

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

_____)
K.V., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Chino, CA, Employer)
_____)

Docket No. 21-0429
Issued: September 13, 2023

Appearances:

*Bruce Herrmann, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 11, 2021 appellant, through her representative, filed a timely appeal from a July 13, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 an 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 Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). One hundred and eighty days from July 13, 2020 was January 9, 2021. As this fell on a Saturday, appellant had until Monday, January 11, 2021 to file the appeal. Therefore, January 11, 2021, the date the appeal was received by the Clerk of the Appellate Boards, renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$61,656.36 for the period November 1, 2014 through March 28, 2020, for which she was without fault, as she 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 \$449.64 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁵ 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 July 1, 1998 appellant, then a 49-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she was hit by a large mail container that pinned her left shoulder against a door while in the performance of duty. OWCP accepted the claim for left shoulder contusion, trapezius sprain/strain, and left thoracic outlet syndrome. On November 22, 2002 the employing establishment indicated that appellant was enrolled in the Federal Employees Retirement System (FERS). Effective September 7, 2003 OWCP paid appellant wage-loss compensation *via* the periodic rolls.

By decision dated January 20, 2005, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective January 23, 2005, finding that she had refused an offer of suitable work. Appellant appealed to the Board. By decision dated March 6, 2009, the Board reversed the termination.⁶

On July 2, 2009 OWCP reinstated appellant's wage-loss compensation retroactive to January 23, 2005. On July 31, 2009 appellant elected to receive FECA benefits in lieu of Office of Personnel Management disability retirement benefits, effective January 23, 2005.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the July 13, 2020 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.*

⁵ Docket No. 08-0151 (issued March 6, 2009).

⁶ *Id.*

On March 2, 2020 OWCP received a completed FERS/SSA dual benefits form from SSA, which listed appellant's monthly SSA age-related retirement benefits with and without FERS beginning November 1, 2014. SSA reported that: effective November 2014, appellant's monthly SSA rate with FERS was \$1,464.90 and without FERS was \$504.90; effective December 2014, her monthly SSA rate with FERS was \$1,489.90 and without FERS was \$512.90; effective December 2015, her monthly SSA rate with FERS was \$1,489.90 and without FERS was \$512.90; effective December 2016, her monthly SSA rate with FERS was \$1,494.00 and without FERS was \$772.00; effective December 2017, her monthly SSA rate with FERS was \$1,524.00 and without FERS was \$525.00; effective December 2018, her monthly SSA rate with FERS was \$1,566.50 and without FERS was \$539.50; and effective December 2019, her monthly SSA rate with FERS was \$1,591.90 and without FERS was \$547.90.

In a letter dated April 2, 2020, OWCP informed appellant that the portion of her SSA age-related retirement benefits attributable to her federal service would be deducted from her 28-day periodic rolls compensation payments beginning March 29, 2020 in the amount of \$1,044.00 every 28 days, resulting in net compensation every 28 days of \$1,798.57.

On April 2, 2020 OWCP completed a FERS offset overpayment calculation form. It calculated the amount that it should have offset from appellant's compensation for each period from November 1, 2014 through March 28, 2020. OWCP found that: from November 1 through 30, 2014, she received an overpayment of \$949.45; from December 1, 2014 through November 30, 2015, she received an overpayment of \$11,756.21; from December 1, 2015 through November 30, 2016, she received an overpayment of \$11,788.42; from December 1, 2016 through November 30, 2017, she received an overpayment of \$8,687.80; from December 1, 2017 through November 30, 2018, she received an overpayment of \$12,020.93; from December 1, 2018 through November 30, 2019, she received an overpayment of \$12,357.86; and from December 1, 2019 through March 28, 2020, she received an overpayment of \$4,095.69. Based on these figures, OWCP calculated the total overpayment amount of \$61,656.36.

On April 7, 2020 OWCP notified appellant that it had made a preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$61,656.36 because she received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period November 1, 2014 through March 28, 2020. It noted that the SSA had confirmed that a portion of her SSA age-related retirement benefits were attributed to her years of federal service as an employee under the FERS retirement program and that portion required an offset of her FECA compensation benefits until March 29, 2020, when her monthly wage-loss compensation was adjusted. OWCP explained that it had calculated the overpayment of compensation by determining the difference between appellant's SSA age-related retirement benefit rates with and without FERS for each period, and then multiplying that amount by the number of days in each period. It calculated that the total overpayment amount was \$61,656.36. OWCP found that appellant was without fault in the creation of the overpayment. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP provided an overpayment action request form and advised appellant that, within 30 days of the date of the letter, she could request a final decision based on the written record or a precoupment hearing.

On May 8, 2020 appellant submitted an April 25, 2020 overpayment action request form, requesting that OWCP make a decision based on the written evidence and consider waiver of recovery of the overpayment. She indicated that she disagreed with the amount of the overpayment. Appellant provided an April 7, 2020 letter from her representative alleging that SSA had withheld benefit payments for 25 months within the period November 1, 2014 through March 28, 2020. She did not provide a completed Form OWCP-20.

By decision dated May 14, 2020, OWCP finalized the April 7, 2020 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$61,656.36 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period November 1, 2014 through March 28, 2020, without an appropriate offset. It found that she was without fault in the creation of the overpayment but denied waiver of recovery. OWCP required recovery of the overpayment by deducting \$449.64 from appellant's continuing wage-loss compensation payments every 28 days.

In an additional overpayment action request form, received June 1, 2020, appellant requested that OWCP make a decision based on the written evidence and requested waiver of recovery because she was without fault in the creation of the overpayment. She disagreed with the amount of the overpayment. Appellant's representative again contended that the FERS/SSA dual benefits calculation form was an insufficient basis for the findings of overpayment as SSA had withheld her benefit payments for 25 months within the period of the overpayment.

Appellant submitted a September 5, 2016 letter, wherein SSA advised appellant that she had received an overpayment of SSA disability benefits in the amount of \$90,201.00 during the period April 2004 through October 2013. It indicated that it had not taken into account her workers' compensation payments in calculating her SSA disability benefits, effective April 2004. SSA advised appellant that it would begin withholding her full SSA benefits effective December 14, 2016 and continuing until the overpayment was recovered.

In a November 7, 2016 letter, SSA found that appellant had an overpayment balance of \$88,711.10 and that it was withholding her entire benefit of \$1,489.90 per month for the period from November 2016 through October 2021. In a June 26, 2017 letter, it indicated that the balance of the overpayment was \$79,747.10 and that appellant would receive benefits in the amount \$1,360.00 per month beginning July 2017. On November 7, 2017 SSA reported that she owed a balance of \$79,747.10 and that on December 2017 she would receive full benefits in the amount of \$1,360.00. On August 31, 2018 it advised that appellant owed a balance of \$78,223.10 and that beginning September 2018 through December 2022 it would withhold her entire benefit of \$1,524.00.

Appellant also provided a 2016 SSA statement which indicated that she received \$17,878.80 in benefits and had repaid \$1,489.90 of her SSA overpayment. A 2017 SSA statement indicated that appellant received \$17,928.00 in SSA benefits and had repaid \$8,964.00 of her SSA overpayment. A 2019 SSA statement indicated that appellant received \$18,798.00 in SSA benefits and had repaid \$18,798.00 of her overpayment.

By decision dated July 13, 2020, OWCP issued a superseding final overpayment determination, again finalizing the April 7, 2020 preliminary determination that appellant had

received an overpayment of compensation in the amount of \$61,656.36 for the period November 1, 2014 through March 28, 2020. It found that while the evidence submitted supported that appellant had been overpaid SSA benefits for the period April 2004 through October 2013, the overpayment of FECA compensation benefits that occurred from November 2013 through March 2020 was unrelated to the payments diverted by SSA to recoup the prior overpayment of SSA benefits. OWCP determined that appellant was without fault in the creation of the overpayment. It denied waiver of recovery of the overpayment, noting that she had provided no financial documents to support her monthly expenses. OWCP required recovery of the overpayment by deducting \$449.64 from appellant's 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.⁷ 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.⁸

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁹ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA age-related retirement 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 OWCP properly determined that appellant received an overpayment of wage-loss compensation for the period November 1, 2014 through March 28, 2020, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits attributable to her federal service during the relevant period. 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, without an appropriate

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

offset.¹¹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period November 1, 2014 through March 28, 2020. Consequently, the fact of overpayment has been established.

The Board further finds, however, that the case is not in posture for decision with respect to the amount of the overpayment. To determine the amount of the overpayment, the portion of 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. SSA provided its age-related retirement benefit rates with FERS and without FERS for the period beginning November 2014 through the period beginning December 2019. OWCP provided its calculations of the amount that should have been offset during the relevant period of November 1, 2014 through March 28, 2020 based on information provided by SSA by determining the difference between the SSA with FERS rate and the SSA without FERS rate and determined that she received an overpayment in the amount of \$61,656.36.

The Board notes, however, in light of the conflicting information regarding the amount of SSA benefits appellant reportedly received, the Board finds that it remains unclear whether OWCP properly calculated the amount of the overpayment for the period November 1, 2014 through March 28, 2020. Accordingly, the case shall be remanded for OWCP to clarify the amount of SSA age-related retirement benefits that appellant actually received during the overpayment period, accounting for the fact that SSA reduced appellant's age-related retirement benefits during the period November 1, 2014 through March 28, 2020 due to the overpayment of SSA disability benefits. OWCP shall then compute the amount of the overpayment of compensation and issue a new preliminary overpayment determination, with an overpayment action request form, a new Form OWCP-20, and instructions for appellant to provide updated supporting financial documentation. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period November 1, 2014 through March 28, 2020 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset; however, the case is not in posture for decision regarding the amount of the overpayment.

¹¹ See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

¹² In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT July 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 13, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board