



required recovery of the overpayment by deducting \$144.14 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On May 8, 2009 appellant, then a 59-year-old lead law enforcement specialist (driver instructor), filed a traumatic injury claim (Form CA-1) alleging that on May 4, 2009 he sustained lower body contusions and bruises and a possible broken or sprained right ankle as a result of a motor vehicle accident while in the performance of duty. He stopped work on May 5, 2009. OWCP accepted appellant's claim for right knee contusion, right hip, thigh, and ankle sprains and right edema. It paid him wage-loss compensation on the supplemental rolls for disability from work commencing June 23, 2009 and on the periodic rolls commencing September 27, 2009.

By decision dated April 21, 2010, OWCP granted appellant a schedule award for six percent permanent impairment of the right leg. The period of the award ran for 17.28 weeks from February 18 through June 18, 2010. On April 25, 2010 appellant returned to limited-duty work eight hours per day.

In a September 3, 2010 decision, OWCP determined that the position of lead law enforcement specialist (general training instructor), fairly and reasonably represented his wage-earning capacity. It reduced appellant's compensation, effective June 19, 2010, to reflect his loss of wage-earning capacity.

In an April 23, 2020 letter, OWCP requested that appellant provide verification of full-time student status or incapacity for self-support with respect to his sons, S.M. and D.M., and daughter, K.M. It provided him with student dependency forms to complete and return with respect to full-time student status.

In a May 3, 2020 student dependency form, appellant indicated that his son, D.M., born July 12, 1996, had been married since October 25, 2019, only had two years of education beyond high school, and was not attending school on a full-time basis. He noted that transcripts were attached to his response. In a separate student dependency form of even date, appellant indicated that his daughter, K.M., born July 12, 1996, was not married, had four years of education beyond high school, and was not attending school on a full-time basis. He noted that she began school in June 2015.

By letter dated May 8, 2020, OWCP informed appellant that no transcripts were attached to his forms and requested that he submit a copy of a transcript, degree, or letter from the college to verify student status.

OWCP received an additional student dependency form completed by appellant on May 3, 2020. He indicated that his son, S.M., born July 12, 1996 was not married, had not completed four years of education beyond high school, and was not attending school on a full-time basis. In an accompanying undated statement, appellant noted that S.M. was disabled and unable to work due to broken bones in his right foot and skin grafts to his big toe resulting from a January 28, 2018 motorcycle accident. He submitted photographs and a diploma from Marine Mechanics Institute which indicated that on July 3, 2019 S.M. successfully completed a marine

technician specialist II program. Appellant also submitted college transcripts from Florida State College at Jacksonville, Florida for D.M. Further, he submitted a diploma from University of Central Florida which indicated that on August 4, 2018, K.M. received a Bachelor of Science degree in nursing.

On July 17, 2020 SSA forwarded a completed Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that beginning in January 2016 appellant's SSA rate with FERS was \$886.60 and without FERS was \$433.60; beginning in December 2016 his SSA rate with FERS was \$889.20 and without FERS was \$434.90; beginning in December 2017 his SSA rate with FERS was \$906.90 and without FERS was \$443.50; beginning in December 2018 his SSA rate with FERS was \$932.20 and without FERS was \$455.90; and beginning in December 2019 his SSA rate with FERS was \$949.10 and without FERS was \$463.10.

In a preliminary overpayment determination dated August 21, 2020, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$25,926.56 because his wage-loss compensation benefits had not been reduced for the period January 1, 2016 through August 15, 2020 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 the stated period and totaling this amount to find an overpayment of \$25,926.56. OWCP informed appellant that his compensation would be offset by the portion of his SSA age-related retirement benefits attributable to his federal service, effective August 16, 2020. It further advised him of its preliminary overpayment determination that he was without fault in the creation of the overpayment and requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. Additionally, OWCP notified appellant that he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. It allotted 30 days for him to respond.

On September 11, 2020 appellant requested waiver of recovery of the \$25,926.56 overpayment and a decision based on the written record. In an accompanying letter of even date, he noted that after he returned to work at the employing establishment he stopped work again in November 2010 due to his employment injury. Appellant asserted that he did not receive FERS benefits and that he only received FECA compensation. He noted that when he became eligible he was approved to receive SSA age-related retirement benefits. Appellant claimed that he would suffer severe financial hardship to repay the overpayment as he was a single parent raising three children, and that he was unable to work due to his age and condition.

Appellant completed a Form OWCP-20 on September 11, 2020. He reported monthly income of \$1,571.00, including SSA benefits of \$571.00 and a private pension of \$1,000.00. Appellant listed his adult son, D.M., and 24-year-old son, S.M., as dependents. He reported monthly expenses of \$4,288.00. Appellant indicated that he had \$50.00 cash on hand; \$3,000.00 in a checking account; \$117,000.00 in a savings account; and \$40,000.00 in personal property, totaling \$160,050.00. He did not submit supporting financial documentation.

OWCP, by decision dated April 26, 2021, finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of

\$25,926.56 for the period January 1, 2016 through August 15, 2020, because his FECA compensation payments were not offset by the portion of his SSA age-related retirement benefits attributable to his federal service. It found that he was without fault in the creation of the overpayment, but denied waiver of recovery because the evidence of record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP noted that appellant repay the overpayment by deducting 25 percent of the net amount of his 28-day continuing compensation payments, which resulted in a monthly repayment amount of \$144.14.

### **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>2</sup> However, section 8116 also 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>3</sup> 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.<sup>4</sup>

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of the employee.<sup>5</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>6</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$25,926.56 for the period January 1, 2016 to August 15, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset.

In its April 26, 2021 decision, OWCP found that an overpayment of compensation was created for the period January 1, 2016 through August 15, 2020. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a

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<sup>2</sup> *Id.* at § 8102(a).

<sup>3</sup> *Id.* at § 8116.

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> 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).

<sup>6</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

claimant cannot receive both compensation for wage loss under FECA and SSA age-related retirement benefits attributable to federal service for the same period.<sup>7</sup> The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning January 1, 2016. OWCP, however, neglected to offset his FECA benefits until August 15, 2020. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period January 1, 2016 through August 15, 2020.

To determine the amount of the overpayment, the portion of the 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. The SSA provided appellant's SSA rates with FERS and without FERS for the period January 1, 2016 through August 15, 2020. OWCP provided 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 1, 2016 through August 15, 2020 and finds that an overpayment of compensation in the amount of \$25,926.56 was created.<sup>8</sup>

### **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.<sup>9</sup>

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. 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.<sup>10</sup> Also, 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.<sup>11</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks,

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<sup>7</sup> *Id.*

<sup>8</sup> *See K.W.*, Docket No. 20-1169 (issued April 7, 2021); *W.C.*, Docket No. 20-1241 (issued February 9, 2021); *S.O.*, Docket 20-0753 (issued October 28, 2020).

<sup>9</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>11</sup> *Id.* at Chapter 6.400.4.a(2) (September 2020).

bonds, saving accounts, mutual funds, and certificate of deposits.<sup>12</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, 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.<sup>13</sup>

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.<sup>14</sup> OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.<sup>15</sup>

### 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.<sup>16</sup>

The Board finds that as appellant reported \$160,050.00 in total assets in a Form OWCP-20 on September 11, 2020 he has not met the standard for waiver of recovery of the overpayment because his assets exceed the allowable resource base of \$6,200.00 for an individual, such as appellant.<sup>17</sup> Although appellant listed his adult son, D.M. as a dependent, he failed to submit any evidence to establish his son's dependent status. Further, he also listed his son, S.M., as a dependent because he is disabled and unable to work. A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.<sup>18</sup> Appellant submitted a diploma from Marine Mechanics Institute which indicated that on July 3, 2019 S.M. successfully completed a marine technician specialist II program. The Board finds that this evidence establishes that S.M. is not a dependent as defined under FECA. Because appellant has not met the second prong of the two-

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<sup>12</sup> *Id.* at Chapter 6.400.4.b(3).

<sup>13</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>14</sup> 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>15</sup> *Supra* note 10 at Chapter 6.400.4c(3) (September 2020).

<sup>16</sup> 20 C.F.R. § 10.436.

<sup>17</sup> *Supra* note 11.

<sup>18</sup> 5 U.S.C. § 8110(a).

prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet ordinary and necessary living expenses.<sup>19</sup> He has not established that he was entitled to waiver on the basis of defeating the purpose of FECA.<sup>20</sup>

Additionally, appellant has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.<sup>21</sup>

Because appellant has not established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the \$25,926.56 overpayment.<sup>22</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441(a) of OWCP's regulations<sup>23</sup> 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.”<sup>24</sup>

Under OWCP's procedures, the compromise of all or part of the overpayment and any charges may be made depending upon the individual claimant's financial circumstances in order to set a repayment schedule. Such a determination is made at the time the repayment schedule is

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<sup>19</sup> *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *S.W.*, Docket No. 20-0363 (issued November 23, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

<sup>20</sup> *F.K.*, *id.*; *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *R.D.*, Docket No. 19-1598 (issued April 17, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

<sup>21</sup> *N.J.*, *supra* note 10; *M.R.*, Docket No. 20-1622 (issued June 30, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>22</sup> *F.K.*, *supra* note 19; *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

<sup>23</sup> 20 C.F.R. § 10.441(a).

<sup>24</sup> *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

established.<sup>25</sup> Compromise is a matter which rests in the discretion of OWCP and is not subject to review by the Board.<sup>26</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$144.14 every 28 days from appellant's continuing compensation payments.

OWCP gave due regard to the financial information submitted, as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, it properly required recovery of the overpayment by deducting \$144.14 every 28 days from appellant's continuing compensation payments.<sup>27</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$25,926.56 for the period January 1, 2016 to August 15, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits 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 \$144.14 every 28 days from his continuing compensation payments.

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<sup>25</sup> *Supra* note 10 at Chapter 6.500.6 (September 2020).

<sup>26</sup> *Id.*; *see M.S.*, Docket No. 20-0068 (issued May 14, 2021).

<sup>27</sup> *M.S., id.; M.B.*, Docket No. 20-1578 (issued March 25, 2021).



**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2021  
Washington, DC

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

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

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