

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Cleveland, OH, Employer**

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

**Docket No. 20-0573
Issued: August 23, 2021**

Appearances:
Appellant, pro se
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 January 17, 2020 appellant filed a timely appeal from a December 17, 2019¹ 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 On appeal to the Board appellant requested an appeal from an October 3, 2019 Board decision issued under Docket No. 19-0425. Decisions and orders of the Board are final 30 days after issuance and not subject to further review. 20 C.F.R. § 501.6(d). Therefore, the Board will not reconsider the findings and conclusions reached in the October 3, 2019 decision on appeal.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 17, 2019 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 denied waiver of recovery of the overpayment of compensation for the period from November 16, 2006 through January 6, 2018; and (2) whether OWCP properly required recovery of the overpayment by deducting \$350.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 1991 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee when his foot slipped between the edge of a mail cage and a loading platform while in the performance of duty. On August 2, 1991 OWCP accepted his claim under File No. xxxxxx486 for sprain, right knee. On August 27, 1991 appellant underwent arthroscopy of the right knee, partial medial meniscectomy, and chondroplasty. By decision dated June 1, 1993, OWCP granted him a schedule award for 38 percent permanent impairment of his right lower extremity. On May 16, 2000 it expanded acceptance of appellant's claim to include post-traumatic degenerative joint disease of the right knee.

On November 27, 2000 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date, as he was pushing a truck onto a scale, it stopped abruptly causing his left knee to twist while in the performance of duty. On December 14, 2000 OWCP accepted this claim under File No. xxxxxx888 for left knee strain. It subsequently expanded the acceptance of this claim to include bilateral degenerative joint disease. OWCP administratively combined appellant's claims on May 15, 2002.⁵ Appellant later underwent bilateral total knee arthroscopies.

On May 2, 2002 appellant returned to light-duty work six hours a day. By decision dated March 11, 2003, OWCP determined that the position of modified mail handler, fairly and reasonably represented his wage-earning capacity. It reduced appellant's compensation to reflect his loss of wage-earning capacity (LWEC). By decision dated July 2, 2003, OWCP granted him a schedule award for 50 percent permanent impairment of his left lower extremity. By decision dated September 29, 2003, it granted appellant a schedule award for an additional 12 percent permanent impairment of his right lower extremity, for a total 50 percent permanent impairment. The period of the schedule award was June 15, 2003 through November 15, 2006.

On August 21, 2006 appellant informed OWCP that he was concurrently receiving Federal Employees Retirement System (FERS) benefits and Social Security Administration (SSA) benefits. In a letter dated September 21, 2006, OWCP informed appellant that, when his schedule

⁴ Docket No. 19-0425 (issued October 3, 2019).

⁵ OWCP administratively combined OWCP File Nos. xxxxxx304, xxxxxx547, xxxxxx608, and xxxxxx888 with the current file, OWCP File No. xxxxxx486, which serves as the master file.

award ended on November 15, 2006, he would need to elect either benefits under the Civil Service Retirement System or FECA benefits of \$717.00 every 28 days. On October 6, 2006 appellant elected to receive FECA benefits, effective November 15, 2006. In a letter dated November 16, 2006, OWCP informed appellant that, when his schedule award ended on November 15, 2006, he would return to his former compensation rate based on his March 11, 2003 LWEC. It listed his continuing compensation payments beginning December 23, 2006 as \$510.76. OWCP informed appellant that FECA required his wage-loss compensation benefits to be reduced if he began receiving SSA retirement benefits based on his age and federal service. It notified him of his obligation to report receipt of such retirement benefits to avoid an overpayment of compensation.

On October 23, November 2, and December 18, 2017 OWCP provided SSA with a form for calculation of dual benefits. SSA responded on January 19, 2018 and indicated that, beginning October 2005, appellant's SSA rate including his federal employment under FERS was \$1,191.20 per month. The SSA rate that appellant was entitled to without his federal employment was \$797.40. By December 2017, these rates increased to \$1,542.10 and \$1,032.30 respectively.

In a letter dated February 8, 2018, OWCP informed appellant that he had been receiving a prohibited dual benefit resulting in an overpayment. It noted that the portion of SSA benefits earned as a federal employee was part of his retirement and that the receipt of wage-loss compensation under FECA and federal retirement was prohibited. OWCP adjusted appellant's FECA benefits to account for his SSA offset of \$470.58, which reduced his FECA wage-loss compensation payments from the gross amount of \$881.00 to \$410.42.

In a preliminary determination dated March 22, 2018, OWCP advised appellant that he had received a \$68,670.27 overpayment of compensation for the period from October 1, 2005 through January 6, 2018 because it failed to offset his FECA benefits by the portion of SSA retirement benefits he had received. It found him at fault in the creation of the overpayment because he accepted payments, which he knew or should reasonably have known were incorrect. OWCP advised appellant that he could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, it provided an overpayment action request form and informed him that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On April 4, 2018 appellant requested a waiver and a precoupment hearing with a representative of OWCP's Branch of Hearings and Review. He disagreed that the overpayment occurred and with the amount of the overpayment, and requested waiver. Appellant asserted that he had paid into SSA for 42 years and only worked for the Federal Government for 12½ years. He further alleged that he did not begin receiving FECA wage-loss compensation benefits concurrently with his SSA benefits until November 16, 2006 rather than October 1, 2005 as found by OWCP.

Appellant completed a Form OWCP-20 on March 30, 2018. He listed his SSA benefits as \$1,408.00 with combined household benefits of \$2,703.00. Appellant noted that his disabled son also received supplemental income of \$334.00. He listed his pension income from armed services retirement variously as \$3,213.00 and \$3,152.84, Department of Veterans Affairs (VA) disability

as \$3,494.91 and FECA benefits of \$410.42 for his total monthly income of between \$8,466.17 and \$8,525.42. Appellant noted his wife's SSA benefits were \$859.00 and included his son's benefits of \$436.00 to reach total monthly income of \$10,156.11. He listed his wife and his 50-year-old disabled son as his dependents. Appellant noted his monthly expenses to include housing of \$705.95, food expenses of \$900.00, clothing expenses of \$400.00, utilities of \$1,005.00, and other expenses of \$4,304.71. He provided a list of other debts paid by monthly installments of \$3,474.00 for a total monthly expense of \$9,747.05. Appellant indicated that he had funds on hand in the amount of \$1,482.00. He provided a detailed list of his monthly expenses.

On September 25, 2018 appellant provided additional financial information supporting his minimum monthly payments on credit cards and other monthly expenses. He included a statement from SSA regarding his adult disabled son's disability benefits. Appellant included within his expenses payments for his disabled adult son's television, internet, and telephone in the amount of \$216.00, his water bill of \$90.00, his electric bill of \$230.00, as well as credit cards in his son's name with minimum payments totaling \$272.25. He also included \$183.00 for his grandson's car payment.

By decision dated November 29, 2018, OWCP's hearing representative found that OWCP properly determined that appellant had received an overpayment of compensation for which he was at fault as he had received dual benefits from SSA and OWCP and, therefore, was not entitled to waiver of recovery. However, he modified OWCP's preliminary determination of overpayment finding that appellant had received an overpayment in the amount \$63,148.71 for the period of November 16, 2006 through January 6, 2018. OWCP's hearing representative determined that appellant had sufficient income for recovery of the overpayment. He determined that appellant's adult son was not a dependent and reduced appellant's expenses for his support. The hearing representative further reduced appellant's expenses by the amount of his grandson's car payment as he did not accept appellant's argument that this was payment for services rendered. He determined that appellant and his wife had monthly income of \$9,320.00 and monthly expenses of \$4,570.33. The hearing representative determined that monthly repayment of \$1,000.00 was appropriate, but that, as the vast majority of appellant's monthly income was not from FECA benefits, a two-part repayment scheme was necessary with recovery of \$350.00 from appellant's continuing FECA benefits and the remaining \$620.83 submitted by appellant through a monthly check.

Appellant appealed the November 29, 2018 decision to the Board on December 18, 2018. In its October 3, 2019 decision, the Board affirmed in part and set aside in part the November 29, 2018 decision. The Board found that OWCP properly determined fact and amount of overpayment of compensation, \$63,148.71, because appellant concurrently received SSA age-related retirement benefits and FECA benefits for the period November 16, 2006 through January 6, 2018. The Board determined, however, that appellant was not at fault in the creation of the overpayment of compensation. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment.

By decision December 17, 2019, OWCP found that, based on the evidence, appellant submitted regarding his income and expenses in 2018 his total monthly income was \$9,320.00 and his ordinary and necessary living expenses did not exceed \$4,570.33. It determined that recovery of the overpayment would not defeat the purpose of FECA as his monthly income exceeded his

monthly expenses by more than \$50.00. OWCP further found that there was no evidence that appellant relinquished a valuable right in reliance on the additional compensation or changed his position for the worse in reliance on the erroneous compensation payment such that recovery would be inequitable or against good conscience. It also found that the overpayment would continue to be recovered in the manner described in the November 29, 2018 decision of the OWCP hearing representative.

LEGAL PRECEDENT -- ISSUE 1

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁶ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.⁷

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.⁸ 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 \$50.00.⁹

Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁰

OWCP's regulations provide that, before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.¹¹ The written notification must also include a preliminary finding regarding whether

⁶ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

⁷ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁸ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

⁹ *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

¹⁰ 20 C.F.R. § 10.437(a)(b).

¹¹ *Id.* at § 10.431(a).

the individual was at fault in the creation of the overpayment.¹² OWCP must inform the individual of his right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹³ OWCP's procedures provide that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.¹⁴

OWCP's procedures provide that if the claimant is determined to be without fault, then the preliminary overpayment determination should be released using a Form CA-2202¹⁵ along with an OWCP-20 within 30 days of the date the overpayment is identified.¹⁶

OWCP's procedures further specify that the preliminary finding of overpayment also informs the claimant of the right to submit additional evidence and argument, if the claimant disagrees with the fact or amount of the overpayment and if the claimant feels the overpayment should be waived. Additional evidence and arguments must be submitted by the claimant within 30 days of the date of the letter.¹⁷

The Board has held that OWCP must rely on current financial information when determining eligibility for waiver of recovery of an overpayment.¹⁸

¹² *Id.* at § 10.431(d).

¹³ *Id.*

¹⁴ *See R.O.*, Docket No. 16-1836 (issued May 23, 2017)(finding that if a case is remanded to OWCP for additional development regarding waiver of recovery of an overpayment, OWCP should issue a new preliminary finding regarding fault, providing appellant with new appeal rights, including the right to a prerecoument hearing, and the opportunity to submit current financial information which OWCP will evaluate to properly determine whether the overpayment should be waived.); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.300.5(a) (September 2018)(The Board notes that this provision of the procedure manual was updated in September 2020 following the issuance of OWCP's December 17, 2019 decision.).

¹⁵ *Id.*; *Id.* at Chapter 6.100.3.d.(2).

¹⁶ *Supra* note 8.

¹⁷ *Id.*

¹⁸ *C.S.*, Docket No. 17-2013 (issued April 11, 2018); *I.P.*, Docket No. 12-1683 (issued January 25, 2013); *C.S.*, Docket No. 12-0313 (issued October 23, 2012) (OWCP must rely on current financial information when determining eligibility for waiver of an overpayment), *Thomas E. Ray*, 51 ECAB 344 (2000) (the Board remanded the case for further development on the issue of waiver where OWCP relied on three-year-old financial information in its waiver determination); *Carol R. Graham*, Docket No. 02-2198 (issued February 4, 2003) (the Board remanded the case for further development on the issue of waiver as OWCP relied on financial information that was 16 months old in determining the claimant's eligibility for waiver of the overpayment); *Ronald E. Smith*, 36 ECAB 652 (1985) (the Board found that OWCP should have attempted to obtain current financial information prior to determining the claimant's eligibility for waiver).

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

On prior appeal, by decision dated October 3, 2019, the Board affirmed OWCP's finding that appellant received an overpayment of compensation in the amount of \$63,148.71 because he concurrently received SSA age-related retirement benefits and FECA benefits for the period November 16, 2006 through January 6, 2018. The Board found, however, that he was not at fault in the creation of the overpayment of compensation. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment.

On remand, OWCP reviewed the March 30, 2018 overpayment recovery questionnaire previously submitted after its initial preliminary overpayment determination of March 22, 2018. It did not provide appellant with a Form CA-2202, preliminary notice of overpayment, advising him of the overpayment for which he was without fault or a Form OWCP-20, overpayment recovery questionnaire, to obtain updated evidence of his financial status as required by its procedures.¹⁹ The Board has held that, if a case is remanded to OWCP for additional development regarding waiver of recovery of an overpayment, OWCP should issue a new preliminary finding noting the Board's determination that appellant was without fault and provide appellant with new appeal rights, including the right to a precoupment hearing, and the opportunity to submit current financial information which OWCP will evaluate to properly determine whether the overpayment should be waived.²⁰ As noted above, OWCP must rely on current financial evidence when determining eligibility for waiver of an overpayment.²¹ Consequently, as it did not comply with its procedures or Board case law, the case will be remanded for OWCP to provide appellant with a new preliminary determination of overpayment and Form OWCP-20. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.²²

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁹ *Supra* note 8.

²⁰ *See C.G.*, Docket No. 15-0891 (issued August 9, 2016)(OWCP failed to issue a new preliminary decision after a remand from the Board on the issue of waiver, which infringes on appellant's procedural rights); *B.T.*, Docket No. 14-1909 (issued May 19, 2015)(The Board found that OWCP's failure to issue a preliminary determination following the Board's remand of an overpayment case infringed appellant's procedural rights under its regulations at 20 C.F.R. §§ 10.431-432); *J.R.*, Docket No. 12-0986 (issued November 13, 2012).

²¹ *Supra* note 19.

²² In view of the Board's disposition of Issue 1, it is premature to address Issue 2.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 23, 2021
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