

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

M.D., Appellant	)	
	)	
and	)	<b>Docket No. 22-1391</b>
	)	<b>Issued: June 20, 2023</b>
DEPARTMENT OF HOMELAND SECURITY,	)	
U.S. IMMIGRATION AND CUSTOMS	)	
ENFORCEMENT, Los Fresnos, TX, Employer	)	
	)	

*Appearances:*  
*Lorenzo Tijerina, Esq., for the appellant<sup>1</sup>*  
*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 September 21, 2022<sup>2</sup> appellant, through counsel, filed a timely appeal from a March 25, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>3</sup> Pursuant to the

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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> Pursuant to the Board's *Rules of Procedure*, an appeal is considered filed when received by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(f). However, when the date of receipt would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the U.S. Postal Service postmark or other carriers date markings. *Id.* at § 501.3(f)(1). The 180<sup>th</sup> day following OWCP's March 25, 2022 decision was Wednesday, September 21, 2022. Because using September 26, 2022, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is September 21, 2022, rendering the appeal timely filed. *Id.*

<sup>3</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, counsel for appellant noted that it was requested only if the facts and issues

Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>5</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$42,756.82, for the period October 1, 2018 through January 2, 2021, for which she was without fault, because she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On November 7, 2008 appellant, then a 56-year-old supervisory immigration enforcement agent, filed a claim for traumatic injury (Form CA-1) alleging that, on October 30, 2008, she sustained injuries to her right arm and both knees during firearms qualification training while in the performance of duty.

OWCP accepted the claim for aggravation of osteoarthritis of left lower leg; contusion of the right upper arm; effusion of left lower leg joint; enthesopathy of the left knee; fracture of the left patella; localized left lower leg primary osteoarthritis; mechanical loosening of other internal prosthetic joint; and other specified local infection of skin and subcutaneous tissues. It paid appellant wage-loss compensation on the supplemental rolls as of December 14, 2008, and on the periodic rolls as of February 15, 2009 until February 26, 2022. OWCP paid her on the supplemental rolls between February 27 and May 21, 2022 and on the periodic rolls again as of May 22, 2022.

OWCP received an EN-1032 form which appellant completed on November 14, 2018 wherein she related that she had reached SSA full retirement age and was receiving benefits as part of an annuity for federal service. Appellant completed EN-1032 forms on November 5, 2019, October 31, 2020, and October 25, 2021 wherein she noted receipt of SSA benefits as part of an annuity for federal service.

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Footnote 3 continued -- needed to be further elaborated for the administrative law judges. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

On December 14, 2020 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits form. It requested appellant's SSA age-related retirement benefit rates with and without FERS.

On December 17, 2020 OWCP received the completed dual benefits form, wherein SSA reported appellant's SSA age-related retirement benefit rates with a FERS offset and without FERS. Beginning October 2018, the SSA rate with FERS was \$2,291.10, and without FERS was \$771.40; beginning December 2018, the SSA rate with FERS was \$2,355.20 and without FERS was \$792.90; beginning December 2019, the SSA rate with FERS was \$2,392.80 and without FERS was \$805.50; and beginning December 2020, the SSA rate with FERS was \$2,423.90 and without FERS was \$815.90.

In letters dated January 27, 2021, OWCP notified appellant that she had been receiving SSA age-related retirement benefits since October 1, 2018, and that the portion of SSA benefits attributed to her federal service required an offset of her FECA compensation benefits. It noted that SSA advised that her current SSA monthly benefit was \$2,423.90, and that if her federal service was not included, her monthly benefit would be \$815.90. Since appellant's federal service increased her monthly benefit by \$1,608.00, this difference was the portion of SSA benefits attributed to federal service and was the amount that must be offset against her FECA compensation benefits. OWCP explained that since SSA payments were paid monthly, or 12 payments per year, and OWCP wage-loss compensation benefits were paid every 28 days, or 13 payments per year, the monthly offset amount would be adjusted to a 28-day payment cycle of \$1,484.31, which would begin on January 3, 2021, and her new wage-loss compensation benefit would be \$5,045.69.

In a FERS offset overpayment calculation worksheet dated July 23, 2021, OWCP used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods. It found that, for the period October 1 through November 30, 2018, appellant received an overpayment in the amount of \$3,056.10; for the period December 1, 2018 through November 30, 2019, she received an overpayment in the amount of \$18,799.10; for the period December 1, 2019 through November 30, 2020, she received an overpayment in the amount of \$19,152.16; and for the period December 1, 2020 through January 2, 2021, she received an overpayment in the amount of \$1,749.36. OWCP calculated a total overpayment in the amount of \$42,756.82.

On July 23, 2021 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$42,756.82, for the period October 1, 2018 through January 2, 2021, because the SSA/FERS offset was not applied to payments for this period. 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 recovery method and advised her that she could request a waiver of recovery of the overpayment.<sup>6</sup> It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. It further notified her that, within 30 days of the date of the

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<sup>6</sup> OWCP issued a preliminary overpayment determination on April 9, 2021; however, it was set aside by an OWCP hearing representative on June 24, 2021, as the FERS offset calculation was illegible.

letter, she could contest the overpayment and request a final decision based on the written evidence, or a prerecoupment hearing.

Appellant did not complete the Form OWCP-20 or provide further financial documentation.<sup>7</sup>

By decision dated March 25, 2022, OWCP finalized its preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$42,756.82, for the period October 1, 2018 through January 2, 2021, because it failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, noting that she had not submitted a completed OWCP-20 form or provided any financial documentation. OWCP determined that appellant was required to repay the full amount of the overpayment, \$42,756.82, within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>8</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.<sup>9</sup> Section 8116 of FECA defines the limitations on the right to receive compensation benefits.<sup>10</sup> Section 8116(a) provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.<sup>11</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>12</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>13</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$42,756.82, for the period October 1, 2018 through January 2,

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<sup>7</sup> On March 16, 2022 OWCP suspended appellant's compensation benefits based upon her failure to complete a Form CA-1032 dated October 12, 2021.

<sup>8</sup> 5 U.S.C. § 8101 *et seq.*

<sup>9</sup> 5 U.S.C. § 8102(a).

<sup>10</sup> *Id.* at § 8116.

<sup>11</sup> *Id.* at § 8116(a).

<sup>12</sup> 20 C.F.R. § 10.421(a).

<sup>13</sup> *Id.*

2021, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

In its March 25, 2022 decision, OWCP found that an overpayment of compensation was created for the period October 1, 2018 through January 2, 2021. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related benefits attributable to federal service for the same period.<sup>14</sup> The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period October 1, 2018 through January 2, 2021.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing October 1, 2018 through January 2, 2021. In its July 23, 2021 preliminary overpayment determination, OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$42,756.82.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2018 through January 2, 2021, and finds that an overpayment of compensation in the amount of \$42,756.82 was created.

### **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>15</sup> The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>16</sup>

Recovery of an overpayment will defeat the purpose of FECA if 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 not exceed a specified amount as determined by OWCP.<sup>17</sup> Additionally, 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

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<sup>14</sup> 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

<sup>15</sup> 5 U.S.C. § 8129(a)-(b).

<sup>16</sup> *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>17</sup> 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 6.400.4a(2) (September 2020).

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.<sup>18</sup>

OWCP regulations provide 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.<sup>19</sup>

### ANALYSIS -- ISSUE 2

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

The fact that OWCP may have been negligent in the creation of the overpayment does not entitle appellant to waiver of recovery of the overpayment.<sup>20</sup> As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>21</sup> In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses, and that her assets do not exceed the established limit as determined by OWCP procedures.<sup>22</sup>

In its preliminary overpayment determination dated July 23, 2021, OWCP clearly explained the importance of providing the completed Form OWCP-20 and financial information. It advised appellant that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days. Appellant, however, did not respond. The evidence of record is, therefore, insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>23</sup>

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>24</sup>

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$42,756.82, for the period October 1, 2018 through January 2, 2021, for which she was without fault, because she concurrently received FECA wage-loss

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

<sup>19</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>20</sup> *See L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

<sup>21</sup> 5 U.S.C. § 8129.

<sup>22</sup> 20 C.F.R. § 10.436.

<sup>23</sup> 20 C.F.R. § 10.438.

<sup>24</sup> *See E.T.*, Docket No. 22-0234 (issued August 17, 2022); *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 25, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 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