

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

L.A., Appellant	)	
	)	
and	)	Docket No. 22-1383
	)	Issued: June 14, 2023
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Louisville, KY,	)	
Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 21, 2022 appellant, through counsel, filed a timely appeal from an August 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 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.

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

<sup>3</sup> The Board notes that OWCP received additional evidence following the August 31, 2022 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.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$33,813.89 during the period July 1, 2021 to March 26, 2022, for which he was without fault, as he concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation benefits; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On May 18, 2018 appellant, then a 61-year-old tractor trailer operator, filed an occupational disease claim (Form CA-2) alleging that on March 12, 2018 he became aware that he had developed a right arm and shoulder condition and on April 22, 2018 he first realized that his condition was due to factors of his federal employment. He stopped work on April 22, 2018.

OWCP accepted the claim for an incomplete rotator cuff tear or rupture of the right shoulder. It authorized right total reverse shoulder arthroplasty surgery which was performed on June 23, 2020. OWCP received a schedule award from February 27, 2019 to February 11, 2020. It paid appellant wage-loss compensation on the supplemental rolls as of May 14, 2020 and on the periodic rolls from July 19, 2020 through March 26, 2022.

On January 26, 2022 appellant completed a Form CA-1105 election form advising that he elected to receive OPM retirement benefits effective July 1, 2021.

In a letter dated April 14, 2022, OWCP advised OPM that appellant elected OPM retirement benefits effective July 1, 2021. It completed an overpayment calculation and noted that the effective date of the periodic rolls termination was March 27, 2022. OWCP determined that an overpayment in the amount of \$33,813.89 had been created, as appellant continued to be paid FECA compensation after his election of OPM retirement benefits for the period July 1, 2021 through March 26, 2022.

On April 14, 2022 OWCP issued a preliminary overpayment determination that an overpayment occurred in the amount of \$33,813.89, for the period July 1, 2021 through March 26, 2022, because appellant received prohibited dual benefit payments. It explained that the overpayment occurred because he concurrently received both FECA benefits and OPM retirement benefits during the period, which resulted in a prohibited dual benefit payment. OWCP provided appellant with its calculations listing the FECA compensation benefits that he received after his election of OPM benefits on July 1, 2021. Its calculations showed that he received FECA benefits from July 1 to 17, 2021 of \$1,957.65; from July 18 to August 14, 2021, of \$3,244.76; from August 15 to September 11, 2021, of \$3,552.56; from September 12 to October 9, 2021 of \$3,552.56; from October 10 to November 6, 2021 of \$3,552.56; from November 7 to December 4, 2021 of \$3,552.56; from December 5, 2021 to January 1, 2022 of \$3,552.56; from January 2 to 29, 2022 of \$3,552.52; from January 30 to February 26, 2022 of \$3,552.52; and from February 27 to March 26, 2022 of \$3,803.64, for a total of \$33,813.89 in FECA workers' compensation from July 1, 2021 to March 26, 2022. Appellant was found to be without fault in the creation of the overpayment because he could not have been aware that the payments were incorrect at the time he received them. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records

to support his reported income and expenses. Additionally, it 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 prerecoumment hearing.

On April 19, 2022 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. He provided an OWCP-20, overpayment recovery questionnaire, dated April 25, 2022, and noted that he had \$5,470.03 in monthly income, consisting of \$2,352.10 in Social Security Administration benefits and \$3,127.93 in other benefits. Appellant listed his monthly expenses as: rent/mortgage \$797.04; food \$1,400.00; clothing \$300.00; utilities \$700.00; other miscellaneous expenses \$1,100.00; monthly payment on Discover credit card \$700.00; and monthly insurance on cars \$300.00; for a total of \$5,297.04 in monthly expenses. He noted that he had \$1,000.00 in checking and savings accounts and cash on hand.

By letter dated June 13, 2022, OWCP advised appellant that in order to support his request for a waiver, he must submit copies of income tax returns, at least three months of bank account statements, canceled checks, pay slips, CDs, money market account, stocks, bonds, and any other records that supported the income, expenses, and assets listed on the OWCP-20 form. The letter advised him that, under 20 C.F.R. § 10.438, failure to submit the requested information would result in denial of the waiver.

OWCP received a letter from OPM dated July 12, 2022, which confirmed that appellant began receiving OPM benefits as of July 1, 2021.

In a letter dated July 22, 2022, OWCP informed appellant that effective July 17, 2022 he would be entitled to FECA benefits every 28 days in the amount of \$4,189.00. However, appellant had elected OPM benefits, and he was not entitled to receive OWCP and OPM benefits during the same period of time.

A telephonic hearing was held before the Branch of Hearings and Review on July 26, 2022. Appellant testified that in March or April 2021 he advised OWCP that he was going to retire, but OWCP continued to pay him. He indicated that his dependents included his wife and two adult disabled stepchildren. Appellant further explained that he had a Thrift Savings Plan (TSP) account, but he would not have access to the account until he was 72, and he was currently 66. He indicated that he has \$5,900.00 in monthly expenses and has a deficit of about \$500.00 each month. Appellant was advised at the hearing that in order to support his claim for a hardship waiver, he must provide supporting financial documentation regarding his income, expenses, and assets.

On July 27, 2022 appellant submitted a handwritten accounting of his expenses, with documentation supporting some expenses.

By decision dated August 31, 2022, OWCP's hearing representative finalized the April 14, 2022 preliminary overpayment determination. Regarding waiver of recovery of the overpayment, she found that appellant had submitted documentation of some but not all of his expenses and he had not explained in his testimony how he was able to pay his monthly expenses if he had a \$500.00 deficit between income and expenses each month. The hearing representative noted that on the OWCP-20 form appellant completed on April 25, 2022 he reported income which exceeded expenses by more than \$50.00, therefore he did not qualify for waiver of recovery of the overpayment.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</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>5</sup>

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>6</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>7</sup> OWCP's procedures also explain that the employee must make an election between FECA and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.<sup>8</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$33,813.89 during the period July 1, 2021 to March 26, 2022, for which he was without fault, as he concurrently received OPM retirement benefits and FECA wage-loss compensation benefits.

The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibits the receipt of FECA wage-loss benefits and a federal annuity.<sup>9</sup> As appellant received FECA benefits while concurrently receiving OPM retirement benefits, an overpayment of compensation was created.<sup>10</sup>

To determine the amount of the overpayment, OWCP verified that OPM began paying retirement benefits to appellant effective July 1, 2021. It received a letter from OPM dated July 12, 2022, which stated, "This letter is to advise you that we began payments to [appellant] effective [July 1, 2021]." OWCP's overpayment determination explained that the overpayment occurred because appellant also was paid FECA workers' compensation between July 1, 2021 and March 26, 2022. It provided its calculations for the above-noted time period and properly

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(a).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); *see also R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

<sup>9</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a).

<sup>10</sup> *See E.F.*, Docket No. 18-1320 (issued March 13, 2019); *E.H.*, Docket No. 15-0312 (issued August 19, 2016); *Franklin L. Bryan*, 56 ECAB 310 (2005).

calculated that from July 1, 2021 to March 26, 2022, appellant received FECA workers' compensation in the amount of \$33,813.89, which was a prohibited dual benefit.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$33,813.89, for the period July 1, 2021 to March 26, 2022.

### **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.<sup>11</sup> 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.<sup>12</sup>

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 the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>16</sup> 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 TSP or 401(k)), jewelry, and artwork.<sup>17</sup>

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

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<sup>11</sup> 5 U.S.C. § 8129(a)-(b).

<sup>12</sup> See *S.R.*, Docket No. 20-1416 (issued September 8, 2022); *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *L.S.*, 59 ECAB 350 (2008).

<sup>13</sup> 20 C.F.R. § 10.436(a)(b).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

<sup>15</sup> *Id.* at Chapter 6.400.4a(2) (September 2018).

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

<sup>17</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

made, gives up a valuable right or changes his or her position for the worse.<sup>18</sup> 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.<sup>19</sup>

### ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. As noted above, even if a claimant is found without fault in the creation of the overpayment, recovery of the overpayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>20</sup>

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown that he needed substantially all of his current income to meet ordinary and necessary living expenses and that his assets did not exceed the allowable resource base. Appellant submitted information regarding his income and expenses, including documentation regarding some of his expenses. He did not provide information regarding his assets. OWCP's hearing representative denied waiver of recovery of the overpayment based on lack of documentation of appellant's resource base. She explained, while appellant testified that he operated on a deficit of around \$500.00 each month, he had not documented his assets and had offered no explanation as to how he paid his monthly expenses, given the deficit. The Board finds that based on the OWCP-20 form appellant completed on April 25, 2022, he had income which exceeded expenses by more than \$50.00. Therefore, appellant did not need substantially all of his current income to meet current ordinary and necessary living expenses.

The Board also finds that appellant has not established that he was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience. Appellant has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt, or that he has relinquished a valuable right or changed his position for the worse in reliance on the payments which created the overpayment.<sup>21</sup>

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

<sup>19</sup> *Supra* note 15 at Chapter 6.400.4c(3) (September 2020).

<sup>20</sup> *Supra* note 13.

<sup>21</sup> *See B.C.*, Docket No. 19-0629 (issued June 2, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>22</sup>

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$33,813.89 during the period July 1, 2021 to March 26, 2022, for which he was without fault, as he concurrently received OPM retirement benefits and FECA wage-loss compensation benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

**ORDER**

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

Issued: June 14, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>22</sup> *Id.*