

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

_____)
W.K., Appellant)

and)

U.S. POSTAL SERVICE, CLIFFSIDE PARK)
POST OFFICE, Cliffside Park, NJ, Employer)
_____)

Docket No. 21-0266
Issued: December 6, 2021

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 December 17, 2020 appellant, through counsel, filed a timely appeal from a November 5, 2020 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 November 5, 2020 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 \$11,022.12, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period June 1, 2018 through October 12, 2019, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$350.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 2, 2007 appellant, then a 55-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained lower lumbar back pain due to factors of his federal employment. OWCP initially accepted the claim for aggravation of lumbosacral spondylolysis.

Appellant completed a claim for compensation (Form CA-7) on February 22, 2008 wherein he noted his retirement system as Federal Employees Retirement System (FERS).

On November 26, 2012 OWCP expanded acceptance of the claim to include chronic pain syndrome, lumbar spinal stenosis, right ankle/foot derangement, and other acquired deformities of the right ankle/foot. The record reflects that OWCP paid appellant wage-loss compensation on the supplemental rolls as of December 13, 2007 and on the periodic rolls as of March 16, 2008.

On October 8, 2019 OWCP forwarded a FERS/SSA dual benefits calculation transmittal form to SSA to obtain information as to whether an offset of compensation benefits was required.

On October 21, 2019 OWCP received from SSA a completed FERS/SSA dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since June 1, 2018. The form showed SSA benefit rates with and without a FERS offset. Beginning June 1, 2018, the SSA rate with FERS was \$1,907.80, and without FERS was \$1,249.50; and beginning December 1, 2018, the SSA rate with FERS was \$1,961.20, and without FERS was \$1,284.40.

OWCP certified a FERS offset calculation worksheet on November 1, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period from June 1, 2018 through October 12, 2019, resulting in a total overpayment amount of \$11,022.12. This form indicated that from June 1 through November 30, 2018 appellant received an overpayment in the amount of \$3,971.50, and from December 1, 2018 through October 12, 2019, he received an overpayment in the amount of \$7,050.62.

In a November 14, 2019 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to his federal service from his 28-day periodic compensation benefits. It determined that appellant would receive a net payment every 28 days of \$2,029.38.

On June 11, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$11,022.12 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period June 1, 2018 through October 12, 2019, to offset his SSA age-related retirement benefits that were attributable to federal service. It determined that he was without fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred, due to the complexity in benefits administration.

OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised him that he could request a waiver of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP provided an overpayment action request form and further 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 prerecoupment hearing.

On June 22, 2020 OWCP received appellant's request for a prerecoupment hearing, which was held on September 9, 2020. Appellant disagreed that an overpayment occurred and disagreed with the amount of the overpayment. During the hearing, he noted that he only had \$500.00 in his checking account. The hearing representative advised appellant to submit supporting financial documentation.

On July 13, 2020 OWCP received appellant's June 27, 2020 Form OWCP-20 and on September 22, 2020, it received a list of appellant's monthly income and expenses. Appellant reported total monthly income of \$4,798.20 and total monthly expenses of \$4,446.00.

On October 5, 2020 OWCP received a bank statement, for the period August 26 to September 24, 2020, which showed an ending balance of \$1,425.74.

By decision dated November 5, 2020, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$11,022.12 for the period June 1, 2018 through October 12, 2019, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without a proper offset. She also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative found that appellant provided financial information that established a monthly household income of \$4,753.96 and that he listed expenses of \$4,471.00, however, supporting documentation was not provided for the listed expenses. She concluded that, without supporting documentation, appellant's household income versus expenses could not be determined. The hearing representative found that appellant received net payment of \$2,077.16 on the periodic rolls every 28 days, therefore, recovery of the overpayment would be made by deducting \$350.00 every 28 days from appellant's continuing compensation payments.

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.⁴ 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.⁵ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.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 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,022.12, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period June 1, 2018 through October 12, 2019, without an appropriate offset.⁹ The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, he also was receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period June 1, 2018 through October 12, 2019. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from June 1, 2018 through October 12, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and determined that appellant received an overpayment of compensation in the amount of \$11,022.12. The Board, thus, finds that appellant received

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

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

⁹ *P.B.*, Docket No. 20-0862 (issued November 25, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ 20 C.F.R. § 10.421(d); *see R.R.*, *supra* note 7; *T.B.*, *supra* note 7; *L.J.*, *supra* note 7.

prohibited dual benefits for the period June 1, 2018 through October 12, 2019, totaling \$11,022.12.

LEGAL PRECEDENT -- ISSUE 2

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.¹¹ 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.¹²

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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, 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.¹³ 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 \$50.00.¹⁴

Section 10.437 of OWCP's implementing regulations 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.¹⁵

OWCP's regulations at Section 10.438 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.¹⁶ Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² 20 C.F.R. § 10.436.

¹³ *Id.*; 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(3) (September 2020).

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁶ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

recovery, and no further request for waiver shall be considered until the requested information is furnished.¹⁷

ANALYSIS -- ISSUE 2

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

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.¹⁸ Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.¹⁹

In its preliminary overpayment determination dated June 11, 2020, OWCP explained the importance of providing the completed overpayment questionnaire and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Appellant submitted a Form OWCP-20 and a list of income and expenses; however, he did not provide documentation to support his financial information.²⁰ As a result, OWCP did not have all of the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²¹

The Board, thus, 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

¹⁷ *Id.* at § 10.438(b).

¹⁸ *Id.* at § 10.436.

¹⁹ *Id.* at § 10.438; *see B.G.*, Docket No. 20-0541 (issued April 28, 2021); *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

²⁰ *R.M.*, Docket No. 19-1570 (issued June 1, 2020).

²¹ *G.G.*, Docket No. 19-0684 (issued December 23, 2019).

²² 20 C.F.R. § 10.438; *see L.D.*, Docket No. 19-0606 (issued November 21, 2019).

²³ *Id.* at § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁴ *Id.* at § 10.441(a).

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 \$350.00 from appellant’s continuing compensation payments every 28 days.²⁶

OWCP provided appellant a Form OWCP-20 along with its June 11, 2020 preliminary overpayment determination. Appellant did not fully complete the overpayment recovery questionnaire or provide the necessary documentation to support his income and expenses prior to the final November 5, 2020 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁷ When an individual fails to provide the requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁸ The Federal (FECA) Procedure Manual provides that in such instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount, until the balance of the overpayment is paid in full.²⁹ While appellant did not submit the financial information requested, the record reflects that his continuing 28-day net compensation amounts to \$2,077.16. Therefore, deducting \$350.00 every 28 days from his continuing compensation is in accordance with the 25 percent repayment rate.³⁰

As appellant did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in requiring recovery of the \$11,022.12 overpayment by deducting \$350.00 every 28 days from appellant’s continuing compensation payments.³¹ Therefore, it properly required recovery of the overpayment by deducting \$350.00 every 28 days from appellant’s continuing compensation benefits.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,022.12, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for

²⁵ *J.K.*, Docket No. 20-1190 (issued January 8, 2021); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁶ *L.D.*, Docket No. 19-1423 (issued March 2, 2020).

²⁷ 20 C.F.R. § 10.438; *see also A.F.*, *supra* note 9.

²⁸ *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

²⁹ Federal (FECA) Procedure Manual, *supra* note 13 at 6.500.8(c)(1) (September 2020).

³⁰ *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

³¹ *M.D.*, Docket No. 19-1500 (issued February 24, 2020).

the period June 1, 2018 through October 12, 2019, without an appropriate offset; and that OWCP properly denied waiver of recovery of the overpayment. The Board also finds that OWCP properly required recovery of the overpayment by deducting \$350.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 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