

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

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$92,159.31, for the period June 1, 2009 through July 20, 2019, for which she was without fault, as 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

This case has previously been before the Board.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 April 5, 2004 appellant, then a 56-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that, on April 1, 2004, she sustained a back injury when drawing blood from an infant while in the performance of duty. OWCP initially accepted the claim for lumbar strain, and later expanded its acceptance of the claim to include permanent aggravation of facet arthropathy, lumbar degenerative spondylosis at L4-5 and L5-S1, and radiculopathy of the left lower extremity. Appellant stopped work on March 5, 2007. OWCP paid her wage-loss compensation on the supplemental rolls as of March 11, 2007, and on the periodic rolls as of July 8, 2007.

By decision dated February 19, 2020, an OWCP hearing representative finalized an August 8, 2019 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$101,944.10 because the Federal Employees Retirement System (FERS) offset was not applied to payments for the period June 1, 2009 through July 20, 2019. He further found that she was without fault in the creation of the overpayment but denied waiver of recovery of the overpayment. OWCP's hearing representative noted that additional information had been received regarding appellant's request for waiver of the overpayment, but the waiver could not be granted as the evidence did not substantiate that adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. He required recovery of the overpayment by monthly payments of \$900.00.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 1, 2022 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.*

⁴ Docket No. 21-0028 (issued September 3, 2021).

OWCP noted that interest would begin to accrue as of the date of the letter at the rate of the U.S. Treasury Note.

On May 20, 2020 appellant, through counsel, requested a change in her repayment plan for the overpayment due to loss of rental income.

Following a review of the merits of appellant's claim on OWCP's own motion pursuant to 5 U.S.C. § 8128, by decision dated July 20, 2020, an OWCP hearing representative set aside OWCP's February 19, 2020 decision and remanded the case for an amended finalized overpayment decision, as there was a technical error regarding the interest rate. The hearing representative also altered the repayment schedule to \$800.00 monthly in consideration of the reported loss of anticipated income from rental property.

By decision dated July 29, 2020, OWCP issued an amended final overpayment decision that appellant had received an overpayment of compensation in the amount of \$101,944.10 because the FERS offset was not applied to payments for the period June 1, 2009 through July 20, 2019. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, referring to the July 20, 2020 decision. OWCP required recovery of the overpayment by monthly payments of \$800.00.

On October 5, 2020 appellant, through counsel, appealed the July 29, 2020 merit decision to the Board. In a decision dated September 3, 2021, the Board found that OWCP had established fact of overpayment, but that the case was not in posture for decision with regard to the amount of the overpayment, as OWCP had received two sets of figures for appellant's SSA benefit rates with and without FERS offset. As such, the Board affirmed in part, and set aside in part, OWCP's July 29, 2020 decision, and remanded the case to OWCP to seek clarification from SSA regarding the conflicting information it provided regarding the SSA payments appellant was entitled to receive without a FERS offset. The Board instructed OWCP to then issue a new preliminary overpayment determination with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information to be followed by a *de novo* decision.

On September 7, 2021 OWCP forwarded a FERS/SSA dual benefits calculation form to SSA. It noted that a discrepancy existed between the SSA rates with and without FERS provided in SSA's June 27, 2013, and June 15, 2019 responses. OWCP requested that SSA review and provide correct SSA rates with and without FERS.

On September 18, 2021 OWCP received a completed FERS/SSA dual benefits form from SSA. SSA noted that appellant began receiving retirement benefits in March 1993. The form indicated: beginning June 2009, December 2009, and December 2010, her SSA rate with FERS was \$1,045.60 and without FERS was \$454.60; beginning December 2011, her SSA rate with FERS was \$1,083.20 and without FERS was \$471.00; beginning December 2012, her SSA rate with FERS was \$1,101.60 and without FERS was \$479.00; beginning May 2013, her SSA rate with FERS was \$1,460.80 and without FERS was \$479.00; beginning December 2013, her SSA rate with FERS was \$1,482.70 and without FERS was \$486.20; beginning December 2014 and December 2015, her SSA rate with FERS was \$1,507.90 and without FERS was \$494.40; beginning December 2016, her SSA rate with FERS was \$1,512.40 and without FERS was

\$495.80; beginning December 2017, her SSA rate with FERS was \$1,542.60 and without FERS was \$505.70; beginning December 2018, her SSA rate with FERS was \$1,585.70 and without FERS was \$519.80; beginning December 2019, her SSA rate with FERS was \$1,611.00 and without FERS was \$528.10; and beginning December 2020, her SSA rate with FERS was \$1,631.90 and without FERS was \$535.00.

On October 8, 2021 OWCP requested clarification from SSA. It requested that SSA verify if appellant's SSA rate with and without FERS was correct for the period beginning May 2013; to provide the correct figures if the previous figures were incorrect; and noted that SSA's statement regarding appellant's receipt of retirement benefits beginning in 1993 was not possible based on appellant's birthdate.

On October 29, 2021 OWCP received a completed FERS/SSA dual benefits form from SSA. SSA indicated that OWCP should disregard prior rate determinations, as they were not adjusted for Medicare premiums. SSA explained that appellant elected reduced retirement insurance benefits (RIB) as of June 2009. As of full retirement age in May 2013, the retirement rate was adjusted removing the reduction, due to ongoing disability. The form indicated: beginning June 2009, her SSA rate with FERS was \$1,045.00 and without FERS was \$459.00; beginning July 2009, her SSA rate with FERS was \$1,045.40 and without FERS was \$459.40; beginning December 2009, her SSA rate with FERS was \$1,045.50 and without FERS was \$458.50; beginning December 2010, her SSA rate with FERS was \$1,045.50 and without FERS was \$458.50; beginning December 2011, her SSA rate with FERS was \$1,082.90 and without FERS was \$475.90; beginning December 2012, her SSA rate with FERS was \$1,100.90 and without FERS was \$483.90; beginning May 2013, her SSA rate with FERS was \$1,459.90 and without FERS was \$634.90; beginning December 2013, her SSA rate with FERS was \$1,481.90 and without FERS was \$643.90; beginning December 2014 and December 2015, her SSA rate with FERS was \$1,507.90 and without FERS was \$654.90; beginning December 2016, her SSA rate with FERS was \$1,512.00 and without FERS was \$657.00; beginning December 2017, her SSA rate with FERS was \$1,542.00 and without FERS was \$670.00; beginning December 2018, her SSA rate with FERS was \$1,585.50 and without FERS was \$688.50; beginning December 2019, her SSA rate with FERS was \$1,610.60 and without FERS was \$699.60; and beginning December 2020, her SSA rate with FERS was \$1,631.50 and without FERS was \$708.50.

OWCP completed a FERS offset overpayment calculation form on February 3, 2022. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$92,159.31. The form indicated: from June 1 through 30, 2009 appellant received an overpayment of \$579.56; from July 1 through November 30, 2009 an overpayment of \$2,955.76; from December 1, 2009 through November 30, 2010 an overpayment of \$7,063.35; from December 1, 2010 through November 30, 2011 an overpayment of \$7,063.35; from December 1, 2011 through November 30, 2012 an overpayment of \$7,324.02; from December 1, 2012 through April 30, 2013 an overpayment of \$3,071.44; from May 1 through November 30, 2013 an overpayment of \$5,820.33; from December 1, 2013 through November 30, 2014 an overpayment of \$10,083.63; from December 1, 2014 through November 30, 2015 an overpayment of \$10,264.12; from December 1, 2015 through November 30, 2016 an overpayment of \$10,292.24; from December 1, 2016 through November 30, 2017 an overpayment of \$10,288.19;

from December 1, 2017 through November 30, 2018 an overpayment of \$10,492.75; and from December 1, 2018 through July 20, 2019 an overpayment of \$6,860.57.

On February 3, 2022 OWCP notified appellant that the overpayment decision of July 29, 2020 had been vacated and the matter reopened. It issued a preliminary overpayment determination on February 3, 2022. OWCP indicated that appellant had been overpaid benefits during the period June 1, 2009 through July 20, 2019 in the amount of \$92,159.31 because she received SSA age-related retirement benefits as part of an annuity under FERS concurrently with FECA wage-loss benefits, which was a prohibited dual benefit. It found that appellant was without fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed 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 her reported income and expenses. Additionally, it provided an overpayment action request form and notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a prerecoupment hearing.

On March 2, 2022 appellant, through counsel, requested a decision based on the written evidence regarding possible waiver as she was found to be without fault in the creation of the overpayment. In an attached Form OWCP-20, she reported monthly income of \$8,484.09, monthly expenses of \$8,664.71, and \$718,567.69 in total assets. Appellant provided financial information to support these figures, but did not provide line items of expenses and bills to show the minimum amounts due each month.

By decision dated April 1, 2022, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$92,159.31, for the period June 1, 2009 through July 20, 2019. It enclosed a FERS offset overpayment calculation form dated February 3, 2022. OWCP further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, finding that her assets of \$718,567.69 exceeded the \$10,300.00 asset base for an individual with a spouse plus \$1,200.00 for each additional dependent. It required repayment of the overpayment at a rate of \$800.00 per month.

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.⁵ 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.⁶

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

federal service of the employee.⁷ FECA Bulletin No. 97-09 provides 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has established that appellant received an overpayment of compensation in the amount of \$92,159.31 during the period June 1, 2009 through July 20, 2019, for which she is without fault, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without appropriate offset.

The Board preliminarily notes that it found in its September 3, 2021 decision that appellant received an overpayment of compensation for the period June 1, 2009 through July 20, 2019, for which she was without fault, without an appropriate offset. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.⁹ Therefore, the Board's prior finding regarding the fact and period of the overpayment is not subject to further consideration.

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amounts of SSA age-related retirement benefits that were attributable to federal service. In its response of October 29, 2021, SSA explained the prior variation of figures it had provided OWCP and provided corrected rates with FERS and without FERS during the specific period June 1, 2009 through July 20, 2019. In the April 1, 2022 final decision, OWCP provided its calculations for each relevant period based on SSA's worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period June 1, 2009 through July 20, 2019 and finds that an overpayment of compensation in the amount of \$92,159.31 has been established. OWCP obtained documentation from SSA establishing appellant's SSA rates with and without FERS for the relevant period. SSA explained the inconsistencies in its prior documentation sent to OWCP. Therefore, the Board finds that appellant received an overpayment of FECA compensation in the amount of \$92,159.31 for the period June 1, 2009 through July 20, 2019.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and

⁷ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *T.C.*, Docket No. 21-0612 (issued December 2, 2021); *T.W.*, Docket No. 20-0836 (issued July 21, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998). *See also* 20 C.F.R. § 501.6(d).

when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁰ Section 10.438 of OWCP regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP’s regulations.¹²

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and, also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ 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 \$50.00.¹⁴

OWCP’s procedures provide that the 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.¹⁵ An individual’s liquid assets include, but are not limited to, cash and the value of stocks, bonds, saving accounts, mutual funds, and certificates of deposit. Non-liquid 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 Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁶

ANALYSIS -- ISSUE 2

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

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.438.

¹² *Id.* at §§ 10.434-10.437.

¹³ *Id.* at § 10.436.

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

¹⁵ *Id.* at Chapter 6.400.4a(2).

¹⁶ *Id.* at Chapter 6.400.4b(3)(a), (b).

As OWCP found appellant without 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.¹⁷

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience because her resource base included \$718,567.69 in assets. This exceeds the resource base of \$10,300.00 for an individual with a spouse plus \$1,200.00 for each additional dependent as provided by OWCP's procedures.¹⁸

As appellant failed to establish that, recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$92,159.31, for the period June 1, 2009 through July 20, 2019, for which she was without fault, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁷ *Id.* at § 10.436.

¹⁸ *Id.*

¹⁹ *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 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