

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

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B.M., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FARM)
SERVICE AGENCY, Stillwater, OK, Employer**)
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**Docket No. 23-0891
Issued: January 30, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 19, 2023 appellant, through counsel, filed a timely appeal from a May 31, 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 to consider 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 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 31, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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 \$39,346.98, for the period July 1, 2015 through September 10, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits 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 \$484.62 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 6, 1996 appellant then a 43-year-old duplicating press operator, filed a traumatic injury claim (Form CA-1) alleging that on May 30, 1996 a file cabinet fell from a hand truck and struck her right foot while in the performance of duty. OWCP accepted her claim for complex regional pain syndrome of the right lower limb, pain in the right knee, intervertebral disc degeneration in the lumbar region, spondylosis with radiculopathy in the lumbosacral region, crushing injury of right toe(s), closed fracture of one or more phalanges of the right foot, prolonged depressive reaction, sprain of the lumbosacral joint ligament, and thoracic or lumbosacral neuritis or radiculitis. A notification of personnel action (Standard Form (SF) 50-B) dated July 28, 2000 indicated that appellant was removed from her federal employment on that date as she was medically unable to perform the duties of the position. The form also indicated that her retirement plan was "FERS [Federal Employees Retirement System] & Social Security." OWCP paid appellant wage-loss compensation on the periodic rolls, effective June 16, 2002.

On June 27, 2022 OWCP sent a FERS/SSA dual benefits form to SSA. It listed the computation period as January 1, 2016 through June 17, 2022.

On August 4, 2022 SSA completed the FERS/SSA dual benefits form, which indicated that appellant had been in receipt of SSA age-related retirement benefits since July 2015 and had received disability benefits prior to that date. The form listed her SSA age-related retirement benefit rate with and without a FERS offset. Beginning July 2015, the SSA rate with FERS was \$976.80 and without FERS was \$688.20; beginning December 2016 the SSA rate with FERS was \$979.70 and without FERS was \$690.20; beginning December 2017 the SSA rate with FERS was \$999.20 and without FERS was \$704.00; beginning December 2018 the SSA rate with FERS was \$1,027.20 and without FERS was \$723.70; beginning January 2019 the SSA rate with FERS was \$1,325.50 and without FERS was \$723.70; beginning December 2019 the SSA rate with FERS was \$1,346.70 and without FERS was \$735.30; beginning December 2020 the SSA rate with FERS was \$1,364.20 and without FERS was \$744.80; and beginning December 2021 the SSA rate with FERS was \$1,444.60 and without FERS was \$788.70.

On October 4, 2022 OWCP prepared a FERS offset overpayment calculation worksheet wherein it found a total overpayment of compensation for the period July 1, 2015 through September 10, 2022 in the amount of \$39,881.44.

In a preliminary overpayment determination dated October 4, 2022, OWCP notified appellant of its preliminary finding that she received an overpayment of compensation in the amount of \$39,346.98 for the period July 1, 2015 through September 10, 2022, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement

benefits without an appropriate offset. It noted that it had incorrectly adjusted her ongoing compensation payments for the periods July 17 through August 13, 2022, and August 14 through September 10, 2022, reducing each of these payments by \$267.23 instead of \$605.45. OWCP thus subtracted two payments of \$267.23 from the overpayment amount of \$39,881.44 to reach the total overpayment amount of \$39,346.98. It determined that appellant was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, and canceled checks, pay slips, and any other records that support income and expenses. Additionally, OWCP provided an overpayment action request form and further notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing.

On October 21, 2022 appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review, and requested waiver of recovery of the overpayment.

Appellant submitted a Form OWCP-20 dated October 30, 2022, and reported total monthly income of \$3,790.00, total monthly expenses of approximately \$2,636.00, and assets valued at -\$11.00. In an additional Form OWCP-20 dated November 4, 2022, she reported total monthly income of \$3,671.67, total monthly expenses of \$2,427.00, and assets valued at \$123.00.

During a precoupment hearing conducted on March 14, 2023 appellant testified that her income consisted solely of wage-loss compensation, SSA benefits, and approximately \$1,600.00 per year in tribal benefits. She also testified that she had less than \$123.00 in her checking account and that she no longer had a retirement account. The hearing representative asked what appellant felt she could reasonably repay per month, and appellant responded, "I can't answer that right now because I know that I'm not making it with what I have...." Appellant's counsel argued that, due to OWCP's negligent administration of her claim, appellant had given up the valuable right to make prompt repayment, and that the double reduction in her benefits amounted to a penalty provision. He and OWCP's hearing representative explained the need for her to complete a new, more accurate Form OWCP-20 with supporting financial documentation.

On March 28, 2023 appellant submitted a Form OWCP-20, listing monthly Social Security benefits of \$1,448.00 and a yearly tribal dividend of \$1,600.00, total monthly expenses of \$2,399.00, and assets valued at \$3,398.00, including \$3,000.00 in furniture and appliances. She attached a note listing expenses for groceries of \$800.00, gas of \$150.00, and clothes and miscellaneous of \$150.00. Appellant submitted a checking account statement with an ending balance of \$557.97, showing a Social Security deposit of \$1,488.00, an overdraft fee, a utility charge of \$76.21, an insurance premium of \$43.50, and a charge of \$600.00 hand labeled as "rent." OWCP received additional documentation including an OWCP benefit statement showing net compensation of \$2,076.16, a receipt for a printer with a handwritten note that it was "bought to make copies per your request," several documents related to health insurance claims, an automotive membership bill showing a balance of \$62.00 with a handwritten note indicating it was paid, a "payoff quote" document indicating a loan balance of \$3,360.00, a car sales quote indicating that monthly payments of \$695.00 would be due beginning on May 3, 2023, a statement for a lapsed car insurance policy with an unpaid premium of \$864.00, and an appointment reminder for a counseling session indicating that "self-pay will be \$74.28."

By decision dated May 31, 2023, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$39,346.98 for the period July 1, 2015 through September 10, 2022, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. The hearing representative found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, explaining that the three OWCP-20 forms were inconsistent with each other, and that she had not submitted sufficient financial documentation. In a separate decision of even date, OWCP required recovery of the overpayment by deducting \$484.62 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.⁴ 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.⁵

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.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 age-related retirement benefits 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 \$39,346.98 for the period July 1, 2015 through September 10, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset.

OWCP paid appellant wage-loss compensation on the periodic rolls, effective June 16, 2002. Appellant received SSA age-related retirement benefits beginning July 1, 2015. As noted, a claimant cannot receive concurrent FECA wage-loss compensation benefits and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that a portion of appellant's benefits were attributable to her federal

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

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

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

⁸ 20 C.F.R. § 10.421(d); *id.*; *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *S.M.*, *supra* note 6.

service. Thus, the record establishes that she received an overpayment of FECA wage-loss compensation.⁹

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to appellant's specific SSA age-related retirement benefits that were attributable to federal service. SSA provided its rates with FERS and without FERS for the period beginning July 2015. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$39,881.44, from which it subtracted the incorrect compensation adjustments for the periods July 17 through August 13, 2022, and August 14 through September 10, 2022, to reach a total overpayment amount of \$39,346.98.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits in the amount of \$39,346.98 for the period July 1, 2015 through September 10, 2022.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary, 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.¹¹ An individual is deemed to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹²

Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on

⁹ *Id.*

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.436(a)-(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020).

¹² *Id.* at Chapter 6.400.4a(3); *see also N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹³

Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁴

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 of recovery of the overpayment 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.¹⁵ Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP.¹⁶

In its preliminary overpayment determination, dated October 4, 2022, OWCP explained the importance of providing the completed Form OWCP-20 and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and other records to support income and expenses. It advised her that it would deny waiver if she failed to furnish the requested financial information in a timely manner. During the course of the precoupment hearing conducted on March 14, 2023, appellant was again instructed to fully complete and return Form OWCP-20 and include supporting documentation, as the form alone would be insufficient to substantiate her request for waiver of recovery of the overpayment.

Between October 30, 2022 and March 28, 2023 appellant submitted three completed OWCP-20 forms, each containing different totals for monthly income, monthly expenses, and additional assets. She also submitted a limited amount of financial documentation, including a checking account statement, OWCP benefit statement, a receipt for a printer, documents related to health insurance claims, and several unpaid bills and quotes. Taken together, this evidence is insufficient to determine that recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.¹⁷ Consequently, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides in pertinent part that, when an overpayment has been made to an individual who is entitled to further payments, the individual

¹³ 20 C.F.R. § 10.437(a)(b).

¹⁴ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁵ *Id.* at § 10.436.

¹⁶ 20 C.F.R. § 10.438; *V.B.*, Docket No. 20-0976 (issued January 26, 2021).

¹⁷ *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the 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.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$484.62 from appellant's continuing compensation payments every 28 days.

In setting the recovery rate at \$484.62, OWCP took into consideration the factors set forth at 20 C.F.R. § 10.441(a) in order to minimize hardship, while liquidating the debt, as appellant had not submitted sufficient documentation to assess her financial standing.¹⁹ Thus, it did not abuse its discretion in setting the rate of recovery.²⁰ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$484.62 every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$39,346.98 for the period July 1, 2015 through September 10, 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. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$484.62 from her continuing compensation payments every 28 days.

¹⁸ *Id.* at § 10.441(a); A.S., Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁹ *See A.V.*, Docket No. 22-1234 (issued May 4, 2023); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

²⁰ *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995); 20 C.F.R. § 10.441; *see A.F., id.*; *Donald R. Schueler*, *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 30, 2024
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