

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

E.H., Appellant)

and)

DEPARTMENT OF THE NAVY, PUGENT)
SOUND NAVAL SHIPYARD, Bremerton, WA,)
Employer)
-----)

**Docket No. 23-1087
Issued: January 8, 2024**

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 August 11, 2023 appellant filed a timely appeal from February 28 and June 2, 2023 merit decisions 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.

ISSUES

The issues are: (1) whether OWCP properly denied authorization for 600MG of IBUPROFEN, effective March 9, 2023; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,410.65, for the period October 1, 2017 through August 13, 2022, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss benefits, without an appropriate offset; (3) whether OWCP properly denied waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$645.00 from appellant's continuing compensation benefits every 28 days.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on a different issue.² The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On October 6, 2007 appellant, then a 55-year-old lead firefighter, filed an occupational disease claim (Form CA-2) alleging that he sustained a back injury due to factors of his federal employment. OWCP accepted the claim for permanent aggravation of degenerative disc disease at L3-4, L4-5, and L5-S1, and a disc protrusion at L4-5. It initially paid appellant wage-loss compensation on the supplemental rolls commencing November 1, 2007. OWCP paid him wage-loss compensation on the periodic rolls as of November 20, 2011.

Appellant completed claims for compensation (Form CA-7) in which he indicated that this retirement system was the Federal Employees Retirement System (FERS).

On June 27, 2022 OWCP provided SSA with a FERS/SSA dual benefits form. It requested that SSA provide appellant's SSA age-related retirement benefit rates with and without FERS offset from January 1, 2016 to June 17, 2022.

On August 2, 2022 OWCP received the completed dual benefits form, wherein SSA reported SSA age-related retirement benefit rates with a FERS offset and without a FERS offset. Beginning October 1, 2017, the SSA rate with FERS \$2,191.50, and without FERS was \$1,527.70; beginning December 1, 2017, the SSA rate with FERS \$2,235.30, and without FERS was \$1,558.20; beginning December 1, 2018, the SSA rate with FERS \$2,297.80, and without FERS was \$1,601.80; beginning December 1, 2019, the SSA rate with FERS \$2,334.50, and without FERS was \$1,627.40; beginning December 1, 2020, the SSA rate with FERS \$2,364.80, and without FERS was \$1,648.50; and beginning December 1, 2021, the SSA rate with FERS \$2,504.30, and without FERS was \$1,745.70.

In a preliminary overpayment determination dated September 30, 2022, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$41,410.65, because his compensation benefits had not been reduced for the period October 1, 2017 through August 13, 2022, by the portion of his SSA benefits that were attributable to his federal service.

OWCP calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. It then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$41,410.65. OWCP found that during the period October 1 through November 30, 2017 appellant received an overpayment in the amount of \$1,334.89; from December 1, 2017 through November 30, 2018 appellant received an overpayment of \$8,147.52; from December 1, 2018 through November 30, 2019 appellant received an overpayment of \$8,374.95; from December 1, 2019 through November 30, 2020 appellant received an overpayment of \$8,531.82; from December 1, 2020 through November 30, 2021 appellant received an overpayment of \$8,619.21; and from December 1, 2021 through August 13, 2022 appellant received an overpayment of \$6,402.25. It further made a preliminary determination that appellant was without fault in the creation of the overpayment because he was not aware and could not have reasonably been expected to know that he accepted compensation to

² Docket No. 10-1702 (issued March 24, 2011).

which he was not entitled. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. It specifically requested that he provide financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and other records in order to support income, expenses, and assets. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a prerecoumment hearing.

On October 20, 2022 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review. He argued that the overpayment would place him in financial stress from which he could not recover.

Appellant submitted an October 21, 2022 overpayment recovery questionnaire which listed monthly income of \$8,176.43, including SSA benefits of \$3,437.00 and other benefits of \$4,739.43. He listed monthly expenses of \$10,305.08, which included \$2,461.03 for rent or mortgage, \$1,200.00 for food, \$100.00 for clothing, \$900.00 for utilities, and \$800.00 for other expenses, and also listed other expenses to include a truck payment and credit card payments. Appellant listed assets of \$0.00 cash on hand, \$325.00 checking account balance, \$123.75 saving account balance, \$0.00 stocks and bonds, \$0.00 personal property, and \$436,000.00 as the value of his house and cars. He indicated that the overpayment would put him in financial distress from which he could not recover and that he was not aware of the overpayment until he received a letter from OWCP. However, appellant did not submit any financial documentation in support of his claimed income, expenses, and assets.

In a letter dated January 10, 2023, OWCP informed appellant that he was currently receiving medication through the pharmacy benefit manager (PBM) Optum, that was managing pharmacy benefits for injured employees covered under FECA, and that a drug formulary, or list of medications that a claimant was eligible to receive under FECA, had gone into effect on December 9, 2021. The PBM informed appellant that his usage of the prescription for 600MG of IBUPROFEN exceeded the cumulative days' supply limit and was not allowed under its formulary. It requested that he notify his physician to determine if there was an alternative medication available or, if not, to have his physician complete a Prior Authorization Request Form (PARF) to request continued use of the nonformulary medicine. The PBM indicated that it would allow the medication until March 8, 2023. After this date, unless a PARF is submitted and approved by Optum, OWCP would only be able to fill this medication if prescribed within formulary allowances for safety reasons.

On February 3, 2023 an OWCP hearing representative notified appellant that a hearing would be held on March 9, 2023 regarding the preliminary overpayment determination.

By decision dated February 28, 2023, OWCP denied authorization for IBUPROFEN TAB 600MG, effective March 9, 2023. It explained that appellant was afforded 30 days to respond or have his provider submit a PARF; however, no medical evidence was received in response to its January 10, 2023 letter.

By decision dated June 2, 2023, OWCP's hearing representative finalized the preliminary overpayment determination,³ finding that appellant had received an overpayment of compensation in the amount of \$41,410.65, for the period October 1, 2017 through August 13, 2022, because it failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It determined that he was without fault in the creation of the overpayment; however, it denied waiver of recovery of the overpayment of compensation based on the financial information provided. OWCP determined that the overpayment would be recovered by deducting \$645.00 from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA⁴ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening in the amount of monthly compensation.⁵ In general, drugs and medications which are necessary to treat an injury or occupational disease may be purchased at OWCP's expense on the recommendation of the attending physician. These include prescription as well as nonprescription medications.⁶

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.⁷ The only limitation on OWCP's authority is that of reasonableness.⁸ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied authorization for 600MG of IBUPROFEN, effective March 8, 2023.

By letter dated January 10, 2023, the PBM informed appellant that 600MG of IBUPROFEN was not allowed under its formulary of medications that a claimant was eligible to receive under FECA. It requested that he ask his physician if there was alternative medication

³ OWCP's hearing representative converted the request for a prerecoument hearing to a review of the written evidence.

⁴ *Supra* note 1.

⁵ 5 U.S.C. § 8103; *see T.W.*, Docket No. 23-05094 (issued July 11, 2023); *L.W.*, Docket No. 21-0607 (issued October 18, 2022); *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3a (October 1995).

⁷ *C.Y.*, Docket No. 21-0335 (issued November 7, 2022); *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

⁸ *M.S.*, Docket No. 22-0113 (issued June 7, 2022); *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

available or, if not, have the physician complete a PARF to request continued use of 600MG of IBUPROFEN.

No documentation was received from the physician pertaining to the PBM request.

As noted, OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief, and the only limitation on OWCP's authority is that of reasonableness.⁹ It has the general objective of fully ensuring that an employee recovers from his or her injury possible, in the shortest amount of time, and has broad administrative discretion in choosing means to achieve this goal.¹⁰ Accordingly, the Board finds that OWCP properly denied authorization for 600MG of IBUPROFEN.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹¹ 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.¹²

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.¹³ FECA Bulletin No. 97-09 provides 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,410.65, for the period October 1, 2017 through August 13, 2022, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset.

In its June 2, 2023 decision, OWCP found that an overpayment of compensation was created for the period October 1, 2017 through August 13, 2022, based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits

⁹ See *R.B.*, Docket No. 21-0598 (issued May 19, 2022).

¹⁰ See *R.C.*, *supra* note 7; *M.G.*, Docket No. 18-0099 (issued April 26, 2018).

¹¹ 5 U.S.C. § 8102(a).

¹² *Id.* at § 8116.

¹³ 20 C.F.R. § 10.421(d); see *S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

¹⁴ FECA Bulletin No. 97-09 (issued February 3, 1997).

attributable to federal service for the same period.¹⁵ The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period October 1, 2017 through August 13, 2022. The Board therefore finds that fact of overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing October 1, 2017 through August 13, 2022. OWCP provided its calculations for each relevant period based on an SSA worksheet and in its September 30, 2022 preliminary overpayment determination. OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$41,410.65.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2017 through August 13, 2022 and finds that an overpayment of compensation in the amount of \$41,410.65 was created.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁶ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁷

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.¹⁸ 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 notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁹

¹⁵ 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

¹⁶ 5 U.S.C. § 8129.

¹⁷ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁸ 20 C.F.R. § 10.436a(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 2018).

¹⁹ *Id.* at § 10.437(a)(b).

OWCP regulations provide 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.²⁰

ANALYSIS -- ISSUE 3

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

The fact that OWCP may have been negligent in the creation of the overpayment does not entitle appellant to waiver of recovery of the overpayment.²¹ As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²² In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.²³

In its preliminary overpayment determination dated September 30, 2022, OWCP explained the importance of providing the completed Form OWCP-20 and financial information. It advised appellant that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. While appellant completed the form, he did not submit supporting financial documentation. The evidence of record is, therefore, insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁴

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁵

LEGAL PRECEDENT -- ISSUE 4

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

²⁰ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²¹ *See L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

²² 5 U.S.C. § 8129.

²³ 20 C.F.R. § 10.436.

²⁴ *Id.* at § 10.438.

²⁵ *See E.T.*, Docket No. 22-0234 (issued August 17, 2022); *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

²⁶ 20 C.F.R. § 10.441; *see M.M.*, Docket No. 23-0129 (issued May 19, 2023); *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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 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 hardship.²⁷

When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines. The Federal (FECA) Procedure Manual provides that, in these instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount, until the balance of the overpayment is paid in full.²⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$645.00 from appellant's continuing compensation payments every 28 days.

Appellant submitted a Form OWCP-20; however, he did not provide supporting financial documentation. OWCP's procedures provide that when an individual fails to provide requested information on income, expenses, and assets, OWCP should set the rate of recovery at 25 percent of the 28-day net compensation amount, until the balance of the overpayment is paid in full.²⁹ Based on the evidence of record, OWCP gave due regard to the relevant factors noted above and therefore did not abuse its discretion in setting the rate of recovery.³⁰ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$645.00 every 28 days.³¹

CONCLUSION

The Board finds that OWCP properly denied authorization for 600MG of IBUPROFEN effective March 8, 2023. The Board further finds that an overpayment of compensation was created in the amount of \$41,410.65 for the period October 1, 2017 through August 13, 2022, for which he was without fault, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery by deducting \$645.00 from appellant's continuing compensation payments every 28 days.

²⁷ *Id.*

²⁸ *Supra* note 18 at Chapter 6.500.8c(1) (September 2018).

²⁹ *P.M.*, Docket No. 22-1059 (issued April 28, 2023).

³⁰ *Id.*

³¹ *See M.W.*, Docket No. 22-0791 (issued November 10, 2022); *D.L.*, Docket No. 20-0716 (issued June 1, 2022); *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 28 and June 2, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 8, 2024
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