

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

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<b>D.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0694</b>
	)	<b>Issued: December 31, 2020</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Brookfield, MO, Employer</b>	)	
_____	)	

*Appearances:*  
*Patricia Lambert, for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 10, 2020 appellant, through her representative, filed a timely appeal from a January 10, 2020 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.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that OWCP received additional evidence following its January 10, 2020 decision. 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 appellant received an overpayment of compensation in the amount of \$22,439.23, for the period December 19, 2016 through January 31, 2019, for which she was not at fault, because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On November 4, 2016 appellant, then an 83-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2016 she sustained fractures on the left side of her face when she was involved in a motor vehicle accident while in the performance of duty. Appellant's supervisor listed appellant's retirement coverage as Federal Employees' Retirement System (FERS).<sup>4</sup> On December 13, 2016 OWCP accepted the claim for acute embolism and thrombosis of left femoral vein, pleural effusion, closed fracture of right hip, saddle embolus of pulmonary artery without acute cor pulmonale, acute embolism and thrombosis of deep veins of left proximal lower extremity, acute respiratory failure with hypoxia hypotension, displaced closed spiral fracture of shaft of right arm humerus, lip laceration without foreign body, bilateral lefort I fractures, and iron deficiency anemia secondary to blood loss. OWCP paid appellant wage-loss compensation on the supplemental rolls effective December 19, 2016, and on the periodic rolls effective February 5, 2017.<sup>5</sup>

On April 24, 2019 SSA forwarded a FERS/SSA dual benefits calculation form. The form reported appellant's monthly SSA benefit rates as follows: effective December 19, 2016 appellant's SSA monthly rate with FERS was \$1,763.40, and without FERS was \$914.80; effective January 2017 appellant's SSA monthly rate with FERS was \$1,783.00, and without FERS was \$914.80; effective December 2017 appellant's SSA monthly rate with FERS was \$1,818.60, and without FERS was \$933.10; and effective December 2018 appellant's SSA monthly rate with FERS was \$1,869.50, and without FERS was \$959.20.

A FERS offset calculation sheet compiled by OWCP on May 28, 2019 computed an overpayment in the amount of \$22,439.23, for the period December 19, 2016 through January 31, 2019. OWCP converted the monthly FERS offset to a 28-day FERS offset and determined that during the period December 19 to 31, 2016 an overpayment existed in the amount of \$363.68, for the period January 1 to November 30, 2017 an amount of \$9,559.80, from December 1, 2017 to November 30, 2018 an amount of \$10,655.13, from December 1, 2018 to January 31, 2019 an amount of \$1,860.62.

In a preliminary overpayment determination dated June 5, 2019, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$22,439.23, for the period

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<sup>4</sup> Appellant's Notification of Personnel Action (Form SF-50) dated July 31, 2017, also listed her retirement coverage as FERS.

<sup>5</sup> By decision dated February 4, 2019, OWCP granted appellant a schedule award for 22 percent permanent impairment of the right arm and 20 percent permanent impairment of the right leg. The period of the award, equivalent to 126.24 weeks of compensation, ran from February 1, 2019 to July 3, 2021. Appellant's wage-loss compensation payments were suspended January 31, 2019, during the period of the schedule award.

December 19, 2016 through January 31, 2019, because compensation was not reduced by the FERS/FECA offset. It found that appellant was without fault in creating the overpayment because she relied on misinformation given in writing by OWCP or another government agency which she had reason to believe was connected with the administration of her benefits, and there was no reason to believe that she knew, or should have known, the proper course of action to be followed. Appellant was informed that, if she believed the overpayment should be waived, she should complete an overpayment recovery questionnaire (Form OWCP-20) and submit detailed supporting financial documentation within 30 days.

On June 27, 2019 appellant completed an overpayment action request form. She indicated that she wished to contest the overpayment, disagreed that an overpayment occurred, disagreed with the amount of the overpayment, and requested a waiver because she was found to be without fault in the creation of the overpayment. Appellant submitted a statement explaining her work history and describing the November 3, 2016 injury. She noted that her husband was killed in a farm accident in 2007, that she was able to care for herself, but she was unable to drive, required help to complete household chores, and relied on her family for care. No additional evidence was received.

By decision dated January 10, 2020, OWCP finalized the June 5, 2019 overpayment determination in the amount of \$22,439.23, for the period December 19, 2016 through January 31, 2019. It found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as she had not provided any financial information regarding her income and expenses. OWCP requested that appellant forward recovery of the \$22,439.23 overpayment in full within 30 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>6</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>7</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>8</sup> 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.<sup>9</sup>

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

<sup>8</sup> 20 C.F.R. § 10.421(d); *see J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>9</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

## **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$22,439.23, for the period December 19, 2016 through January 31, 2019, for which she was not at fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset.

OWCP paid appellant FECA wage-loss compensation from December 19, 2016, until February 1, 2019 when she received a schedule award. However, it paid her wage-loss compensation until January 31, 2019, without offsetting the portion of the SSA age-related retirement benefits due to her federal service. As discussed, a claimant cannot receive both compensation for wage loss and the portion of SSA age-related retirement benefits that are attributable to federal service for the same period.<sup>10</sup> Appellant received SSA age-based retirement benefits based on her federal service concurrently with disability compensation from OWCP without an appropriate offset and thus received an overpayment of compensation. The record establishes fact of overpayment.

To determine the amount of the overpayment, OWCP must calculate the portion of the SSA benefits that were attributable to federal service. It received documentation from SSA providing appellant's SSA rate with FERS and without FERS for the period December 19, 2016 through January 31, 2019. OWCP calculated the amount that OWCP should have offset during the relevant period based on the information provided by SSA. It modified the amount of the overpayment by reducing appellant's monthly SSA benefit attributable to federal service to a 28-day benefit, which was then subtracted from appellant's FECA benefits, which she received every 28 days. No contrary evidence was provided. The Board has reviewed OWCP's calculation of benefits for the period December 19, 2016 through January 31, 2019, and finds that an overpayment of compensation in the amount of \$22,439.23 was created.<sup>11</sup>

## **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>12</sup> Thus, a finding that appellant was without fault does not automatically result in waiver 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>13</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 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

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<sup>10</sup> *Id.*; see also *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

<sup>11</sup> *LG., id.*; *R.B.*, Docket No. 19-0571 (issued June 12, 2020).

<sup>12</sup> 5 U.S.C. § 8129.

<sup>13</sup> *L.S.*, 59 ECAB 350 (2008).

from data provided by the Bureau of Labor Statistics.<sup>14</sup> 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 position for the worse.<sup>15</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>16</sup>

OWCP's 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.<sup>17</sup> Failure to submit the requested information within 30 days of the request will result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>18</sup>

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

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

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The fact that a claimant is without fault, however, does not preclude OWCP from recovering the overpayment.<sup>19</sup> Waiver is only possible if recovery would defeat the purpose of FECA or be against equity and good conscience.<sup>20</sup> Appellant, however, did not provide the required financial documentation to OWCP.<sup>21</sup>

In its preliminary determination dated June 5, 2019, OWCP explained the importance of providing the completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. No additional evidence was received. As a result, OWCP did not have the necessary financial information to determine whether waiver of recovery of the overpayment would defeat the purpose of FECA or would be

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<sup>14</sup> 20 C.F.R. § 10.436.

<sup>15</sup> *Id.* at § 10.437.

<sup>16</sup> *Id.* at § 10.437(b)(1).

<sup>17</sup> *Id.* at § 10.438(a); *see R.L.*, Docket No. 19-1786 (issued July 6, 2020); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>18</sup> *Id.* at § 10.438(b).

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

<sup>20</sup> *Supra* note 14; *J.C.*, Docket No. 19-0122 (issued June 11, 2019).

<sup>21</sup> *Id.* at § 10.438(b); *M.D.*, Docket No. 19-1500 (issued February 24, 2020); *T.J.*, Docket No. 19-1242 (issued January 13, 2020).

against equity and good conscience.<sup>22</sup> It was, therefore, required to deny waiver of recovery of the overpayment.<sup>23</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$22,439.23, for the period December 9, 2016 through January 31, 2019, for which she was not at fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 10, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>22</sup> See *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

<sup>23</sup> *Supra* note 18.