

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

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| E.H., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0065 |
| |) | Issued: September 2, 2021 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Nashville, TN, Employer |) | |
| |) | |

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 8, 2019 appellant filed a timely appeal from an April 15, 2019 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 the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 15, 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.*

ISSUE

The issue is whether OWCP properly denied waiver of recovery of an overpayment in the amount of \$63,696.96 with regard to the period August 1, 2015 through January 6, 2018, for which he was without fault.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On June 3, 2004 appellant, then a 55-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he injured his lower back when lifting while in the performance of duty. OWCP accepted the claim for aggravation of lumbar degenerative disc disease. Appellant stopped work on June 13, 2012. OWCP paid him wage-loss compensation on the periodic rolls as of July 1, 2012.

In correspondence dated January 23, 2018, OWCP notified appellant that, based on information provided by Social Security Administration (SSA) regarding the amount of his SSA age-related retirement benefits attributable to federal service, his FECA benefits had been adjusted effective January 7, 2018.

On January 23, 2018 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$63,696.96 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits, for the period September 1, 2014 to January 6, 2018, was based on credits attributable to his federal service, and that this portion of his SSA benefit was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment.

By decision dated March 6, 2018, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$63,696.96, for which appellant was at fault. It required recovery of the overpayment by deducting \$425.00 from his continuing compensation payments every 28 days.

On April 17, 2018 appellant filed an appeal with the Board.⁴

By decision dated January 29, 2019, the Board affirmed the March 6, 2018 decision in part, as modified, and set aside the decision in part. The Board found that appellant received an overpayment of compensation in the amount of \$63,696.95 for the period September 1, 2014 through January 6, 2018 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The Board further found, however,

³ Docket No. 18-1009 (issued January 29, 2019).

⁴ Appellant elected to receive Office of Personnel Management (OPM) retirement benefits, effective January 23, 2019, in lieu of compensation benefits under FECA.

that appellant was at fault in the creation of the overpayment only for the period September 1, 2014 through July 31, 2015, and thereby precluded from waiver of recovery of the overpayment for that period. The Board found appellant without fault in the creation of the overpayment for the period August 1, 2015 through January 6, 2018. The Board remanded the case to OWCP to consider waiver of recovery of the overpayment for that period, followed by a *de novo* decision.

On February 28, 2019 OWCP advised appellant that pursuant to the Board's remand of the case, it would further consider whether appellant was eligible for waiver of recovery of the overpayment. It forwarded appellant an overpayment recovery questionnaire (Form OWCP-20) for his completion and afforded him 30 days to respond.

On a completed Form OWCP-20 overpayment recovery questionnaire dated March 22, 2019, appellant noted that he had monthly income of \$2,155.00 from SSA, \$966.94 in retirement benefits from the OPM, and \$160.00 from an annuity, for total monthly income of \$3,261.94. He also indicated that he had assets of \$6,387.82 which included \$30.00 cash, \$1,385.00 checking account balance, \$4,672.82 savings account balance, and \$300.00 other funds. Appellant prepared a financial statement in which he indicated monthly expenses of \$135.00 property tax, \$1,041.13 home repair due to flooding, \$500.00 church contributions, \$39.00 home security, \$175.30 electricity, \$183.71 gas, \$98.34 telephone/internet, \$35.00 water, \$24.00 trash, \$60.35 mobile telephone, \$375.00 groceries, \$100.00 restaurants, \$191.58 bundled home and car insurance, \$250.00 car/gasoline, \$30.00 cleaning/laundry, \$500.00 prescription drugs, \$148.67 health insurance, \$27.42 vision and dental insurance, \$30.30 supplemental insurance, \$11.31 life insurance, and 5 monthly credit card and personal loan payments totaling \$640.00, for a total of \$4,596.11 in monthly expenses. He listed his respective monthly credit card payments which totaled \$515.00 and a personal loan \$125.00. In an attached statement, appellant requested waiver, contending that his home had flooded and that a 2010 automobile needed substantial repairs. He forwarded supporting financial documentation regarding his assets and expenses. This included: an estimate on home repairs; a Thrift Savings Account statement showing a balance of \$7,447.18; a loan payment calculator; bank receipts for monies deposited; cancelled checks to a church and for a personal loan; and partial billing statements for homeowners and life insurance, taxes, television/internet/telephone, and credit cards.

OWCP subsequently received additional supporting financial documentation consisting of partial statements for various credit cards.

On April 15, 2019 OWCP issued a revised final overpayment decision regarding the overpayment of compensation in the amount of \$63,696.96 for the period September 1, 2014 through January 6, 2018. It indicated that it had reviewed appellant's overpayment questionnaire and the submitted financial documentation, and determined that although he was without fault in part, the circumstances of his case did not warrant waiver of recovery of the overpayment. An attached overpayment memorandum explained that the evidence of record confirmed that he had monthly income of \$3,336.13, other funds totaling \$6,387.82, and debts totaling \$4,416.57. OWCP then determined, however, that certain reported expenses were inflated, and that appellant had not provided sufficient documentation to support the amounts claimed. It found that his adjusted income after expenses was \$1,021.85 per month, noting that he had \$6,387.82 in additional assets and that he did not have a mortgage or rent payment. OWCP found that the

information submitted was insufficient to support waiver of recovery of the \$63,696.96 overpayment. It required recovery of the overpayment by monthly payments of \$425.00.

LEGAL PRECEDENT

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.⁵ 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.⁶

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.⁷ 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 \$50.00.⁸

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.⁹ 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.¹⁰

⁵ 5 U.S.C. § 8129(a), (b).

⁶ *E.L.*, Docket No. 20-0723 (issued October 15, 2020); *L.S.*, 59 ECAB 350 (2008).

⁷ 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 2018). 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).

⁸ Federal (FECA) Procedure Manual, *id.* at Chapter 6.400.4a(3).

⁹ 20 C.F.R. § 10.437.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 6.400.4c(3).

ANALYSIS

The Board finds that OWCP properly denied waiver of recovery of the overpayment in the amount of \$63,696.96.

Appellant's adjusted income after expenses was \$1,021.85 per month and he had \$6,387.82 in additional assets. Moreover, he did not provide sufficient documentation of all his expenses, as requested by OWCP.¹¹

As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.¹² The record also establishes that he did not give up a valuable right or change his position for the worse in reliance on the overpaid amount.¹³ As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly denied waiver of recovery of the overpayment in the amount of \$63,696.96.

¹¹ See *R.M.*, Docket No. 19-0183 (issued November 18, 2019).

¹² See *R.F.*, Docket No. 20-0159 (issued October 15, 2020); *M.C.*, Docket No. 19-0699 (issued February 12, 2020).

¹³ *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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