

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
San Francisco, CA, Employer)

Docket No. 20-0068
Issued: May 14, 2021

Appearances:
Eddie Reyna, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 8, 2019 appellant, through her representative, filed a timely appeal from an April 30, 2019 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 appellant submitted additional evidence on appeal. 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 \$112,567.28, compromised to \$25,000.00, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period July 1, 2011 through February 2, 2019, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$165.44 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On October 10, 1995 appellant, then a 47-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed tendinitis in both wrists, elbows, and shoulders due to factors of her federal employment. She noted that she first became aware of her condition on September 25, 1995. A January 31, 2013 notification of personnel action (PS Form 50) noted appellant's retirement plan as Federal Employees Retirement System (FERS).

OWCP accepted the claim for right shoulder neck bursitis and right lateral epicondylitis. It initially paid appellant wage-loss compensation on the supplemental rolls, and then paid her on the periodic rolls as of September 30, 2009.

On January 30, 2019 OWCP forwarded a FERS/SSA benefits calculation worksheet to the SSA to obtain information necessary for a determination of whether an offset of compensation benefits was required.

On February 7, 2019 OWCP received from SSA a February 1, 2019 FERS/SSA dual benefits calculation which indicated that appellant had been in receipt of SSA age-related retirement benefits since July 2011. The form showed appellant's SSA benefit rates with and without a FERS offset as follows: beginning July 2011, the SSA rate with FERS was \$1,290.90 and without FERS was \$146.60; beginning December 2011, the SSA rate with FERS was \$1,337.40 and without FERS was \$151.90; beginning December 2012, the SSA rate with FERS was \$1,360.10 and without FERS was \$154.40; beginning December 2013, the SSA rate with FERS was \$1,380.40 and without FERS was \$156.70; beginning January 2014, the SSA rate with FERS was \$1,383.00 and without FERS was \$156.70; beginning December 2014 to November 2016, the SSA rate with FERS was \$1,406.50 and without FERS was \$159.30; beginning December 2016, the SSA rate with FERS was \$1,410.60 and without FERS was \$159.70; beginning December 2017, the SSA rate with FERS was \$1,438.80 and without FERS was \$162.80; and beginning December 2018, the SSA rate with FERS was \$1,479.10 and without FERS was \$167.40.

OWCP completed a FERS offset calculation worksheet on February 14, 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 July 1, 2011 through February 2, 2019, resulting in a total overpayment of \$112,567.28. The form indicated that: from July 1 through November 30, 2011, appellant received an overpayment in the amount of \$5,771.80; from December 1, 2011 through November 30, 2012, she received an overpayment in the amount of \$14,304.16; from

December 1, 2012 through November 30, 2013, she received an overpayment in the amount of \$14,508.15; from December 1 through 31, 2013, she received an overpayment in the amount of \$1,250.59; from January 1 through November 30, 2014, she received an overpayment in the amount of \$13,502.78; from December 1, 2014 through November 30, 2016, she received an overpayment in the amount of \$30,056.15; from December 1, 2016 through November 30, 2017, she received an overpayment in the amount of \$15,052.04; from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$15,354.57; and from December 1, 2018 through February 2, 2019, she received an overpayment in the amount of \$2,767.54.

In a February 13, 2019 letter, OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-day periodic compensation benefits. It noted that her gross FECA 28-day compensation benefit of \$1,984.00, would be offset by her SSA benefit of \$1,210.80, to a 28-day compensation benefit of \$772.20.

On February 26, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$112,567.28 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period July 1, 2011 through February 2, 2019 to offset her SSA age-related retirement benefits that were attributable to federal service. It also determined that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request a waiver of the overpayment. It further requested that she 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 further notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On March 22, 2019 appellant's representative requested additional time to complete the Form OWCP-20 and noted that appellant wished to contest the overpayment.

On April 8, 2019 OWCP received a partially completed Form OWCP-20 dated April 8, 2019. Appellant's income was listed as \$1,439.00 in SSA benefits, \$661.00 in Supplemental Security Income (SSI) benefits for a total monthly income of \$2,100.00. Her expenses were listed as: rent or mortgage \$527.00, food \$1,200.00, clothing \$300.00, utilities \$300.00, and other expenses \$900.00 for total monthly expenses of \$3,227.00.

On April 9, 2019 OWCP received appellant's April 6, 2019 Form OWCP-20. Appellant requested waiver of recovery of the overpayment and argued that she was without fault. She alleged that she would have elected to receive SSA benefits from her husband's account had she known that her SSA benefits would be offset. Appellant argued that OWCP should have known that she was receiving both FECA benefits and SSA benefits which she had noted in her Form CA-1032 forms. In the Form OWCP-20 she listed her monthly income of \$2,129.00 in SSA benefits and \$1,439.00 in SSA benefits. Appellant listed her monthly expenses as \$527.00 for mortgage, \$1,200.00 for food, \$300.00 for clothing, \$300.00 for utilities, and \$900.00 for other expenses. She did not list any cash on hand, or other assets. Appellant submitted documentation which included a statement from her bank related to a settlement trade in the amount of \$25,000.00

on December 18, 2018, checking account summary dated January 31, 2019 which listed a balance of \$24,823.80, a checking account summary dated February 28, 2019 which listed a balance of \$27,984.98, and a certificate of deposit dated April 24, 2018 in the amount of \$10,000.00.

In an April 30, 2019 memorandum to file, OWCP explained that it would compromise the overpayment principal. It explained that, after reducing the \$112,567.28 principal owed by \$87,567.28, OWCP arrived at a compromise figure of \$25,000.00 that appellant could repay in her expected lifetime, by August 31, 2031. OWCP noted that she requested a waiver and after a review, it was determined that a waiver could not be granted. It further explained that the Procedure Manual dictated that appellant repay the overpayment by deducting 25 percent of the net amount of her 28-day continuing compensation payments, which resulted in a monthly repayment amount of \$165.44.

By decision dated April 30, 2019, OWCP finalized the February 26, 2019 preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$112,567.28, which was reduced to \$25,000.00 by compromise. OWCP further found that she was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. It required recovery by deducting \$165.44 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 of compensation 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 FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-based 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

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 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).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$112,567.28, compromised to \$25,000.00, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period July 1, 2011 through February 2, 2019, without an appropriate offset.

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, she also was receiving SSA age-related retirement benefits based upon her 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.⁹ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period July 1, 2011 through February 2, 2019. Consequently, the fact of overpayment has been established.¹⁰

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 amounts of SSA age-related retirement benefits that were attributable to federal service. SSA provided its benefit rates with FERS and without FERS for specific periods from July 1, 2011 through February 2, 2019. OWCP provided its calculations for each relevant period based on the SSA worksheet and properly determined that appellant received an overpayment of compensation in the amount of \$112,567.28, compromised to \$25,000.00.

The Board thus finds that appellant received an overpayment of compensation in the amount of \$112,567.28, compromised to \$25,000.00, for the period July 1, 2011 through February 2, 2019.

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

⁹ *Id.*

¹⁰ *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).

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² *L.S.*, 59 ECAB 350 (2008). 20 C.F.R. § 10.436. 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 6.400.4a (3) (September 2018).

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.¹³

Section 10.438 of the implementing 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 on 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.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

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.¹⁶

In its preliminary overpayment determination dated February 26, 2019, OWCP clearly explained the importance of providing the completed overpayment questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income, expenses and assets.

Appellant's representative submitted an incomplete Form OWCP-20 on April 8, 2019. Appellant submitted a second Form OWCP-20 on April 9, 2019; however, this form was also incomplete as she did not list any assets. While she did submit some supporting documentation regarding assets, OWCP could not determine the actual amount of her assets as she did not complete this section of the Form OWCP -20. As appellant did not submit the information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.¹⁷

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

¹⁴ *Id.* at § 10.438(a).

¹⁵ *Id.* at § 10.438.

¹⁶ *Id.* at § 10.436.

¹⁷ *D.C.*, Docket No. 19-0118 (issued January 15, 2020); *see S.B.*, Docket No. 16-1795 (issued March 2, 2017).

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.¹⁸

Section 10.441(a) of OWCP's regulations¹⁹ 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."²⁰

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 established.²¹ Compromise is a matter which rests in the discretion of OWCP and is not subject to review by the Board.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$165.44 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, including the compromised overpayment amount, and found that this method of recovery would minimize resulting hardship.²³ Therefore, it properly required recovery of the overpayment by deducting \$165.44 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 \$112,567.28, compromised to \$25,000.00, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period July 1, 2011 through February 2, 2019, without an

¹⁸ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

¹⁹ *Id.* at § 10.441(a).

²⁰ *Id.*; *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²¹ *Supra* note 12 at Chapter 6.100.6 (September 2018).

²² *Id.*

²³ *M.B.*, Docket No. 20-1578 (issued March 25, 2021).

appropriate offset; and that OWCP properly denied waiver of recovery of the overpayment. OWCP also found that OWCP properly required recovery of the overpayment by deducting \$165.44 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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