

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

M.H., Appellant

and

**DEPARTMENT OF THE ARMY, DEFENSE
LANGUAGE INSTITUTE,
Presidio of Monterey, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 25-0065
Issued: January 10, 2025**

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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 28, 2024 appellant, through counsel, filed a timely appeal from a September 23, 2024 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 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 September 23, 2024 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 \$20,718.09, for the period January 2, 2021 through October 8, 2022, for which he was without fault, because he concurrently received FECA wage-loss compensation 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 it properly required recovery of the overpayment by deducting \$461.54 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On April 9, 2016 appellant, then a 66-year-old assistant professor, filed a traumatic injury claim (Form CA-1) alleging that on March 30, 2016 he injured his face, back, and knees when he fell as the chair he attempted to sit on rolled back while in the performance of duty. OWCP initially accepted the claim for lumbar strain and later expanded its acceptance of the claim to include spinal stenosis with and without neurogenic claudication, lumbar radiculopathy, and intervertebral disc disorder with myelopathy of the lumbar region. It paid appellant wage-loss compensation on the supplemental rolls commencing January 2, 2021, and on the periodic rolls commencing January 2, 2022.

On August 19, 2022 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

On September 21, 2022 OWCP received a completed FERS/SSA dual benefits form, wherein SSA indicated appellant's SSA age-related retirement benefit rates with FERS and without FERS. Beginning December 2020, the SSA rate with FERS was \$1,078.70 and without FERS was \$131.40. Beginning December 2021, the SSA rate with FERS was \$1,142.30 and without FERS was \$139.10.

In a preliminary overpayment determination dated December 12, 2022, OWCP advised appellant that he had received an overpayment of compensation in the amount of \$20,718.09 for the period January 2, 2021 through October 8, 2022, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation based on his federal service, without an appropriate offset. It provided a FERS offset overpayment calculation, in which it used the information provided by SSA to calculate the 28-day FERS offset for the relevant periods. OWCP explained that from January 2 through November 30, 2021 appellant received an overpayment in the amount of \$10,339.47, and from December 1, 2021 through October 8, 2022 appellant received an overpayment in the amount of \$10,318.62. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised him that he could request waiver of recovery of the overpayment. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records that support income and expenses. Additionally, it provided an overpayment action request form and further notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoupment hearing.

On December 19, 2022 appellant, through counsel, requested a prerecoupment hearing and waiver of recovery of the overpayment.

Appellant submitted a completed Form OWCP-20 dated December 27, 2022, wherein he reported monthly income and expenses. He also identified his assets. OWCP received copies of bank statements, medical expenses, telephone, cable, and utility bills, a mortgage statement, vehicle registrations, property tax statements, an AAA membership statement, insurance premium notices, and credit card statements.

A prerecoumpment hearing was held on June 2, 2023 before a representative of OWCP's Branch of Hearings and Review.

On August 13, 2023 OWCP received a completed FERS/SSA dual benefits form, wherein SSA reported appellant's SSA age-related retirement benefit rates with FERS and without FERS. Beginning December 2020, the SSA rate with FERS was \$1,078.50 and without FERS was \$115.10. Beginning December 2021, the SSA rate with FERS was \$1,142.10 and without FERS was \$121.80.

By decision dated August 16, 2023, OWCP's hearing representative vacated the December 12, 2022 preliminary overpayment determination and remanded the case to OWCP to obtain clarification from SSA regarding the differing amounts of SSA benefits with FERS and without FERS which it had reported in the September 21, 2022 and August 13, 2023 FERS/SSA dual benefits forms.

On August 30, 2023 OWCP requested clarification from SSA.

On December 28, 2023 OWCP received a completed FERS/SSA dual benefits form, wherein SSA reported appellant's SSA age-related retirement benefit rates with FERS and without FERS. Beginning December 2020, the SSA rate with FERS was \$1,078.70 and without FERS was \$131.40. Beginning December 2021, the SSA rate with FERS was \$1,142.30 and without FERS was \$139.10.

By letter dated February 1, 2024, OWCP requested additional clarification from SSA.

On February 15, 2024 OWCP received a response from SSA that the completed FERS/SSA dual benefits form dated August 12, 2023 was incorrect because when the calculation was performed, some of appellant's federal earnings were not removed from the earning record, the wrong effective date was used, and it had failed to use appellant's monthly benefit amount before deductions for items such as supplemental medical insurance. It also noted that its responses dated September 21, 2022 and December 28, 2023 were final and accurate.

On March 25, 2024 OWCP issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$20,718.09 for the period January 2, 2021 through October 8, 2022, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It provided a FERS offset overpayment calculation, using the information provided by SSA on September 18, 2022, December 28, 2023, and February 15, 2024 to calculate the 28-day FERS offset for the relevant periods. OWCP found that from January 2 through November 30, 2021 appellant received an overpayment in the amount of \$10,339.47, and from December 1, 2021 through October 8, 2022 appellant received an overpayment in the amount of \$10,318.62. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment and requested that he complete an overpayment action request form and Form OWCP-20 and submit supporting financial documentation. Additionally, OWCP notified

appellant that he could request a final decision based on the written evidence or a prerecoupment hearing within 30 days.

On April 9, 2024 appellant, through counsel, requested a prerecoupment hearing and waiver of recovery of the overpayment.

Appellant submitted a completed Form OWCP-20 dated April 15, 2024, listing total monthly income of \$7,248.79 and total monthly expenses of \$7,885.62. He identified assets of \$105.00 cash on hand, \$4,146.48 in a checking account, and \$10,205.74 in a savings account for total assets of \$14,457.22.⁴ OWCP received updated copies of medical expenses, telephone, cable, and utility bills, a mortgage statement, vehicle registrations and payments, property tax statements, insurance premium notices, and credit card statements.

A prerecoupment hearing was conducted on July 8, 2024.

On August 5 and 8, 2024, OWCP received additional updated financial documentation from appellant, including a June 26, 2024 bank statement, which indicated a checking account balance of \$7,724.83, and a savings account balance of \$8,281.00.

By decision dated September 23, 2024, an OWCP hearing representative finalized the March 25, 2024 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$20,718.09 for the period January 2, 2021 through October 8, 2022. He found that he was without fault in the creation of the overpayment but denied waiver of the recovery of the overpayment. The hearing representative directed that the overpayment amount be recovered by deducting \$461.54 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.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 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

⁴ On the Form OWCP-20, appellant made a notation that the savings account was "for my funeral."

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

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).

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 \$20,718.09 for the period January 2, 2021 through October 8, 2022, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

As previously noted, a claimant cannot receive both FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period, without an appropriate offset.⁹ The evidence of record establishes that appellant concurrently received wage-loss compensation benefits and SSA age-related retirement benefits that were attributable to federal service during the period January 2, 2021 through October 8, 2022. Consequently, the fact of overpayment has been established.¹⁰

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 a dual benefits form from SSA regarding potential dual benefits. The SSA provided appellant's SSA age-related retirement benefit rates with FERS and without FERS for the period January 2, 2021 through October 8, 2022. OWCP explained its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 2, 2021 through October 8, 2022 and finds that OWCP properly calculated an overpayment of compensation in the amount of \$20,718.09.

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."¹¹ Section 10.438 of OWCP 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹²

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

⁹ *Id.*

¹⁰ *See* L.B., Docket No. 19-1322 (issued January 27, 2020).

¹¹ 5 U.S.C. § 8129.

¹² 20 C.F.R. § 10.438.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹³

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.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

OWCP's procedures provide that the 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 Assets do not include the value of household furnishings (primary residence), apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income-producing property, if the income from such property has been included in comparing income and expenses.¹⁹

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁰

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience because his reported assets

¹³ *Id.* at §§ 10.434-10.437.

¹⁴ *Id.* at § 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 *Id.* at Chapter 6.400.4b(3)(c).

²⁰ 5 U.S.C. § 8129.

of \$14,457.22 exceed the resource base of \$6,200.00 for an individual with no dependents or \$10,300.00 for an individual with dependents as provided by OWCP's procedures.²¹

As appellant failed to establish that recovery of the overpayment of compensation would either 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.²²

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.²³

Section 10.441(a) of OWCP's regulations²⁴ 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 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."²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$461.54 from appellant's continuing compensation payments every 28 days.

In determining whether appellant could repay the overpayment through \$461.54 deductions from continuing compensation payments, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion.²⁶ The Board thus finds that OWCP

²¹ *Supra* note 17.

²² Although appellant claimed that his savings account balance of \$10,205.74 was "for my funeral," he did not submit documentation of a prepaid burial contract or any other evidence which would permit exclusion of the savings account balance as an asset. *Supra* note 20. Moreover, his June 26, 2024 bank account statement reflected a checking account balance of \$7,724.83 and a savings account balance of \$8,281.00, for a total of \$16,005.83, which also exceeds the resource base. *Supra* note 17.

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

²⁴ *Id.* at § 10.441(a).

²⁵ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁶ *See J.K.*, Docket No. 20-1190 (issued January 8, 2021).

properly required recovery of the \$20,718.09 overpayment at the rate of \$461.54 from his continuing compensation payments every 28 days.²⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$20,718.09 during the period January 2, 2021 through October 8, 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 of the overpayment by deducting \$461.54 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁷ See *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).