

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

M.D., claiming as widow of M.D., Appellant)	
)	
and)	Docket No. 22-0189
)	Issued: March 2, 2023
U.S. POSTAL SERVICE, DENVER-CAPITOL)	
HILL STATION, Denver, CO, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 18, 2021 appellant, through counsel, filed a timely appeal from October 26 and November 9, 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 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 9, 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 \$15,155.74 for the period January 1, 2018 through February 27, 2021, for which she was without fault, because she concurrently received FECA survivor's benefits and Social Security Administration (SSA) 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 \$ 684.02 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On January 3, 2018 appellant, the employee's widow, filed a claim for compensation by widow, widower, and/or children (Form CA-5) alleging that the employee's death on December 16, 2017 was causally related to his accepted employment injury.⁴ OWCP accepted the claim and paid appellant survivor's benefits effective December 17, 2017.

On December 3, 2020 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA for completion.

On December 10, 2020 SSA completed the FERS/SSA dual benefits calculation form and provided appellant's SSA benefits as a widow aged 60 or over of the employee from January 2018 through December 2020. SSA indicated that effective January 2018, appellant's SSA rate with FERS was \$2,090.60 and without FERS was \$1,703.20; effective December 2018, her rate with FERS was \$2,149.10 and without FERS was \$1,750.90; effective December 2019 her SSA rate with FERS was \$2,183.50 and without FERS was \$1,778.80; and effective December 2020, her SSA rate was \$2,211.80 and without FERS was \$1,801.90.

OWCP completed a FERS offset calculation form on March 4, 2021. It calculated the amount that it should have offset from appellant's compensation for each period from January 1, 2018 through December 1, 2019. OWCP found that, from January 1 through November 30, 2018, appellant received an overpayment of \$4,265.66; from December 1, 2018 through November 30, 2019, she received an overpayment of \$4,791.53; from December 1, 2019 through November 30, 2020, she received an overpayment of \$4,883.08; and from December 1, 2019 through February 27, 2021, she received an overpayment of \$6,148.50. Based on these figures, OWCP calculated the total overpayment amount of \$20,088.77.

On May 9, 2021 OWCP adjusted appellant's compensation for the SSA offset. It found that with the SSA offset, she was entitled to net compensation of \$2,692.71 every 28 days.

In a preliminary overpayment determination dated April 22, 2021, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the

⁴ On October 21, 2014 the employee, then a 59-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained interstitial lung disease due to exposure to mold and water contaminants causally related to factors of his federal employment. OWCP accepted the claim, assigned OWCP File No. xxxxxx205, for chronic fibrosing hypersensitivity pneumonitis, interstitial pulmonary disease, hypoxemia, bronchiectasis, supplemental oxygen dependence, secondary hypertension, enterocolitis due to Clostridium Difficile, and squamous cell carcinoma of the nose.

amount of \$20,088.77 because her survivor's benefits had not been reduced for the period January 18, 2018 through February 27, 2021 by the portion of SSA retirement benefits attributable to the employee's 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 supporting 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 May 13, 2021, appellant requested a telephonic precoupment hearing. She disagreed that the overpayment had occurred and with the amount of the overpayment, and requested waiver of recovery of the overpayment.

In an OWCP-20 form dated June 14, 2021, appellant listed her total monthly income as \$2,846.47. She further indicated that she had assets of \$37,996.97 and \$237,063.00 in her husband's Individual Retirement Account (IRA). Appellant questioned the need for an offset given that she was receiving survivor's benefits. She advised that she had paid for a family vacation, needed a new car, recently repaid loans to her daughter and daughter-in-law, and had to hire an attorney. Appellant asserted that she had monthly expenses of \$3,987.00. She reasoned she should not have to repay the debt, noting that her husband had died as a result of his work for the employing establishment. Appellant also indicated that she had to stop working as a result of an immune response to chemicals in the employee's hospital room. She did not provide any financial documentation to support her claimed income and expenses.

In a brief dated August 26, 2021, counsel argued that appellant had detrimentally relied upon the money that was the subject of the overpayment by repaying debts of \$8,650.00 to her daughter and \$8,950.00 to her daughter-in-law, and thus was entitled to waiver of recovery of the overpayment.

A telephonic hearing was held on September 1, 2021. Appellant challenged the amount of the overpayment, asserting that it should be around \$15,000.00 rather than \$20,000.00. She noted that the employee had just turned 62 when he died. Appellant related that she received survivor's benefits from OWCP and received SSA benefits as a widow's survivor's benefit under the employee's account. She described her expenses and income and noted that she had an IRA of approximately \$237,063.99 and a house with no mortgage. Appellant related that she had paid her daughter a check for \$8,650.00 and her daughter-in-law a check for \$8,950.00 for expenses incurred when her husband got sick and they had to leave their house. Counsel questioned whether the SSA offset provision applied since appellant received the employee's SSA benefits rather than her own.

On September 14, 2021 appellant submitted a yearly budget listing expenses totaling \$5,600.00 per month, including expenses for vacations, dog grooming, health center, dance lessons, and gifts. She indicated that she had monthly income of \$5,582.36. Appellant advised that she had \$42,456.00 in savings and checking accounts but had to pay for cataract surgery, taxes, and insurance.

In a letter dated September 7, 2021, appellant related that she had considered the money she received from OWCP prior to purchasing her house. She listed upcoming expenses and resubmitted her yearly budget.

By decision dated October 26, 2021, OWCP's hearing representative finalized the preliminary finding that appellant received an overpayment of compensation because OWCP had failed to offset from her SSA benefits the portion of the employee's SSA benefits attributable to his federal service. He found, however, that OWCP had miscalculated the amount of the overpayment by determining the overpaid amount for two partially overlapping periods, December 1, 2019 through November 30, 2020 and December 1, 2019 through February 27, 2021. The hearing representative recalculated the overpayment using the periods January 1 through November 30, 2018, December 1, 2018 through November 30, 2019, December 1, 2019 through November 30, 2020, and December 1, 2020 through February 27, 2021, to find an overpayment of \$15,155.74. He denied waiver of recovery of the overpayment as appellant's assets exceeded the available resource base. The hearing representative further found that she had not shown that she gave up a valuable right or changed her position for the worse in repaying loans to her daughter and daughter-in-law totaling \$17,600.00. He noted that appellant had not provided any financial documentation supporting her income and expenses. The hearing representative thus set the rate of recovery at 25 percent of the 28-day net compensation amount, or a deduction of \$684.02 every 28 days from her continuing compensation benefits.

By decision dated November 9, 2021, OWCP finalized the finding that appellant received an overpayment of compensation in the amount of \$15,155.74 for the period January 18, 2018 through February 27, 2021 because it had failed to offset her compensation payments by the portion of the employee's SSA retirement benefits that were attributable to his federal service. OWCP denied waiver of recovery of the overpayment. It required recovery of the overpayment by deducting \$684.02 from her continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁵ 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 provides that a beneficial "may receive compensation under the FECA for either the death or disability of an employee concurrently with benefits under [SSA] on account of the age or death of such employee. However, this provision of the FECA also requires OWCP to reduce the amount of any such compensation by the amount of any [SSA] benefits that are attributable to the federal service of

⁵ *Supra* note 1.

⁶ 5 U.S.C. § 8102.

⁷ *Id.* at § 8116.

the employee.”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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,155.74 for the period January 18, 2018 through February 27, 2021, for which she was without fault, because she concurrently received FECA survivor’s benefits and the employee’s SSA retirement benefits, without an appropriate offset.

OWCP paid appellant FECA survivor’s benefits effective December 17, 2017. Appellant received SSA benefits as a widow of the employee beginning January 2018. As noted, a claimant cannot receive concurrent FECA survivor’s benefits and SSA benefits attributable to the employee’s federal service without the appropriate offset.¹⁰ The information provided by SSA indicated that a portion of the employee’s SSA benefits that appellant received were attributable to his federal service. The portion of the SSA benefits earned through federal employment was part of the employee’s FERS retirement package to which the widow succeeded, and the widow’s receipt of benefits under FECA without the appropriate offset constituted a prohibited dual benefit.¹¹ Accordingly, the Board finds that fact of overpayment has been established.¹²

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 from January 2018 through December 2020. OWCP’s hearing representative provided its calculations for each relevant period based on SSA’s worksheet and determined that appellant received an overpayment in the amount of \$15,155.74. The Board has reviewed OWCP’s calculation of dual benefits received by appellant for the period December 1, 2018 through February 27, 2021 and finds that an overpayment of compensation in the amount of \$15,155.74 was created.¹³

On appeal counsel contends that appellant was receiving death benefits due to her husband’s employment rather than her federal service and thus no offset should be taken. However, as appellant received survivor’s benefits based on part of the employee’s federal service,

⁸ 20 C.F.R. § 10.421(d).

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

¹⁰ *Supra* note 8. *See F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11 (February 1995); *see also* *L.A. (N.W.)*, Docket No. 19-0708 (issued August 21, 2019); *J.B. (J.B.)*, Docket No. 16-0707 (issued November 1, 2016); *M.B. (T.B.)*, Docket No. 14-446 (issued September 8, 2014).

¹² *See L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹³ *See N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

she received a dual benefit, and an offset was required pursuant to section 10.421(d) of FECA.¹⁴ As discussed, the portion of SSA benefits that her husband earned as a federal employee as part of his FERS retirement package must be offset from her survivor's benefits.¹⁵

Counsel further argues that any debt should be collected against the estate, and notes that OWCP has procedures for obtaining repayment of an overpayment from an estate. However, appellant received survivor's benefits. The overpayment was not created because OWCP overpaid the employee and thus there is no issue of recovery from a deceased debtor's estate.

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 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, saving accounts, mutual funds, and certificate of deposits.²⁰

Recovery of an overpayment is against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay

¹⁴ 20 C.F.R. § 10.421(d).

¹⁵ *See supra* note 11.

¹⁶ 5 U.S.C. § 8129.

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 6.400.4a(2) (September 2020).

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

¹⁹ *See id.* at Chapter 6.400.4a(2) (September 2020).

²⁰ *Id.* at Chapter 6.400.4b(3).

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 advised that she had assets in cash, checking accounts of \$42,456.00 and approximately \$237,063.99 in an IRA. Her stated assets exceed the resource base of \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent, as provided in OWCP's procedures.²³ 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 not necessary to consider the first prong of the test, *i.e.*, whether she needs substantially all of his current income to meet ordinary and necessary living expenses.²⁴ She has not established that he was entitled to waiver on the basis of defeating the purpose of FECA.²⁵

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has not submitted evidence to substantiate that she would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment she gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²⁶

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.²⁷

On appeal counsel contends that appellant detrimentally relied upon the overpaid amount in repaying a loan to her daughter and daughter-in-law of \$8,650.00 and \$8,950.00, respectively. However, in view of her assets, the Board finds that this is not a case of financial hardship, as she

²¹ 20 C.F.R. § 10.437(a)(b).

²² *Id.* at § 10.436.

²³ *Supra* note 17.

²⁴ *See S.W.*, Docket No. 20-0363 (issued November 23, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

²⁵ *N.B.*, *supra* note 13; *R.D.*, Docket No. 19-1598 (issued April 17, 2020).

²⁶ *N.J.*, *supra* note 18; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁷ *See P.M.*, Docket No. 21-0915 (issued December 14, 2021); *T.C.*, Docket No. 21-0612 (issued December 2, 2021).

has sufficient assets to repay the debt.²⁸ Appellant further has not shown that she gave up a valuable right or changed her position for the worse in repaying a loan that she owed, or that she would not have made the decision to repay the loan in the absence of the overpaid benefit, and that this decision resulted in a loss.²⁹ Consequently, she has not shown that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 3

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.”³⁰ When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines. OWCP’s procedures provide that, in these instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.³¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$684.02 from appellant’s continuing compensation payments every 28 days.

OWCP provided appellant with a Form OWCP-20 with its April 22, 2021 preliminary overpayment determination. Appellant completed the form but failed to provide the necessary financial documentation to support her income and expenses prior to the final overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.³² When an individual fails to provide requested financial information, OWCP shall follow minimum collection guidelines designed to collect the debt promptly and in full.³³ The Board, therefore, finds that OWCP properly required recovery of the overpayment at the rate of 25 percent from appellant’s net continuing compensation payments at the rate of \$684.20 every 28 days.

²⁸ See *J.B.*, Docket No. 15-1043 (issued August 6, 2015).

²⁹ See *R.F.*, Docket No. 20-0159 (issued October 15, 2020).

³⁰ 20 C.F.R. § 10.441.

³¹ Federal (FECA) Procedure Manual, *supra* note 17 at 6.500.8c(1) (September 2018).

³² *Id.* at § 10.438(a); see *J.R.*, Docket No. 21-0485 (issued December 10, 2021).

³³ See *M.S.*, Docket No. 20-1261 (issued June 10, 2021); *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 6.400.3 (September 2020).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,155.74 for the period January 1, 2018 through February 27, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA survivor's 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 \$684.02 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the October 26 and November 9, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 2, 2023
Washington, DC

Alec J. Koromilas, 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