

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

M.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
HUNTER HOLMES MCGUIRE VA MEDICAL
CENTER, Richmond, VA, Employer**

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**Docket No. 21-1031
Issued: November 29, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 23, 2021 appellant filed a timely appeal from a May 28, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$44,320.59 for the period December 1, 2009 through March 3, 2018, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether

¹ 5 U.S.C. § 8101 *et seq.*

OWCP properly required recovery of the overpayment by deducting \$1,000.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 22, 1992 appellant, then a 48-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her back as a result of lifting and moving heavy objects while in the performance of duty. She stopped work on June 23, 1992 and has not returned. On February 24, 1994 OWCP accepted appellant's claim for lumbar strain with radiculopathy and hepatitis secondary to prescription drugs. It subsequently expanded its acceptance of the claim to include a single episode of depressive reaction. OWCP paid appellant wage-loss compensation on the supplemental rolls as of September 7, 1992 and on the periodic rolls as of June 16, 2002.

On March 13, 2018 SSA forwarded a completed Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP, which indicated that appellant had been in receipt of SSA age-related retirement benefits since December 2009. The form indicated her SSA age-related retirement benefit rates with and without a FERS offset. Beginning December 2009, the SSA rate with FERS was \$1,406.20 and without FERS was \$983.50, beginning December 2010, the SSA rate with FERS was \$1,406.20 and without FERS was \$983.50, beginning December 2011, the SSA rate with FERS was \$1,456.80 and without FERS was \$1,018.90, beginning December 2012, the SSA rate with FERS was \$1,481.50 and without FERS was \$1,036.20, beginning December 2013, the SSA rate with FERS was \$1,503.70 and without FERS was \$1,051.70, beginning December 2014, the SSA rate with FERS was \$1,529.20 and without FERS was \$1,069.50, beginning December 2015, the SSA rate with FERS was \$1,529.20 and without FERS was \$1,069.50, beginning December 2016, the SSA rate with FERS was \$1,533.70 and without FERS was \$1,072.70, and beginning December 2017, the SSA rate with FERS was \$1,564.30 and without FERS was \$1,094.10.

OWCP, in a letter dated March 19, 2018, notified appellant that her continuing compensation benefits would be offset by \$434.03 every 28 days, the portion of her SSA age-related retirement benefits attributable to her federal service.

In a preliminary overpayment determination dated April 17, 2018, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$44,320.59 because her wage-loss compensation benefits had not been reduced for the period December 1, 2009 through March 3, 2018 by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$44,320.59. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. Additionally, it notified her that, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP allotted 30 days for appellant to respond.

On May 15, 2018 appellant completed an overpayment action request form and requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment noting in a May 15, 2018 letter, that in 2011 she had asked SSA to clarify whether her monthly benefit was related to her brief service as a Civil Service Retirement System (CSRS) offset employee. In response, the SSA summarized her monthly benefit amount. Appellant telephoned the SSA and spoke to several individuals who could not tell her the amount to report to OWCP. She also telephoned OWCP, but her calls were not returned. Since 2011, appellant documented the uncertainty of her SSA payment in her annual updates. She claimed that she had poor health and that repayment of the overpayment would diminish her savings that were used to pay for her future medical and personal care. Appellant submitted a September 11, 2011 letter in which she requested that SSA provide assistance in determining the portion of her monthly benefit check paid as a result of her former federal employment. She noted that when she returned to federal service in 1987 she was part of the CSRS offset retirement program. Prior to that date, appellant's federal salary was not subjected to Social Security tax as she was a full CSRS employee. Although her record would show many reported Social Security earnings dating back to 1960, none of it was from federal employment until approximately May 1987. Appellant explained that, after a brief break in employment, she returned to federal service in 1987 and became a CSRS offset employee. She also submitted a September 14, 2011 letter wherein SSA informed her that her regular monthly payment beginning December 2010 was \$1,175.00 per month.

In a Form OWCP-20 completed by appellant on May 15, 2018 she reported that her monthly income included \$11,148.00 in her spouse's retirement benefits, \$1,033.66 in SSA benefits, \$4,879.97 in FECA benefits, and \$175.00 in Thrift Savings Plan, and \$2,000.00 in other income, for a total monthly income of \$17,236.63. She reported monthly expenses as \$4,710.90 for rent or mortgage, \$450.00 for food, \$700.00 for clothing, \$860.00 for utilities, and \$1,200.00 for other expenses, for a total of \$7,920.90. Appellant had assets that included \$200.00 cash on hand, \$875,000.00 in a checking account, \$58,000.00 in a savings account, \$25,735.00 in stocks and bonds, for a total of \$958,935.00. She submitted supporting financial documentation.

Following a preliminary review, by an October 10, 2018 decision, an OWCP hearing representative found that the case was not in posture for a prerecoupment hearing and remanded the case to OWCP to obtain clarification from SSA regarding what retirement system appellant was under and to determine the period and the amount of the overpayment.

OWCP, in an October 16, 2018 letter, requested that the Office of Personnel Management (OPM) identify appellant's retirement system during her federal service.

In a response letter dated November 20, 2018, OPM advised that appellant was under CSRS from January 4, 1965 through September 7, 1968, December 22, 1980 through April 30, 1986, and May 10, 1987 through February 7, 1999. Appellant was under the CSRS offset retirement program from May 10, 1987 through February 7, 1999.

In a November 29, 2018 letter, OWCP requested information from SSA regarding appellant's possible FERS/SSA dual benefits.

On March 4, 2019 OWCP received a completed FERS/SSA dual benefits calculation form from SSA dated February 28, 2019, wherein SSA provided the same SSA rates with FERS and without FERS for specific periods from December 2009 through December 2017 as set forth in its March 13, 2018 FERS/SSA dual benefits calculation form.

In a preliminary overpayment determination dated December 17, 2020, OWCP again notified appellant that she had received an overpayment of compensation in the amount of \$44,320.59 because her wage-loss compensation benefits had not been reduced for the period December 1, 2009 through March 3, 2018 by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$44,320.59. OWCP again advised appellant that she was without fault in the creation of the overpayment. It also provided appellant with an overpayment action request form and a Form OWCP-20, and asked her to submit supporting financial documentation. OWCP informed appellant of the appeal actions she could take and afforded her 30 days to respond.

On January 11, 2021 appellant completed an overpayment action request form and again requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment. In an accompanying Form OWCP-20 of even date, appellant reported that her monthly income included \$8,089.59 in her spouse's retirement, \$1,235.60 in SSA benefits, \$5,255.68 in TSP and FECA benefits, and \$63.00 in other income, for a total monthly income of \$14,643.87. She reported monthly expenses as \$5,328.78 for rent or mortgage, \$600.00 for food, \$100.20 for clothing, \$609.93 for utilities, \$4,675.73 for other expenses, \$205.00 for a credit card debt, for a total of \$11,519.64. Appellant had assets that included \$100.00 cash on hand, \$764,967.96 in a checking account, \$62,454.29 in a savings account, \$28,360.64 in stocks and bonds, \$33,798.98 in other property and funds, for a total of \$861,321.23.

By decision dated May 28, 2021, the hearing representative finalized OWCP's preliminary overpayment determination of December 17, 2020, finding that appellant received an overpayment of compensation in the amount of \$44,320.59 for the period December 1, 2009 through March 3, 2018 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for that period without appropriate offset. She also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP determined that recovery of the overpayment would require deducting \$1,000.00 from appellant's continuing compensation payments every 28 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 duty.² 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,

² *Id.* at § 8102(a).

pay, or remuneration of any type from the United States.³ 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.⁴

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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$44,320.59, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period December 1, 2009 through March 3, 2018.

The evidence of record supports that, while appellant was receiving wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. As noted, a claimant cannot receive both wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁷ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during a period while she was receiving wage-loss compensation as of September 7, 1992. Consequently, the fact of overpayment has been established.⁸

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 the SSA rate with FERS, and without FERS for specific periods commencing December 1, 2009 through March 3, 2018. OWCP provided its calculations for each

³ *Id.* at § 8116.

⁴ *Id.* at § 8129(a).

⁵ 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).

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

⁷ 5 U.S.C. § 8116(d)(2); *see W.C.*, Docket No. 20-1241 (issued February 9, 2021); *R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

⁸ *Id.*

relevant period based on the SSA worksheet and in its December 17, 2020 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 1, 2009 through March 3, 2018 and finds that an overpayment of compensation in the amount of \$44,320.59 was created.⁹

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.¹⁰

Recovery of an overpayment will defeat the purpose of FECA when 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.¹¹ 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.¹² 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.¹³

ANALYSIS -- ISSUE 2

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

⁹ See *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ 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).

¹¹ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that 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. *Id.* at Chapter 6.400.4a(2).

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

¹³ *Supra* note 11 at Chapter 6.400.4(d)(2) (September 2020).

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.¹⁴

Appellant provided her current monthly income and expenses in a Form OWCP-20 on January 11, 2021 as well as a summary of her liquid assets. OWCP properly determined that she listed available assets totaling \$861,321.23. This amount exceeds the base asset amount of \$10,300.00 for individuals with a spouse or dependent.¹⁵ It was therefore unnecessary for OWCP to consider whether appellant's monthly income exceeds her monthly ordinary and necessary expenses by more than \$50.00.¹⁶ OWCP therefore properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that, 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 the error is discovered or his or her attention is called to the 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.¹⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$1,000.00 from appellant's continuing compensation payments every 28 days.

In setting the recovery rate, OWCP explained that the factors set forth at 20 C.F.R. § 10.441(a) had been considered to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.¹⁸ As noted, appellant submitted a Form OWCP-20 on January 11, 2021 showing that she had available assets totaling \$861,321.23, which included \$100.00 cash on hand, \$764,967.96 in a checking account, \$62,454.29 in a savings account, \$28,360.64 in stocks and bonds, and \$33,798.98 in other property and funds. Thus, OWCP did not abuse its discretion in setting the rate of recovery.¹⁹ The Board therefore finds that

¹⁴ 20 C.F.R. § 10.436.

¹⁵ *Supra* note 11; *see W.C. and R.D., supra* note 7.

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.441(a); *see C.M., supra* note 7.

¹⁸ *See W.C., supra* note 7; *J.C.*, Docket No. 20-0204 (issued October 16, 2020); *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

¹⁹ *See W.C., id.*; *J.C., id.*; *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$1,000.00 every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$44,320.59, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period December 1, 2009 through March 3, 2018. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$1,000.00 from her continuing compensation payments every 28, days.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 29, 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