

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.

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

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$52,344.17, for the period September 1, 2015 through August 13, 2022, for which she was without fault, because she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation 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 \$480.22 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on different issues.⁴ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 9, 2008 appellant, then a 55-year-old laboratory technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her neck, shoulders, head, right knee, and left forearm that day when her foot became caught on the lip of a cooler, causing her to fall forward while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant's retirement coverage was under the Federal Employees Retirement System (FERS). By decision dated September 8, 2008, OWCP accepted the claim for thoracic and lumbar sprains of the back, and cervical subluxations at C1 and C6. It paid appellant wage-loss compensation on the supplemental rolls, effective August 18, 2008, and on the periodic rolls, effective September 28, 2008.

On January 29, 2016 OWCP provided SSA with a FERS/SSA dual benefits calculation form.

On March 29, 2016 SSA returned the dual benefits calculation form, noting that appellant was only receiving SSA disability insurance benefits (DIB) and indicated no offset for "exclusion."

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 27, 2023 decision, appellant submitted additional evidence to OWCP. 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.*

⁴ Docket No. 10-1127 (issued March 28, 2011); Docket No. 13-1866 (issued March 7, 2014).

On June 27, 2022 OWCP provided SSA with another FERS/SSA dual benefits calculation form.

On August 9, 2022 SSA completed the FERS/SSA dual benefits form, which reported appellant's SSA age-related retirement benefit rates with a FERS offset and without a FERS offset from September 2015 through June 2022. Beginning September 2015, the SSA rate with FERS was \$918.00 and without FERS was \$363.90; beginning December 2015, the SSA rate with FERS was \$918.00 and without FERS was \$363.90; beginning December 2016, the SSA rate with FERS was \$920.70 and without FERS was \$364.90; beginning December 2017, the SSA rate with FERS was \$939.10 and without FERS was \$372.10; beginning September 2018, the SSA rate with FERS was \$1,013.90 and without FERS was \$372.10; beginning December 2018, the SSA rate with FERS was \$1,042.20 and without FERS was \$382.50; beginning December 2019, the SSA rate with FERS was \$1,058.80 and without FERS was \$388.60; beginning December 2020, the SSA rate with FERS was \$1,072.50 and without FERS was \$393.60; and beginning December 2021, the SSA rate with FERS was \$1,135.70 and without FERS was \$416.80.

In a letter dated August 25, 2022, OWCP advised appellant that, effective September 10, 2022, her FECA wage-loss compensation benefits would be offset by her SSA age-related retirement benefits every 28 days, in the amount of \$663.60. Appellant's new net wage-loss compensation payment every 28 days would be \$1,835.46.

On September 8, 2022 OWCP prepared a FERS offset overpayment calculation worksheet wherein it explained the calculation of appellant's SSA/FERS offset overpayment for the period September 1, 2015 through August 13, 2022 in the total amount of \$52,344.17.

In a preliminary overpayment determination dated October 26, 2022, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$52,344.17 for the period September 1, 2015 through August 13, 2022 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It found that she 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 a waiver of the overpayment. It further requested that she provide 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. Additionally, OWCP further provided an overpayment action request form and 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 prerecouplement hearing.

On November 2, 2022 appellant requested a prerecouplement hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment because she was found to be without fault in the creation of the overpayment. Appellant also submitted a completed Form OWCP-20 on November 20, 2022 with supporting financial documentation. She reported monthly income of \$4,783.00 and monthly expenses of \$5,320.00. Appellant further identified assets totaling \$507,033.00 which included her home, vehicles, and retirement accounts.

A prerecoupment hearing was held on April 13, 2023.

Following the hearing, appellant submitted additional supporting financial documentation and April 27, 2023 correspondence from SSA referencing retirement, survivors, and disability insurance, indicating that she was previously overpaid in the amount of \$59,588.20 from September 11, 2015 through March 2017 due to an OWCP offset as she filed for SSA retirement benefits in March 2017. The correspondence further noted that, beginning in March 2017, SSA withheld her SSA retirement benefits in its entirety to collect towards the overpayment, which was fully recovered in May 2021.

By decision dated June 27, 2023, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$52,344.17 for the period September 1, 2015 through August 13, 2022 as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$480.22 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 of an employee resulting from personal injury sustained while in the performance of his or her federal employment.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

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to federal service of the employee.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, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997).

The evidence of record indicates that, while appellant was receiving compensation for wage loss under FECA, she also was receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁹ Consequently, the fact of overpayment has been established.¹⁰

With regard to the period and amount of the overpayment, as previously noted, OWCP is required 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.¹¹ On March 29, 2016 SSA noted in the FERS/SSA dual benefits calculation form that appellant was only receiving SSA disability benefits that she was entitled to and indicated that no offset applied. However, on August 8 and September 9, 2022, SSA completed a FERS/SSA dual benefits calculation form reporting that appellant had received SSA age-related retirement benefits subject to SSA/FERS offset from September 1, 2015 through August 13, 2022.

OWCP has not adequately explained how the overpayment was determined in light of the discrepancies in the evidence as to when appellant began receiving SSA age-related retirement benefits.¹² As the case record remains unclear as to how OWCP determined the period and amount of the overpayment, the Board is unable to adequately review this aspect of the case.¹³ The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.¹⁴

Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP shall obtain clarification from SSA regarding appellant's SSA age-related retirement benefit rates with and without FERS for the period in question, and also whether the prior overpayment affects this one. It shall then determine the amount of the overpayment of compensation and issue a new preliminary overpayment determination with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information.¹⁵ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁶

⁹ See *E.M.*, Docket No. 21-1231 (issued April 19, 2023); *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹⁰ *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

¹¹ 20 C.F.R. § 10.421(d).

¹² See *R.E.*, Docket No. 19-1583 (issued May 27, 2020); *E.T.*, Docket No. 19-1046 (issued December 31, 2019).

¹³ See *L.D.*, Docket 20-1344 (issued March 9, 2023). See also *S.H.*, Docket No. 20-1189 (issued January 27, 2021).

¹⁴ *R.K.*, Docket No. 21-0873 (issued May 8, 2023).

¹⁵ *N.S.*, Docket No. 23-0081 (issued May 4, 2023).

¹⁶ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation because she concurrently received and SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. The Board further finds that this case is not in posture for decision with respect to the period and amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 13, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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