

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

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<b>L.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1103</b>
	)	<b>Issued: March 22, 2024</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>AGENCIES, Aviano, Italy, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 7, 2018 appellant filed a timely appeal from an April 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015 because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the April 19, 2018 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

determined that appellant was at fault in the creation of the overpayment and, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On January 31, 2011 appellant, then a 61-year-old English/Second Language teacher, filed a traumatic injury claim (Form CA-1) alleging that on January 28, 2011 she injured her lower back, neck, and head when she fell down a flight of stairs while in the performance of duty. Her retirement system coverage was noted on the claim form as Federal Employees Retirement System (FERS). Appellant stopped work on the date of injury. OWCP subsequently accepted her claim for crushing injuries of multiple sites of the trunk, cortex contusion without open wound, unspecified state of consciousness, lumbar sprain, lumbago, and brain stem contusion with concussion, but without open wound. It paid appellant wage-loss compensation on the supplemental rolls, effective March 15, 2011, and on the periodic rolls, effective October 23, 2011.

On March 25, 2015 OWCP provided SSA with a FERS/SSA dual benefits calculation form requesting information concerning a potential overpayment.

On July 7, 2015 SSA completed the FERS/SSA dual benefits calculation form, reporting appellant's SSA age-related retirement benefit rates with a FERS offset and without a FERS offset as follows: beginning March 2011, the SSA rate with FERS was \$1,309.30 and without FERS was zero; beginning December 2011, the SSA rate with FERS was \$1,356.40 and without FERS was zero; beginning January 2012, the SSA rate with FERS was \$1,367.30 and without FERS was zero; beginning December 2012, the SSA rate with FERS was \$1,390.50 and without FERS was zero; beginning December 2013, the SSA rate with FERS was \$1,411.30 and without FERS was zero; and beginning December 2014, the SSA rate with FERS was \$1,435.20 and without FERS was zero. In correspondence dated August 24, 2015, SSA informed OWCP that appellant had worked for the Federal Government from 1988 through 2013. It reported no other employer.

In a letter dated January 19, 2016, OWCP informed appellant that the portion of SSA age-related retirements benefits attributable to her federal service would be deducted from her 28-day periodic rolls compensation payments, and that an overpayment of compensation could exist. It noted that her new net compensation payment every 28 days would be \$1,324.80.

On March 9, 2018 OWCP prepared a FERS offset overpayment calculation worksheet, based on the benefit rates provided by SSA, wherein it noted the calculations of appellant's overpayment of compensation from March 15, 2011 through December 12, 2015. It determined that: for the period March 1 through November 30, 2011 appellant received an overpayment of \$11,265.74; for the period December 1 through 31, 2011 she received an overpayment of \$1,386.21; for the period January 1 through November 30, 2012 appellant received an overpayment of \$15,099.30; for the period December 1, 2012 through November 30, 2013 she received an overpayment of \$16,731.84; for the period December 1, 2013 through November 30, 2014 appellant received an overpayment of \$16,982.13; and for the period December 1, 2014 through December 12, 2015 she received an overpayment of \$17,837.49. The total overpayment was determined to be \$79,302.71.

On March 9, 2018 OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. It found her at fault in the creation of the overpayment because she knowingly accepted dual benefits for this period, which were subject to offset. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method. It further requested financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support her reported income and expenses. OWCP 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 prerecoupment hearing.

By decision dated April 19, 2018, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It determined that she was at fault in the creation of the overpayment and, was thereby precluded from waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$500.00 from appellant's continuing FECA 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.<sup>3</sup> However, 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.<sup>4</sup>

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.<sup>5</sup> 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 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.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015 because she concurrently

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<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

<sup>6</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see P.G.*, Docket No. 13-0589 (issued July 9, 2013).

received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. As explained, a claimant cannot receive both wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.<sup>7</sup> The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to her federal service during the period while she was receiving wage-loss compensation. Consequently, the fact of overpayment has been established.<sup>8</sup>

To determine the amount of the overpayment, the portion of SSA benefits that were attributable to federal service must be calculated. OWCP received a completed dual benefit 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 specific periods from March 15, 2011 through December 12, 2015. OWCP calculated the amount that should have been offset during the relevant period based on the information provided by SSA.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that an overpayment of 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 be against equity and good conscience.<sup>10</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>11</sup>

Section 10.433(a) of OWCP's regulations provides that OWCP:

“[m]ay consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient

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<sup>7</sup> See *supra* notes 5 and 6.

<sup>8</sup> See *A.S.*, Docket No. 17-0606 (issued December 21, 2017); *I.H.*, Docket No. 15-1578 (issued November 19, 2015).

<sup>9</sup> See *A.S., id.*; *I.H., id.*

<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefit.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

‘(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

‘(2) Failed to provide information which he or she knew or should have known to be material; or

‘(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)’<sup>12</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

As noted above, to determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>14</sup> Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, she could not reasonably have known during the relevant period that her concurrent receipt of SSA age-related retirement benefits and FECA wage-loss compensation constituted an actual prohibited dual benefit.<sup>15</sup>

The Board thus finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015.

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<sup>12</sup> 20 C.F.R. § 10.433(a); see *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

<sup>13</sup> *Id.* at § 10.433(b).

<sup>14</sup> *Id.*

<sup>15</sup> See *R.C.*, Docket No. 14-1383 (issued December 5, 2014) (OWCP erred when it determined that the claimant was at fault in the creation of an overpayment because it did not show that he knew or should have known that he impermissibly accepted dual benefits of SSA age-related retirement benefits and FECA wage-loss compensation).

As appellant was without fault in the creation of the overpayment, the case shall be remanded for OWCP to issue a *de novo* decision on waiver and, if warranted, recovery of the overpayment.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$79,302.70 for the period March 15, 2011 through December 12, 2015 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 22, 2024  
Washington, DC

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

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

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

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<sup>16</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.