

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

_____)	
P.M., Appellant)	
)	
and)	Docket No. 20-0445
)	Issued: September 2, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Hilo, HI, Employer)	
_____)	

Appearances:
Appellant, pro se
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 December 19, 2019 appellant filed a timely appeal from an October 18, 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 this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$14,852.67 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 November 1, 2013 through July 20, 2019, without an appropriate offset; (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 18, 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 evidence for the first time on appeal. *Id.*

OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$332.56 from appellant's continuing compensation payments, every 28 days.

FACTUAL HISTORY

On November 12, 2003 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his neck and back in a motor vehicle accident while in the performance of duty. His supervisor indicated that appellant's retirement coverage was under the Federal Employees Retirement System (FERS). On January 5, 2004 OWCP accepted the claim for a concussion with brief loss of consciousness, post-concussion syndrome, cervical strain with radiculopathy, lumbar radiculopathy, tension headaches from the cervical strain, and depression and anxiety. It paid appellant wage-loss compensation on the supplemental rolls commencing December 12, 2003 and on the periodic rolls commencing March 31, 2004.

In an April 6, 2013 letter, OWCP informed appellant that its records indicated that he was approaching the minimum age at which an individual is eligible to receive SSA retirement benefits. It explained that FECA requires that an individual's compensation benefits be reduced if that individual is also receiving SSA age-related retirement benefits, and that failure to report the receipt of such retirement benefits could result in an overpayment, which could be subject to recovery.

On July 22, 2016 OWCP received a FERS/SSA dual benefits calculation worksheet, noting appellant's SSA benefit rates with and without FERS commencing November 2013, December 2014, and December 2015.

An April 23, 2019 letter from the employing establishment indicated that appellant was receiving FECA compensation benefits and was eligible to receive SSA age-related retirement benefits. The employing establishment requested that OWCP contact SSA to determine if appellant's benefits should be reduced by the FERS offset and to determine if an overpayment existed because appellant's FERS offset had not been applied.

On June 21, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form for its completion.

On June 26, 2019 SSA completed the dual benefits calculation form, listing appellant's SSA benefit rates with a FERS offset and without a FERS offset from November 2013 through December 2018. Beginning November 2013, the SSA rate with FERS was \$1,244.90 and without FERS was \$1,036.90. Beginning December 2013, the SSA rate with FERS was \$1,263.90 and without FERS was \$1,052.90. Beginning December 2014, the SSA rate with FERS was \$1,284.90 and without FERS was \$1,070.90. Beginning December 2015, the SSA rate with FERS was \$1,284.90 and without FERS was \$1,070.90. Beginning December 2016, the SSA rate with FERS was \$1,289.00 and without FERS was \$1,074.00. Beginning December 2017, the SSA rate with FERS was \$1,314.00 and without FERS was \$1,095.00. Beginning December 2018, the SSA rate with FERS was \$1,351.50 and without FERS was \$1,125.50.

In a July 31, 2019 letter, OWCP indicated that it had determined that appellant had been receiving both FECA and SSA age-related retirement benefits at the same time, resulting in a prohibited dual benefit. It explained that his FECA compensation would be offset in the amount

of \$208.62 every 28 days and that his FECA compensation payments every 28 days would be \$3,325.58 after the SSA offset.

An August 1, 2019 FERS offset calculation worksheet noted each alleged period of overpayment and provided calculations, which resulted in a total overpayment in the amount of \$14,852.67 during the period November 1, 2013 through July 20, 2019.

In a preliminary determination dated August 13, 2019, OWCP informed appellant that he received an overpayment of compensation in the amount of \$14,852.67 because the SSA/FERS offset was not applied to payments for the period November 1, 2013 through July 20, 2019. It determined that he was without fault in the creation of the overpayment because he relied on improper information given in writing by OWCP or by another government agency, which he had reason to believe was connected with the administration of benefits. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method and advised him that he could request a waiver of recovery of the overpayment. It requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. It provided him with 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 September 13, 2019 appellant requested that OWCP make a decision based on the written evidence regarding possible waiver of recovery of his overpayment. He indicated that he disagreed with the amount of the overpayment because he had not applied for Social Security retirement benefits until about a year after his 62nd birthday, and noted that he was not given back pay for the payments he could have received, and that he was not aware that he was being overpaid. Appellant additionally requested wavier of recovery of the overpayment because he was without fault in its creation.

In a September 13, 2019 Form OWCP-20, appellant indicated that his total household monthly income was \$5,219.00, which included \$2,556.00 in SSA benefits and \$2,663.00 in other benefits, he did not list his FECA benefit of \$3,325.58. He listed his total monthly household expenses as \$4,432.77, which included \$1,032.77 in rent or mortgage, including property tax, \$1,200.00 in food, \$400.00 in clothing, \$1,000.00 in utilities, and \$800.00 in other expenses. Appellant listed his total monthly debts as \$2,681.82, which included \$100.00 to an online payment company, \$250.00 to a bank, \$145.00 to another bank, \$200.00 to the military exchange store, \$150.00 to a credit card company, \$100.00 to another credit card company, \$150.00 to a clothing company, \$100.00 to another clothing company, \$150.00 to a car company, \$1,000.00 to another car company, \$103.00 to a funeral home, and \$333.82 to a timeshare. He indicated that he pays a \$1,032.77 monthly mortgage for real estate other than his family home with an outstanding principal of \$143,750.99. Appellant also listed his total funds as \$10,291.60, which included \$160.00 in cash, \$1,760.00 in a checking account, \$2,525.00 in a savings account, and \$5,846.60 in stocks and bonds.

By decision dated October 18, 2019, OWCP finalized the August 13, 2019 preliminary determination that appellant had received an overpayment of compensation in the amount of \$14,852.67 for the period November 1, 2013 through July 20, 2019 because it had failed to offset his compensation payments by the portion of his SSA benefits that were attributable to federal

service. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP found that recovery of an overpayment would not defeat the purpose of FECA because there was no evidence, which indicated that, after deducting appellant's ordinary and necessary living expenses from his income, he would have \$50.00 or less left, and that he did not provide a list of assets to determine whether his assets exceed the resource base for an individual with a spouse. It found that it would recover the overpayment by deducting \$332.56 every 28 days from his continuing compensation payments.

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 his or her duty.³ 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.⁴

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,852.67 for the period November 1, 2013 through July 20, 2019 for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset.

As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.⁷ The evidence of record does establish that appellant received SSA age-related retirement benefits that were attributable to his

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also E.M.*, Docket No. 19-0857 (issued December 31, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁷ *S.M.*, Docket No. 20-0152 (issued August 10, 2020); *see also N.B., id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

own federal service during a period of time that he received FECA wage-loss compensation. The fact of the overpayment is, therefore, established.

To determine the amount of the overpayment, the portion of the SSA age-related retirement 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 appellant's benefit rates with FERS and without FERS during the specific period November 1, 2013 through July 20, 2019. OWCP provided its calculation for each relevant period based on SSA's worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period November 1, 2013 through July 20, 2019 and finds that an overpayment of compensation in the amount of \$14,852.67 has been established.

In an overpayment action request form, received by OWCP on September 17, 2019, appellant indicated that the amount of the overpayment was in error and he disagreed with the amount of the overpayment because he did not apply for SSA benefits until about a year after his 62nd birthday. Appellant did not, however, submit any evidence substantiating that he did not receive SSA age-related retirement benefits as of November 2013. OWCP, therefore, properly relied on SSA's records to determine that the overpayment began in November 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."⁸ Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁹

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹⁰ Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense and, also, if the beneficiary's assets do not exceed a specified amount

⁸ 5 U.S.C. § 8129.

⁹ 20 C.F.R. § 10.438.

¹⁰ *Id.* at §§ 10.434-10.437.

determined by OWCP from data provided by the Bureau of Labor Statistics.¹¹ Therefore, for waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹² 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 \$50.00.¹³

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 of recovery of the overpayment 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

The evidence of record establishes that appellant's income exceeds his ordinary expenses by more than \$50.00.¹⁵ The Board notes that in listing his income appellant did not include his FECA payments, with this adjustment appellant's total monthly income totaled \$8,544.58, while his total monthly expenses and debts totaled \$7,114.59. Appellant, therefore, did not need substantially all of his monthly income to meet current ordinary and necessary living expenses. The Board also notes that appellant's listed expenses indicate that he had expenses related to assets, such as property, aside from his primary home, which were unreported and undocumented. Appellant, therefore, had not established that recovery of the overpayment would defeat the purpose of FECA.¹⁶ There is also no evidence to support that appellant gave up a valuable right or changed his position for the worse, in reliance on his FECA compensation. Appellant, therefore, did not establish that recovery of the overpayment was against equity and good conscience.¹⁷

¹¹ *Id.* at § 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. Chapter 6.400.4a(2).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at § 10.436.

¹⁵ *Supra* note 11.

¹⁶ *Id.*

¹⁷ *See R.D.*, Docket No. 19-1598 (issued April 17, 2020); *R.C.*, Docket No. 19-0845 (issued February 3, 2020).

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 properly denied waiver of recovery.¹⁸

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.¹⁹

Section 10.441(a) of the 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 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

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$332.56 each 28 days from appellant's continuing compensation payments. The record indicates that appellant's monthly income exceeds his reported monthly expenses by over \$1,000.00 per month. OWCP, therefore, did not abuse its discretion in finding that he should repay the overpayment at the rate of \$332.56 per compensation period.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,852.67 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period November 1, 2013 through July 20, 2019, without an appropriate offset. The Board

¹⁸ *Id.*

¹⁹ *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁰ 20 C.F.R. § 10.441(a).

²¹ *N.B.*, *supra* note 6; *N.S.*, Docket No. 14-2081 (issued February 12, 2015).

further finds that OWCP properly denied waiver of recovery of the overpayment, and required recovery by deducting \$332.56 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 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