

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

_____)	
J.H., Appellant)	
)	
and)	
)	Docket No. 22-1375
DEPARTMENT OF THE AIR FORCE,)	Issued: May 16, 2023
TEXAS AIR NATIONAL GUARD, Houston, TX,)	
Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 19, 2022 appellant, through counsel, filed a timely appeal from an August 19, 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 to consider the merits of this case.

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.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$38,895.43 for the period July 1, 2016 through February 27, 2021 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 \$553.85 from appellant's continuing FECA compensation, every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on different issues. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.³ The relevant facts are as follows.

On September 22, 2000 appellant, then a 46-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2000 he sustained a lower back strain when he changed a tire on an aircraft while in the performance of duty. OWCP accepted the claim for lumbar strain and displacement of lumbar intervertebral disc without myelopathy. It paid appellant wage-loss compensation on the daily rolls as of November 6, 2000 and on the periodic rolls as of June 16, 2002. A notification of personnel action (Form SF-50) dated May 3, 2001 indicated that appellant's retirement plan was FERS and FICA.

On July 28, 2020 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits form.

On September 17, 2020 SSA completed the dual benefits form, reporting appellant's SSA age-related retirement benefit rates with a FERS offset and without a FERS offset from July 2016 through December 2019. Beginning July 2016, the SSA rate with FERS was \$1,530.30 and without FERS was \$861.40; beginning December 2016, the SSA rate with FERS was \$1,534.80 and without FERS was \$863.90; beginning December 2017, the SSA rate with FERS was \$1,565.50 and without FERS was \$881.20; beginning December 2018, the SSA rate with FERS was \$1,609.30 and without FERS was \$905.90; and beginning December 2019, the SSA rate with FERS was \$1,635.10 and without FERS was \$920.30.

On March 4, 2021 OWCP again forwarded a FERS/SSA dual benefits form to SSA.

On March 16, 2021 SSA completed the FERS/SSA dual benefits form, reporting that beginning December 2020 appellant's SSA rate with FERS was \$1,656.30 and without FERS was \$931.80.

In a FERS offset overpayment calculation worksheet dated March 19, 2021, OWCP calculated appellant's total overpayment to be \$38,895.43. It found that during the period July 1

³ *Order Remanding Case*, Docket No. 05-628 (issued July 6, 2005); Docket No. 07-656 (issued July 26, 2007); Docket No. 20-2303 (issued August 12, 2011).

to November 30, 2016 appellant had received an overpayment of \$3,373.90; from December 1, 2016 to November 30, 2017 an overpayment of \$8,072.92; from December 1, 2017 to November 30, 2018 an overpayment of \$8,234.16; from December 1, 2018 to November 30, 2019 an overpayment of \$8,463.99; from December 1, 2019 to November 30, 2020 on overpayment of \$8,624.73; and from December 1, 2020 to February 27, 2021 an overpayment of \$2,125.73.

In a preliminary overpayment determination dated March 17, 2022, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$38,895.43 because his wage-loss compensation benefits had not been reduced for the period July 1, 2016 through February 27, 2021 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA age-related retirement benefit rates with and without FERS for the stated period and totaling this amount to find an overpayment of \$38,895.43.⁴ OWCP further advised him of its preliminary overpayment determination that he was without fault in the creation of the overpayment. It requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that he could request a final decision based on the written evidence or a prerecoumment hearing. It afforded appellant 30 days to respond.

On March 22, 2022 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. He disagreed with the fact and amount of the overpayment and requested waiver of recovery.

Appellant completed a Form OWCP-20 on April 8, 2022. He reported monthly income totaling \$7,503.00 and monthly expenses totaling \$2,618.22. Appellant further reported assets totaling \$99,590.91.

Following a July 6, 2022 telephonic prerecoumment hearing, appellant submitted a revised Form OWCP-20 dated July 19, 2022.⁵ He reported monthly income totaling \$5,335.00 and monthly expenses totaling \$2,332.22. Appellant also reported assets totaling \$99,000.00. He did not submit supporting financial documentation.

By decision dated August 19, 2022, OWCP's hearing representative finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$38,895.43 for the period July 1, 2016 through February 27, 2021, because his FECA compensation payments were not offset by the portion of his SSA age-related retirement benefits attributable to his federal service. The hearing representative found that he was without fault in the creation of the overpayment but, denied waiver of recovery because the evidence of record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The hearing representative determined that appellant's monthly income exceeded his monthly expenses by \$3,811.00 and that appellant had

⁴ OWCP informed appellant that his compensation would be offset by the portion of his SSA age-related retirement benefits attributable to his federal service, effective February 28, 2021.

⁵ Appellant listed his adult son, D.M., and adult daughters, Y.S. and C.O., as dependents.

assets in excess of \$99,000.00. The hearing representative required recovery of the overpayment by deducting \$553.85 from his continuing compensation payments every 28 days.

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 duty.⁶ However, section 8116 also 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 When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁸

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the employee's federal service.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$38,895.43 for the period July 1, 2016 through February 27, 2021 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

In an August 19, 2022 decision, OWCP's hearing representative found that an overpayment of compensation was created for the period July 1, 2016 through February 27, 2021. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹¹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning July 1, 2016. OWCP, however,

⁶ *Supra* note 2 at § 8102(a).

⁷ *Id.* at § 8116.

⁸ *Id.* at § 8129(a).

⁹ 20 C.F.R. § 10.421(d); *see B.W.*, Docket No. 21-0277 (issued May 6, 2022; *R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

¹⁰ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹¹ *Id.*

neglected to offset his FECA benefits until February 27, 2021. Accordingly, the Board finds that fact of overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA benefits that were 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. The SSA provided appellant's SSA rates with FERS and without FERS for the period July 1, 2016 through February 27, 2021. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of SSA age-related retirement benefits received by appellant for the period July 1, 2016 through February 27, 2021 and finds that an overpayment of compensation in the amount of \$38,895.43 was created.¹²

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.¹³

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, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP. 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 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.¹⁵ 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.¹⁶ Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat,

¹² See *P.M.*, Docket No. 21-0915 (issued December 14, 2021); *K.W.*, Docket No. 20-1169 (issued April 7, 2021); *W.C.*, Docket No. 20-1241 (issued February 9, 2021); *S.O.*, Docket 20-0753 (issued October 28, 2020).

¹³ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; see *A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹⁵ *Id.* at Chapter 6.400.4.a(2) (September 2020).

¹⁶ *Id.* at Chapter 6.400.4.b(3).

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.¹⁷

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

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and recovery is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁰

The Board finds that as appellant reported \$99,000.00 in total assets in a Form OWCP-20 on July 19, 2022, he has not met the standard for waiver of recovery of the overpayment because his assets exceed the allowable resource base of \$6,200.00 for an individual, such as appellant.²¹ Because he 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 for OWCP to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet ordinary and necessary living expenses.²² Appellant has not established that he was entitled to waiver on the basis of defeating the purpose of FECA.²³

Additionally, appellant has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that

¹⁷ *Id.* at Chapter 6.400.4b(3)(a), (b).

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

¹⁹ *Supra* note 14 at Chapter 6.400.4c(3) (September 2020).

²⁰ 20 C.F.R. § 10.436.

²¹ Although appellant listed his adult son, J.H., and adult daughters, Y.S. and C.O., as dependents, he failed to submit any evidence to establish his children's dependent status. *See supra* note 15; *see also P.M.*, *supra* note 12.

²² *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *S.W.*, Docket No. 20-0363 (issued November 23, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

²³ *P.M.*, *supra* note 12; *F.K.*, *id.*; *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *R.D.*, Docket No. 19-1598 (issued April 17, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²⁴

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 \$38,895.43 overpayment.²⁵

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of OWCP's regulations²⁶ provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later 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.”²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$553.85 from appellant's continuing FECA compensation, every 28 days.

OWCP gave due regard to the financial information submitted, as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, it properly required recovery of the overpayment by deducting \$553.85 every 28 days from appellant's continuing compensation payments.²⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$38,895.43 for the period July 1, 2016 through February 27, 2021 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the

²⁴ *P.M., id.*; Docket No. 20-1622 (issued June 30, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECA6B 569, 571-72 (1989).

²⁵ *P.M., id.*; *F.K., supra* note 22; *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

²⁶ 20 C.F.R. § 10.441(a).

²⁷ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁸ *P.M., id.*; *M.S., id.*; *M.B.*, Docket No. 20-1578 (issued March 25, 2021).

overpayment and properly required recovery of the overpayment by deducting \$553.85 from appellant's continuing FECA compensation, every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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