

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

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N.B., Appellant

and

U.S. POSTAL SERVICE, WILLIAMSBRIDGE  
STATION, Bronx, NY, Employer

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**Docket No. 18-0795**  
**Issued: January 4, 2019**

*Appearances:*  
Thomas S. Harkins, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 5, 2018 appellant, through counsel, filed a timely appeal from a September 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received a \$69,227.73 overpayment of compensation as he concurrently received Social Security

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

Administration (SSA) age-based benefits while receiving FECA benefits for the period August 1, 2011 to December 10, 2016; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$500.00 per month from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On May 30, 2008 appellant, then a 60-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he suffered various injuries as the result of an assault by a postal customer. OWCP accepted the claim for brachial radiculitis or neuritis, right shoulder traumatic arthropathy, postconcussion syndrome, other bilateral shoulder region affections, headache, cervicalgia, and neck and lumbar sprains. Appellant stopped work on May 30, 2008 and OWCP placed him on the periodic rolls for temporary total disability effective November 7, 2008.

In a form dated December 14, 2016, the SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) for the periods August 11, 2011 to December 10, 2016. It provided the amount that he received in retirement benefits including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including FERS, the SSA indicated that appellant was entitled to a monthly payment of \$1,667.90 effective August 2011, \$1,727.80 effective December 2011, \$2,083.90 effective October 2013, \$2,084.70 effective December 2013, \$2,120.10 effective December 2014 and December 2015, and \$2,126.40 effective December 2016. Without FERS, appellant was entitled to a monthly payment of \$751.50 effective August 2011, \$778.50 effective December 2011, \$925.40 effective October 2013, \$939.20 effective December 2013, \$955.10 effective December 2014 and December 2015, and \$957.90 effective December 2016.

In a January 4, 2017 letter, OWCP adjusted appellant's compensation to offset the portion of his SSA retirement benefits attributable to his federal service. It indicated that he would receive net compensation of \$1,760.19 every 28 days.

In a preliminary determination dated January 9, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$69,227.73 because it had failed to reduce his compensation benefits for the period August 1, 2011 to December 10, 2016 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount for the period in question to find a total overpayment of \$69,227.73. It further made a preliminary determination that appellant was with fault in the creation of the overpayment as he was aware or reasonably should have been aware that the payments he received were not properly offset. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On January 12, 2017 appellant requested a prerecoupment hearing by a hearing representative of OWCP's Branch of Hearings and Review. He also requested waiver of recovery of the overpayment and submitted one-page overpayment recovery questionnaire noting no assets.

On February 8, 2017 OWCP received appellant's completed overpayment recovery questionnaire listing monthly income of \$4,471.19 for him and his wife. A separate page detailed income of \$1,965.00 in SSA benefits and \$1,760.90 FECA benefits for appellant and \$748.00 SSA benefits for his wife, resulting in total income of \$4,473.19. Appellant noted no assets and that he lived from disability check to disability check. He listed monthly expenses of \$50.00 to offset an SSA overpayment, \$1,471.82 for mortgage, \$151.28 for gas, \$120.15 for electricity, \$126.42 for water system, \$119.77 for internet phone, \$351.77 for cable, \$81.04 for cellular phone, \$98.43 for Sirius XM radio, \$95.29 for American Family Home Insurance, \$90.00 for Campanion Life Insurance, \$400.00 for food and house and supplies, \$211.51 for Macy's credit card, \$250.00 for Sears medical card, \$79.55 for Physician Mutual, \$122.00 for wife's Medicare insurance, \$133.00 for supplementary Mutual of Omaha Insurance, \$122.00 for his Medicare insurance, \$418.35 for his FECA health care deduction, and \$375.00 for clothing. Appellant reported biweekly expense of \$45.00 for trash, quarterly expenses \$119.28 for John Hancock Life Insurance, \$129.79 and \$175.55 for CUNA Life insurance, \$83.88 for service agreement contract, and \$136.71 for Tru Surge Life Insurance, biyearly expense of \$235.64 for landscaping, and yearly expenses of \$1,487.00 for home owners insurance, \$310.00 for home owners association fee and \$1,144.37 for property tax, resulting in total monthly expenditure of \$5,383.22.

A telephonic prerecoupment hearing was held on July 12, 2017. Appellant reiterated his request for waiver of recovery of the overpayment and the hearing representative held the case record open for 30 days for the submission of additional evidence including bank statements.

On August 10 and 14, 2017 OWCP received copies of bank statements for two accounts. Balances for one bank account ranged from \$5,019.02 to \$6,459.66 for the period March 31 to July 10, 2017 and the second account ranged from -\$44.32 to \$2,318.31 for the period January 4 to July 7, 2017.

By decision dated September 25, 2017, the hearing representative affirmed and modified the decision of OWCP. She found an overpayment of FECA compensation benefits in the amount of \$69,227.73 for the period August 1, 2011 to December 10, 2016 because OWCP failed to offset appellant's compensation payments for the portion of his SSA retirement benefits that were attributable to his federal service. The hearing representative found that he was not with fault in the creation of the overpayment, but denied waiver of recovery as his income exceeded his expenses. She excluded duplicate expenses for property taxes and home insurance as these expenses were included in mortgage escrow payments. The hearing representative reduced credit card expenses from the full amount to the minimum monthly payment of \$27.00 and \$25.00. With respect to the clothing monthly expense of \$375.00, she found that this appeared to be covered in credit card expense and was otherwise not supported. The hearing representative noted that appellant's Direct TV bill varied monthly from \$225.00 to \$351.00. She further found that monthly grocery expenses of \$400.00 were reasonable. The hearing representative found that the evidence supported appellant's monthly income of \$4,473.19 and monthly expenses of \$3,420.00. A review of bank statements from two accounts, revealed an approximate average balance of \$500.00 to \$2,000.00 and the second account had an average balance of \$6,000.00 to 8,000.00.

Thus, the hearing representative found that appellant had monthly discretionary income of “approximately \$1,000.00” and did not qualify for hardship waiver. Lastly, she determined that recovery of the overpayment would be made by deducting \$500.00 per month from his 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 duty.<sup>3</sup> 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 the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-based benefits that are attributable to federal service of the employee.<sup>5</sup> 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.<sup>6</sup>

Section 404.310 of SSA regulations provides that entitlement to SSA age-based compensation begins at 62 years.<sup>7</sup> Section 404.409 of SSA regulations provides that for individuals born between January 2, 1943 and November 1, 1955, full retirement age is 66 years.<sup>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$69,227.73.

OWCP found that an overpayment of compensation was created in the amount of \$69,227.73 for the period August 1, 2011 to December 10, 2016. The overpayment was based on the evidence received from SSA with respect to benefits paid to appellant. The record indicates that while appellant was receiving compensation for total disability under FECA he concurrently received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.<sup>9</sup> The

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116.

<sup>5</sup> 20 C.F.R. § 10.421(d); *see C.S.*, Docket No. 17-0167 (issued April 11, 2018); *L.J.*, 59 ECAB 264 (2007).

<sup>6</sup> FECA Bulletin No. 97-09 (issued February 3, 1997).

<sup>7</sup> 20 C.F.R. § 404.310.

<sup>8</sup> *Id.* at § 404.409(a).

<sup>9</sup> *Supra* notes 5 and 6.

information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period August 1, 2011 to December 10, 2016.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service were calculated. OWCP received evidence from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing in August 1, 2011 to December 10, 2016. OWCP provided its calculations for each relevant period based on the SSA worksheet.<sup>10</sup> Counsel has not contested the amount of the \$69,227.73 overpayment and no contrary evidence has been provided to show that OWCP's calculations were incorrect. The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2011 to December 10, 2016 and finds that an overpayment of compensation in the amount of \$69,227.73 was created.

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

Section 8129 of FECA provides that an overpayment must be recovered 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."<sup>11</sup> Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>12</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her 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.<sup>13</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.<sup>14</sup> Nonliquid 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 and furnishings/supplies, vehicle(s) (*i.e.*, any vehicles above the two allowed per immediate family), jewelry, and artwork.<sup>15</sup>

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<sup>10</sup> See *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>11</sup> 5 U.S.C. § 8129(a)-(b).

<sup>12</sup> See *L.S.*, 59 ECAB 350 (2008).

<sup>13</sup> 20 C.F.R. § 10.436. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if the monthly income does not exceed monthly expense by more than \$50.00. Assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

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

<sup>15</sup> *Id.*

Section 10.437 provides that 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 attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>16</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>17</sup>

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

The Board finds that OWCP properly denied waiver of recovery of the \$69,227.73 overpayment of compensation.

The hearing representative found that appellant was without fault in the creation of the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or would be against equity and good conscience. 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 resource base as determined by OWCP's procedures.<sup>18</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses or that his assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics. OWCP procedures provide that 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.<sup>19</sup> Appellant submitted an overpayment recovery questionnaire on February 8, 2017 and copies of bank statements for two accounts on August 10 and 14, 2017.

The hearing representative determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. Appellant asserted that he had a monthly income of \$4,473.19 and monthly expenses of \$5,383.22. OWCP excluded his expenses for property taxes and home insurance as they were already accounted for in his mortgage and clothing expense as covered by his credit card.<sup>20</sup> The hearing representative also divided outstanding credit card payments by 12 to obtain monthly amounts and determined that the minimum monthly

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<sup>16</sup> 20 C.F.R. § 10.437.

<sup>17</sup> *Id.* at § 10.437(b)(1).

<sup>18</sup> *Id.* at § 10.436.

<sup>19</sup> *Supra* note 13.

<sup>20</sup> *Supra* note 13 at Chapter 6.200.6(a)(3) (June 2009); *see also J.W.*, Docket No. 16-1355 (issued January 10, 2017).

payments due of \$24.00 and \$55.00, respectively.<sup>21</sup> She properly determined that appellant's monthly expenses totaled \$3,420.00.

The hearing representative found that appellant's monthly income of \$4,473.19 and his monthly expenses of \$3,420.00 yielded a monthly surplus amount of "approximately \$1,000.00." An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>22</sup> As appellant's current income exceeds his ordinary and necessary living expenses by at least \$1,000.00, he does not need substantially all of his income for ordinary and necessary living expenses.<sup>23</sup>

Additionally, the evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt.<sup>24</sup> Consequently, OWCP properly denied waiver of recovery of the overpayment.

Counsel asserts that repayment would cause financial hardship and was supported by the record. However, as found by the Board, the evidence does not demonstrate that appellant would experience financial hardship repaying the overpayment.

### **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.<sup>25</sup>

Section 10.441(a) of the regulations provides that 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.<sup>26</sup>

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<sup>21</sup> See *N.A.*, Docket No. 17-0794 (issued July 3, 2018).

<sup>22</sup> *Supra* note 13 at Chapter 6.200.6(a)(1); see also *Desiderio Martinez*, 55 ECAB 336 (2004).

<sup>23</sup> As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether his assets exceed the allowable resource base. See *J.W.*, *supra* note 20.

<sup>24</sup> 20 C.F.R. § 10.437.

<sup>25</sup> See *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>26</sup> 20 C.F.R. § 10.441(a).

**ANALYSIS -- ISSUE 3**

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$500.00 each 28 days from appellant's continuing compensation payments. The record indicates that appellant's monthly income exceeds his reported monthly expenses by approximately \$1,000.00 per month. OWCP therefore did not abuse its discretion in finding that he should repay the overpayment at the rate of \$500.00 per compensation period.<sup>27</sup>

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$69,227.73. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and required recovery of the overpayment by deducting \$500.00 every 28 days from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 25, 2017 is affirmed.

Issued: January 4, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>27</sup> N.S., Docket No. 14-2081 (issued February 12, 2015).