

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

F.J., Appellant)	
)	
and)	Docket No. 23-0490
)	Issued: November 22, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Tallahassee, FL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 21, 2023 appellant filed a timely appeal from a December 27, 2022 merit decision of the Office of Workers Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,473.89, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 27, 2022 decision, OWCP received additional evidence. 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.*

Administration (SSA) age-related retirement benefits for the period June 1, 2019 through January 30, 2021, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$245.92 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On February 14, 1989 appellant, then a 35-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his neck and chest when he was involved in a motor vehicle accident (MVA) while in the performance of duty. OWCP accepted his claim for sprains of the right side of the neck, shoulder, upper arm, and acromioclavicular (AC) joint, lumbar sprain, bilateral rotator cuff sprains and deficiency, headache, and disorder of the bursae and tendons in the shoulders.³ It paid appellant wage-loss compensation on the supplemental rolls, effective April 4, 1989, and on the periodic rolls, effective November 3, 2002.

On January 11, 2021 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

OWCP thereafter received a completed FERS/SSA dual benefits form from SSA dated January 23, 2021. The form indicated that appellant received SSA age-related retirement benefits as of June 2019 and provided SSA age-related retirement benefit rates with FERS offset. Beginning June 2019, the SSA rate with FERS was \$1,858.60 and without FERS was \$1,000.40. Beginning December 2019, the SSA rate with FERS was \$1,888.30 and without FERS was \$1,016.40. Beginning December 2020, the SSA rate with FERS was \$1,912.80 and without FERS was \$1,029.60.

In a FERS offset overpayment calculation worksheet dated February 22, 2021, OWCP used the information provided by SSA on January 23, 2021 to calculate the 28-day FERS offset for the relevant periods, and calculated a total overpayment in the amount of \$17,473.89. It found that from June 1 through November 30, 2019 appellant received an overpayment in the amount of \$5,177.49; from December 1, 2019 through November 30, 2020 appellant received an overpayment in the amount of \$10,520.29; and from December 1, 2020 through January 30, 2021 appellant received an overpayment in the amount of \$1,776.11.

Beginning February 23, 2021, OWCP adjusted appellant's net wage-loss compensation to \$2,234.46 per 28-day pay period to include the offset of his SSA age-related retirement benefits attributable to his federal service. It notified him of this change on February 23, 2021.

In a preliminary overpayment determination, also dated February 23, 2021, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$17,473.89, because it had failed to reduce his wage-loss compensation payments for the period June 1, 2019

³ OWCP assigned the current claim OWCP File No. xxxxxx710. Appellant had previously filed a Form CA-1 for an injury on September 18, 1988. OWCP assigned that claim OWCP File No. xxxxxx553, which was accepted on November 7, 1988 for right shoulder and cervical spine sprain. Appellant had a subsequent claim for a December 24, 1993 traumatic injury, which OWCP accepted under File No. xxxxxx818 for a right shoulder sprain. OWCP administratively combined OWCP File Nos. xxxxxx553, xxxxxx818, and xxxxxx710, with the latter file designated as the master file.

through January 30, 2021 by the portion of his SSA age-related retirement benefits attributable to his federal service. It explained each period in the FERS offset calculation and found a total overpayment of \$17,473.89. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment, and requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, and canceled checks, pay slips, and any other records to support income and expenses. Additionally, it notified him that he could request a final decision based on the written evidence or a prerecoument hearing within 30 days.

On March 30, 2021 appellant requested a prerecoument hearing regarding possible waiver of recovery of the overpayment with OWCP's Branch of Hearings and Review. He also requested waiver of recovery of the overpayment because he was found to be without fault in the creation of the overpayment. Appellant attached a completed Form OWCP-20 dated March 30, 2021, wherein he noted a total monthly income of \$5,132.00, which included \$1,912.00 in SSA benefits, \$2,936.00 in household income, and \$284.00 in other benefits. He also reported monthly expenses of \$5,061.00 and that he had a checking account balance of \$262.50, a savings account balance of \$5.01, a retirement account valued at \$38,502.00, and a parcel of land valued at \$41,000.00, for a total of \$80,265.50 in assets. Appellant provided financial documentation, including his bank statement for the time period March 5 through April 5, 2021.

By decision dated July 13, 2021, OWCP denied appellant's request for a prerecoument hearing as untimely filed. It found that, because his request was not filed within 30 days of the February 23, 2021 preliminary overpayment determination, he was not entitled to a prerecoument hearing as a matter of right.

By decision dated December 27, 2022, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$17,473.89 for the period June 1, 2019 through January 30, 2021, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA, or would be against equity and good conscience. OWCP noted that the evidence of record established that appellant's monthly income exceeded his expenses by \$2,303.46 and that he had assets in excess of the resource base of \$6,200.00. It required recovery of the overpayment by deducting \$245.92 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 his or her duty.⁴ Section 8116 limits the right of an employee to receive

⁴ 5 U.S.C. § 8102(a).

compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,473.89, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2019 through January 30, 2021, without an appropriate offset.⁸

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period June 1, 2019 through January 30, 2021. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's 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. SSA provided its rate with FERS and without FERS for specific periods from June 1, 2019 through January 30, 2021. OWCP provided its calculations for each relevant period based on SSA's work sheet and determined that she received an overpayment in the amount of \$17,473.89.

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

⁹ *Id.*

The Board has reviewed OWCP's calculation of benefits received by appellant for the period June 1, 2019 through January 30, 2021 and finds that an overpayment of compensation in the amount of \$17,473.89 was created.¹⁰

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.¹¹ 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.¹²

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.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 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 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.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;

¹⁰ See *R.F.*, Docket No. 20-0159 (issued October 15, 2020); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² *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).

¹³ 20 C.F.R. § 10.436(a)(b).

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).

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

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 of compensation.²⁰

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.²¹

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA, because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses, and that his assets do not exceed the allowable resource base. In the Form OWCP-20, appellant reported a checking account balance of \$262.50, a savings account balance of \$5.01, a retirement account valued at \$38,502.00, and a parcel of land valued at \$41,000.00 for total assets of \$80,265.50.

As noted above, in determining whether recovery of the overpayment would defeat the purpose of FECA, OWCP considers whether assets exceed a resource base of \$6,200.00 for an individual.²² Accordingly, the Board finds that appellant, who reported up to \$80,265.50 in assets, has not met the standard for waiver of recovery of the overpayment, because his assets exceed the allowable resource base.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 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.²⁴

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).

²⁰ *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

²¹ *Supra* note 11.

²² *Supra* note 15.

²³ *S.W.*, Docket No. 20-0363 (issued November 23, 2020); *H.F.*, Docket No. 17-0101 (issued September 5, 2017).

²⁴ *S.R.*, Docket No. 20-1416 (issued September 8, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

The Board also finds that appellant has not established that she 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.²⁵

On appeal, appellant argued that OWCP utilized inaccurate information when determining his monthly household income. The record reflects that he reported monthly income of \$5,132.00. OWCP, in its December 27, 2022 decision, found that appellant had \$7,414.46 in monthly income, and indicated that he had failed to list his FECA payments of \$2,282.46 per month. The Board finds that OWCP improperly increased the amount of appellant's income in its December 27, 2022 decision as the \$5,132.00 figure provided by appellant already included the amount of his FECA payments. However, as 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 he needed substantially all of his current income to meet ordinary and necessary living expenses.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

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁸

Section 10.441(a) of OWCP's regulations²⁹ 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.”³⁰

²⁵ See *B.C.*, Docket No. 19-0629 (issued June 2, 2020); *L.D., id.*; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁶ *Supra* note 24.

²⁷ *S.W.*, Docket No. 20-0363 (issued November 23, 2020).

²⁸ 20 C.F.R. § 10.441; see *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁹ *Id.* at § 10.441(a).

³⁰ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$245.92 from appellant's continuing compensation payments every 28 days.

In determining whether appellant could repay the overpayment through deductions of \$245.92 from his continuing compensation payments, OWCP took into consideration the financial information he submitted as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, while at the same time liquidating the debt in a reasonably prompt fashion.³¹ Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$245.92 per month from his compensation payments.³²

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,473.89, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2019 through January 30, 2021, 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 \$245.92 per month from his continuing compensation payments every 28 days.

³¹ *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.F.*, Docket No. 15-0489 (issued May 11, 2015).

³² *J.B.*, Docket No. 19-1734 (issued November 5, 2020).

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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