

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

M.V., widow of J.V., Appellant)	
)	
and)	Docket No. 23-0430
)	Issued: October 3, 2023
DEPARTMENT OF ENERGY,)	
SOUTHEASTERN COURIER SECTION,)	
Oak Ridge, TN, Employer)	
)	

Appearances:
Marshall W. Stair, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 7, 2023 appellant, through counsel, filed a timely appeal from an October 4, 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 over 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 the employee received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits 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.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 30, 1990 the employee, then a 50-year-old nuclear materials courier, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 1990, he felt a sharp pain in his left knee and leg when jogging during an employing establishment-sanctioned physical fitness program while in the performance of duty. OWCP initially accepted the claim for herniated discs at L3-4 and L4-5, and paid the employee wage-loss compensation on the periodic rolls as of June 16, 2002. It subsequently expanded the acceptance of the employee's claim to include spondylosis with myelopathy, thoracic region; spinal stenosis, lumbar region; spinal stenosis, thoracic region; displacement of lumbar intervertebral disc without myelopathy. OWCP continued to pay the employee wage-loss compensation on the periodic rolls.

In a claim for compensation (Form CA-7) dated March 2, 1999, the employee noted his retirement system as Federal Employees Retirement System (FERS) and Social Security Administration (SSA).

On July 11, 2019 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form. On July 13, 2019 SSA completed the dual benefits form, wherein SSA calculated the employee's SSA age-related retirement benefit rates with and without a FERS offset from November 2005 through December 2018. Beginning November 2005, the SSA rate with FERS was \$1,590.50 and without FERS was \$1,048.10; beginning December 2005, the SSA rate with FERS was \$1,655.70 and without FERS was \$1,091.00; beginning December 2006, the SSA rate with FERS was \$1,710.30 and without FERS was \$1,127.00; beginning December 2007, the SSA rate with FERS was \$1,749.60 and without FERS was \$1,152.90; beginning December 2008, the SSA rate with FERS was \$1,851.00 and without FERS was \$1,219.70; beginning December 2009, the SSA rate with FERS was \$1,851.00 and without FERS was \$1,219.70; beginning December 2010, the SSA rate with FERS was \$1,851.00 and without FERS was \$1,219.70; beginning December 2011, the SSA rate with FERS was \$1,917.60 and without FERS was \$1,263.60; beginning December 2012, the SSA rate with FERS was \$1,950.10 and without FERS was \$1,285.00; beginning December 2013, the SSA rate with FERS was \$1,979.30 and without FERS was \$1,304.20; beginning December 2014, the SSA rate with FERS was \$2,012.90 and without FERS was \$1,326.30; beginning December 2015, the SSA

³ Docket No. 20-0952 (issued February 2, 2022).

rate with FERS was \$2,012.90 and without FERS was \$1,326.30; beginning December 2016, the SSA rate with FERS was \$2,018.90 and without FERS was \$1,330.20; beginning December 2017, the SSA rate with FERS was \$2,059.20 and without FERS was \$1,356.80; and beginning December 2018, the SSA rate with FERS was \$2,116.80 and without FERS was \$1,394.70.

In an August 26, 2019 letter, OWCP informed the employee that, effective August 18, 2019, it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his 28-day periodic compensation benefits. It noted that his current monthly SSA age-related retirement benefit with FERS was \$2,116.80 and without FERS was \$1,394.70. OWCP explained that the amount of FERS/SSA dual benefit to be deducted from the employee's FECA benefits was \$722.10 per month, or \$666.55 every 28 days. It further explained that his new net compensation payment would be \$1,979.21, every 28 days.

On August 26, 2019 OWCP issued a preliminary overpayment determination, notifying the employee that he had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for the stated period and totaling this amount to find an overpayment of \$107,831.76. OWCP further advised the employee of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20), along with supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support his reported income, assets, and expenses. OWCP advised the employee that it would deny waiver if he failed to furnish the requested financial information within 30 days. It provided an appeal request form and further notified him that, within 30 days of the date of the letter, he could contest the overpayment and request a final decision based on the written evidence or a precoupment hearing.

In an accompanying overpayment memorandum, OWCP noted that appellant was overpaid compensation for the period November 1, 2005 to August 17, 2019 in the amount of \$10,831.76. A FERS offset overpayment calculation worksheet completed by OWCP determined the 28-day FERS offset amount for the days in each period, and computed a total overpayment amount of \$107,831.76. The offset calculation worksheet indicated that from November 1 through 30, 2005, the employee received an overpayment in the amount of \$536.44; from December 1, 2005 through November 30, 2006, he received an overpayment in the amount of \$6,795.02; from December 1, 2006 through November 30, 2007, he received an overpayment in the amount of \$7,018.83; from December 1, 2007 through November 30, 2008, he received an overpayment in the amount of \$7,199.74; from December 1, 2008 through November 30, 2009, he received an overpayment in the amount of \$7,596.41; from December 1, 2009 through November 30, 2010, he received an overpayment in the amount of \$7,596.41; from December 1, 2010 through November 30, 2011, he received an overpayment in the amount of \$7,596.41; from December 1, 2011 through November 30, 2012, he received an overpayment in the amount of \$7,891.12; from December 1, 2012 through November 30, 2013, he received an overpayment in the amount of \$8,003.13; from December 1, 2013 through November 30, 2014, he received an overpayment in the amount of \$8,123.46; from December 1, 2014 through November 30, 2015, he received an overpayment in the amount of \$8,261.84; from December 1, 2015 through November 30, 2016, he received an

overpayment in the amount of \$8,284.47; from December 1, 2016 through November 30, 2017, he received an overpayment in the amount of \$8,267.10; from December 1, 2017 through November 30, 2018, he received an overpayment in the amount of \$8,451.96; and from December 1, 2018 through August 17, 2019, he received an overpayment in the amount of \$6,189.43.

On September 24, 2019 OWCP received a check from the employee in the amount of \$10,831.76.

By decision dated September 30, 2019, OWCP finalized the preliminary overpayment determination, finding that the employee had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits with an appropriate offset. It found that he was without fault in the creation of the overpayment but denied waiver of recovery of the overpayment because no financial information had been submitted. OWCP required recovery of the overpayment by deducting \$500.00 from the employee's continuing compensation payment every 28 days beginning October 13, 2019.

On March 23, 2020 the employee, through counsel, appealed to the Board.⁴

In an April 14, 2021 memorandum of telephone call (Form CA-110), the employee's wife advised OWCP that the employee passed away on April 6, 2021. By decision dated February 2, 2022, the Board affirmed in part and set aside in part the September 30, 2019 overpayment decision, and remanded the case to OWCP to clarify the amount of the overpayment of compensation as it had made separate determinations that the overpayment was in the amount of \$10,831.76 and \$107,831.76. The Board also noted that OWCP did not acknowledge receipt of the employee's check for \$10,831.76, which fully repaid the overpayment stated in the August 26, 2019 preliminary overpayment determination. Thus, the Board found that the amount of the overpayment was unclear. The Board instructed OWCP to determine the correct amount of the overpayment and 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 remand, OWCP issued a preliminary overpayment determination on March 17, 2022 and addressed to the employee's estate, finding that the employee had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019 because he had concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits, without an appropriate offset. It subtracted the employee's payment of \$10,831.76, and noted that the remaining balance of the overpayment was \$91,000.00. OWCP determined that the employee was without fault in the creation of the overpayment. It informed appellant that, if she agreed with the overpayment amount, she could make a payment online or send a check or money order for the full amount to OWCP. OWCP requested that she submit a completed Form OWCP-20, along with supporting financial documentation, including copies of

⁴ During the pendency of the appeal, the employee passed away. The Board recognized E.V., the employee's widow, as the substitute appellant to allow the appeal to go forward. *See D.V.*, Docket No. 20-1294 (issued September 14, 2021); *N.D.*, Docket No. 14-1757 (issued June 2, 2015); *Albert F. Kimbrell*, 4 ECAB 662, 666 (1952).

income tax returns, bank account statements, bills, pay slips, and any other records to support her reported income, assets, and expenses. It advised her that it would deny waiver if she failed to furnish the requested financial information within 30 days. OWCP provided an appeal request form and further notified appellant that, within 30 days of the date of the letter, she could contest the overpayment and request a final decision based on the written evidence or a prerecoument hearing. No response was received.

On April 5, 2022 counsel for appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He argued that the employee sent in a check in the amount of \$10,831.76, as stated in the August 26, 2019 preliminary overpayment determination, and that the check was cashed prior to the employee's death on April 6, 2021. Counsel argued that any further claim against the employee was extinguished, as all claims and demands not filed with the probate court within 12 months from the date of the employee's death on April 6, 2021, were forever barred. He noted that the recalculated overpayment was 10 times the original amount and formulated after being notified that the employee was deceased, and that the employee's widow could not be held accountable. The hearing was held on July 20, 2022.

By decision dated October 4, 2022, OWCP's hearing representative finalized the March 17, 2022 preliminary overpayment determination, finding that the employee had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. The hearing representative noted that a partial repayment of \$10,831.76 and \$6,000.00 had been received, with a remaining balance of \$91,000.00. The hearing representative also determined that the employee was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayments, finding that the employee had not provided a completed OWCP-20 form and supporting financial documentation. The hearing representative required recovery of the overpayment in full within 30 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.⁵ 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.⁶ 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.⁷

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8129(a).

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.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 OWCP's procedures for recovery from a deceased debtor's estate provide that, if the claimant recently passed away, it should take prompt action because creditors who have not properly asserted a claim before the estate is closed are generally precluded from any recovery.¹⁰

Thus, it should refer the debt to the financial management system (FMS) for offset of the deceased claimant's last federal tax refund under the Treasury's Offset Program (TOP).¹¹ OWCP has a special profile with FMS under TOP for the collection of these specific estate debts. The claims examiner should follow the referral procedures set forth in Chapter 6.500.12.¹² Including sending the complete referral package to the national office for final review and forwarding to the FMS.¹³

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

The Board notes that the record indicates that the employee passed away on April 6, 2021, and that on March 17, 2022, OWCP issued a notice of preliminary overpayment addressed to the employee's estate, finding that the employee had received an overpayment of compensation in the amount of \$107,831.76 for the period November 1, 2005 through August 17, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits, without an appropriate offset.

OWCP's procedures provide for the recovery of an overpayment from a deceased debtor's estate.¹⁴ The procedures specifically require that, if the claimant recently passed away, OWCP should refer the debt to the FMS for offset of the deceased claimant's last federal tax refund under

⁸ 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).

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

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.15 (September 2020).

¹¹ 31 C.F.R. § 285.2; *id.* at Chapter 6.500.15g(1)-(7) (September 2018). *See D.J.*, (*L.J.*), Docket No. 22-0012 (issued August 18, 2022); *see also R.B.*, (*J.B.*), Docket No. 19-0700 (issued March 16, 2021); *W.J. (E.J.)*, Docket No. 18-1035 (issued July 9, 2019).

¹² *Id.* at Chapter 6.500.12 (September 2020).

¹³ *Id.* at Chapter 6.500.15e.

¹⁴ *Supra* note 16.

the TOP.¹⁵ OWCP has a special profile with FMS under TOP for the collection of these specific estate debts. The claims examiner should follow the referral procedures set forth in Chapter 6.500.12,¹⁶ including sending the complete referral package to the national office for final review and forwarding to the FMS.¹⁷ The evidence of record does not substantiate that actions OWCP has taken to recover the overpayment debt include a referral to FMS for appropriate offset under the TOP, prior to taking overpayment actions against the employee's estate. The case shall therefore be remanded to OWCP to follow the procedures as outlined in Chapter 6.500.15 of its procedure manual.¹⁸ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

IT IS HEREBY ORDERED THAT the October 4, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 3, 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

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *D.J.*, Docket No. 22-0012 (issued August 18, 2022).