FERS retirement package and FECA benefits, which was a prohibited dual benefit. It advised him that his FECA benefits would be offset by an SSA deduction and that his new four-week FECA benefit after the SSA offset would be \$2,527.95.

In an overpayment calculation worksheet received on November 3, 2021, OWCP indicated that the FERS/SSA offset began on July 20, 2019, but the FERS/SSA dual benefits calculations received on March 9, 2021 showed different amounts. It provided a detailed list of the FERS amount deducted and the FERS offset that should have been deducted for the period June 23, 2019 through September 11, 2021.

In a preliminary overpayment determination dated April 29, 2022, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$57,743.11, for the period November 1, 2011 through April 24, 2021, because it had failed to reduce his wage-loss compensation payments to offset his SSA age-related retirement benefits that were attributable to federal service. It noted that OWCP began deducting the FERS/SSA offset from his continuing wage-loss compensation, effective June 23, 2019, but it was based on the wrong FERS offset amount. OWCP indicated that appellant's wage-loss compensation was readjusted, effective April 25, 2021. It determined that he 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, provided an overpayment action request form, and advised him that he could request a waiver of the overpayment. It further requested that he 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, he could request a final decision based on the written evidence, or a precouplement hearing.

In an overpayment action request form dated May 11, 2022, appellant requested a precouplement hearing before a representative of OWCP's Branch of Hearings and Review and requested a waiver of the overpayment because he was found to be without fault. He also noted his disagreement with the fact and amount of overpayment. A hearing was held on August 19, 2022.

Appellant submitted a partially completed overpayment recovery questionnaire signed on May 25, 2022.

By decision dated November 4, 2022, OWCP's hearing representative finalized the April 29, 2022 preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$57,743.11, for the period November 1, 2011 through April 24, 2021, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. The hearing representative explained the overpayment and provided calculations for each period of overpayment from November 1, 2011 through December 31, 2012 and from July 26, 2016 through April 24, 2021. She further found that while appellant was without fault in the creation of the overpayment, waiver of recovery of the overpayment was denied. The hearing representative required recovery of the overpayment by deducting \$696.52 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.⁶ 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.⁷

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.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation, for which he is without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period November 1, 2011 through April 24, 2021.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.¹⁰ The evidence of record has established that appellant received SSA age-related retirement benefits that were attributable to his

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

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

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

¹⁰ *Id.* *See also A.C.*, Docket No. 18-1550 (issued February 21, 2019).

own federal service during a period of time that he received FECA wage-loss compensation. Consequently, the fact of overpayment has been established.¹¹

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

As previously noted, the evidence of record indicates that appellant received wage-loss compensation benefits for intermittent periods of disability beginning March 2011 until he returned to full-time modified work on March 6, 2013. However, in its final overpayment decision, OWCP did not calculate the amount of overpayment for the period January 1 through March 6, 2013. As the amount of overpayment is incorrect, the case must be remanded to OWCP for further development.¹²

On remand, OWCP shall recalculate the amount of the overpayment. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide updated supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹³

CONCLUSION

The Board finds that appellant has received an overpayment of compensation because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without appropriate offset for the period November 1, 2011 through April 24, 2021. The Board further finds that this case is not in posture for decision regarding the amount of the overpayment.

¹¹ See *R.P.*, Docket No. 22-1008 (issued December 9, 2022).

¹² See *G.K.*, Docket No. 22-0024 (issued June 7, 2022); see also *A.V.*, Docket No. 21-0887 (issued May 12, 2022).

¹³ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2022 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: July 27, 2023
Washington, DC

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

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

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