

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

R.E., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Anchorage, AK, Employer)

Docket No. 23-0826
Issued: January 12, 2024

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On May 23, 2023 appellant, through counsel, filed a timely appeal from a May 10, 2023 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.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 10, 2023 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,789.19, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period January 1, 2018 through October 8, 2022 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 \$275.00 per month from appellant's continuing compensation payments.

FACTUAL HISTORY

On November 13, 2003 appellant, then a 51-year-old security screener, filed a traumatic injury claim (Form CA-1) alleging that on November 11, 2003 she injured her back when unloading a machine while in the performance of duty. OWCP accepted her claim for lumbar strain and later expanded its acceptance of the claim to include displaced trimalleolar fracture on the right, intervertebral disc disorder with myelopathy of the lumbar region, and mechanical problems with limbs on the right.⁴ It paid appellant wage-loss compensation on the supplemental rolls effective June 23, 2004, and on the periodic rolls effective March 18, 2007.

On June 27, 2022 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 August 7, 2022. SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset as follows: beginning January 2018, the SSA rate with FERS was \$1,404.00 and without FERS was \$1,241.50; beginning December 2018, the SSA rate with FERS was \$1,443.00 and without FERS was \$1,276.20; beginning December 2019, the SSA rate with FERS was \$1,466.30 and without FERS was \$1,296.60; beginning December 2020, the SSA rate with FERS was \$1,485.30 and without FERS was \$1,313.40; and beginning December 2021, the SSA rate with FERS was \$1,572.90 and without FERS was \$1,390.80.

Effective October 9, 2022, OWCP adjusted appellant's wage-loss compensation to \$2,250.91 per 28-day pay period to include the offset of her SSA age-related retirement benefits attributable to her federal service. It advised her that the amount of the offset was \$182.10 per 28-day pay period and notified her of this change on September 9, 2022.

In an October 18, 2022 preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$9,789.19 because it had failed to reduce her wage-loss compensation payments for the period January 1, 2018 through October 8, 2022 by the portion of her SSA age-related retirement benefits attributable to her federal service. It provided a FERS offset overpayment calculation worksheet, in which it used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods. OWCP found that from January 1 through November 1, 2018 appellant received an overpayment in the

⁴ Appellant underwent a authorized surgery to her lumbar spine on December 14, 2006, which included laminectomy and fusion from L3 through S1 with pedicle screw instrumentation. Following the surgery to her spine, she developed a drop foot on the right, which caused her to fall and fracture her right foot on June 20, 2016, necessitating further surgery including open reduction internal fixation and syndesmosis repair.

amount of \$1,789.28; from December 1, 2018 through November 30, 2019 appellant received an overpayment in the amount of \$2,010.76; from December 1, 2019 through November 30, 2020 appellant received an overpayment in the amount of \$2,047.64; from December 1, 2020 through November 30, 2021 appellant received an overpayment in the amount of \$2,068.51; and from December 1, 2021 through October 8, 2022 appellant received an overpayment in the amount of \$1,873.00. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment and requested that she 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, OWCP notified appellant that she could request a final decision based on the written evidence or a prerecoupment hearing within 30 days.

On October 31, 2022 appellant requested a prerecoupment hearing regarding the reduction in her pay rate and possible waiver of recovery of the overpayment with OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment and submitted a completed Form OWCP-20, reporting total monthly income of \$7,124.00; total monthly expenses of \$7,037.00; and total assets of \$3,147.00.

A hearing was held on March 9, 2023 before a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received a statement dated April 5, 2023, wherein appellant noted a total monthly household income of \$7,583.16. She also reported monthly expenses of \$7,662.75. Appellant provided financial documentation regarding her expenses.

By decision dated May 10, 2023, OWCP's hearing representative finalized the preliminary determination, finding that appellant had received an overpayment of compensation in the amount of \$9,789.19 for the period January 1, 2018 through October 8, 2022, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The hearing representative found that she 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 required recovery of the overpayment by deducting \$275.00 per month from her continuing compensation payments.

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 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

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,789.19 for the period January 1, 2018 through October 8, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving wage-loss compensation under FECA, she was concurrently receiving SSA age-related retirement benefits based upon her 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 without an appropriate offset.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period January 1, 2018 through October 8, 2022. 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 appellant's age-related retirement benefit rates with FERS and without FERS for specific periods from January 1, 2018 through October 8, 2022. OWCP provided its calculations for each relevant period based on SSA's dual benefits form and determined that she received an overpayment in the amount of \$9,789.19.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 1, 2018 through October 8, 2022 and finds that an overpayment of compensation in the amount of \$9,789.19 was created.¹¹

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

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

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

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Id.*

¹¹ *See R.F.*, Docket No. 20-0159 (issued October 15, 2020); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² 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.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 the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁴ 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 \$50.00.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰

¹² 5 U.S.C. § 8129(a)-(b).

¹³ *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).

¹⁴ 20 C.F.R. § 10.436(a)(b).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁶ *Id.* at Chapter 6.400.4a(2).

¹⁷ *Id.* at Chapter 6.400.4b(3).

¹⁸ *Id.* at Chapter 6.400.4b(3)(a), (b).

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

²⁰ *Supra* note 15 at Chapter 6.400.4c(3).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.²¹

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.²²

Appellant has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As noted above, 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 \$50.00.²³ As appellant's reported income exceeds her reported expenses by more than \$50.00, she has not established that recovery of the overpayment would defeat the purpose of FECA. Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets exceed the allowable resource base.

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has not submitted evidence to substantiate that she would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment she gave up a valuable right or changed her position for the worse.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 overpayment.²⁵

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.²⁶

Section 10.441(a) of OWCP's regulations²⁷ 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

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

²² *Id.*

²³ *Supra* notes 14 and 15.

²⁴ *Supra* note 19.

²⁵ *Supra* note 21.

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

²⁷ *Id.* at § 10.441(a).

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.”²⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$275.00 per month from appellant’s continuing compensation payments.

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.²⁹ Therefore, the Board finds that it properly required recovery of the overpayment by deducting \$275.00 per month from appellant’s continuing compensation benefits.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,789.19, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period January 1, 2018 through October 8, 2022 without an appropriate offset. The Board finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$275.00 per month from her continuing compensation payments.

²⁸ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁹ *M.S.*, Docket No. 20-0068 (issued May 14, 2021); *M.B.*, Docket No. 20-1578 (issued March 25, 2021).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board