

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

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<b>S.P., Appellant</b> )	)	
)	)	
<b>and</b> )	)	<b>Docket No. 20-1523</b>
)	)	<b>Issued: December 19, 2022</b>
<b>DEPARTMENT OF THE AIR FORCE, MARCH</b> )	)	
<b>AIR RESERVE BASE, CA, Employer</b> )	)	
_____ )	)	

*Appearances:*  
*Janine LeAnn Paul*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 18, 2020 appellant, through his representative, filed a timely appeal from a March 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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 an 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the March 3, 2020 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.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,542.18 for the period February 1, 2014 through January 4, 2020 for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits, 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 \$338.43 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On November 26, 1991 appellant, then a 39-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that on October 29, 1991 he sustained a severe lower back sprain when he lifted a desk onto the back of a truck while in the performance of duty. He stopped work on October 30, 1991, returned to light-duty work on July 8, 1992 and then stopped work again on January 4, 1993. OWCP accepted the claim for herniated disc at L4-5.

OWCP paid appellant retroactive wage-loss compensation based upon his loss of wage-earning capacity on the supplemental rolls as of February 17, 1998 and on the periodic rolls as of August 19, 2018 through February 29, 2020.

On claims for compensation (Form CA-7) dated June 22, 2005 and June 15, 2006, appellant listed his retirement system as the Federal Employees Retirement System (FERS).

On August 19, 2019 OWCP forwarded a FERS/SSA dual benefits form to SSA.

The form was completed by SSA and received by OWCP on December 30, 2019. SSA reported appellant's SSA age-related retirement benefit rates with and without FERS for the period February 2014 through December 2019. It indicated that, with FERS, he was entitled to monthly payments of \$865.00, effective February 2014; \$879.00, effective December 2014 and December 2015; \$882.00, effective December 2016; \$900.00, effective December 2017 and September 2018; \$924.50 effective December 2018; and \$939.60, effective December 2019. Without appellant's federal service contribution, he was entitled to a monthly payment rate of \$653.00, effective February 2014; \$664.00, effective December 2014 and December 2015; \$666.00, effective December 2016; \$679.00, effective December 2017 and September 2018; \$698.50, effective December 2018, and \$709.60, effective December 2019.<sup>4</sup>

In a FERS offset calculation form dated January 8, 2020, OWCP documented its calculation of the total overpayment in the amount of \$15,542.18 for the period February 1, 2014 through January 4, 2020. It determined that, during the 303 days from February 1 through November 30, 2014, appellant received an overpayment in the amount of \$2,117.67, during the 365 days from December 1, 2014 through November 30, 2015 an amount of \$2,587.09, during the 366 days from December 1, 2015 through November 30, 2016 an amount of \$2,594.18, during the 365 days from December 1, 2016 through November 30, 2017 an amount of \$2,599.12, during the

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<sup>4</sup> A handwritten correction from SSA dated December 23, 2019 contained the final documentation of appellant's SSA rates with and without FERS.

274 days from December 1, 2017 through August 31, 2018 an amount of \$1,996.29, during the 91 days from September 1 through November 30, 2018 an amount of \$633.00, during the 365 days from December 1, 2018 through November 30, 2019 an amount of \$2,719.45, and during the 35 days from December 1, 2019 through January 4, 2020 an amount of \$265.38. A memorandum of the same date noted that appellant's Civil Service Active number confirmed that he was enrolled in FERS.

In a letter dated January 14, 2020, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA age-related retirement benefits attributable to federal service, his FECA wage-loss compensation had been adjusted.

On January 28, 2020 OWCP notified appellant of its preliminary overpayment determination that he an overpayment of compensation in the amount of \$15,542.18 had been created for the period February 1, 2014 through January 4, 2020 because he concurrently received SSA age-related retirement benefits based upon his federal service, and FECA wage-loss compensation without an appropriate offset. It found him without fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for his completion. OWCP requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income, assets, and expenses. It afforded him 30 days to respond. No response was received.

By decision dated March 3, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$15,542.18 for the period February 1, 2014 through January 4, 2020 because it failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to federal service.<sup>5</sup> It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$338.43 from appellant's continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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 duty.<sup>6</sup> 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.<sup>7</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to

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<sup>5</sup> The final decision contained a typographic error as it stated that the period of the overpayment commenced February 1, 2017; however, it included calculation of the overpayment from February 1, 2014.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8116.

federal service of the employee.<sup>8</sup> 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.<sup>9</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,542.18 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period February 1, 2014 through January 4, 2020 without an appropriate offset.

The record indicates that, while appellant was receiving FECA wage-loss compensation benefits, he was also receiving SSA age-related retirement benefits attributable to federal service. As noted, a claimant cannot receive both compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>10</sup> Consequently, the fact of the overpayment has been established.

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. SSA provided the SSA rate with FERS and without FERS for specific periods, commencing February 1, 2014 through January 4, 2020. OWCP provided its overpayment calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period February 1, 2014 through January 4, 2020 and finds that an overpayment of compensation in the amount of \$15,542.18 was created.<sup>11</sup>

### **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.<sup>12</sup> 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

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<sup>8</sup> 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>9</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>10</sup> *See J.C.*, Docket No. 20-1062 (issued January 4, 2021); *I.U.*, Docket No. 20-0129 (issued July 31, 2020).

<sup>11</sup> *Id.*

<sup>12</sup> 5 U.S.C. § 8129.

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.<sup>13</sup>

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.<sup>14</sup> 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 as determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>15</sup> For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, 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.<sup>16</sup> 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>17</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 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.<sup>18</sup> However, appellant had the responsibility to provide financial information to OWCP,<sup>19</sup> but failed to do so.

In its preliminary overpayment determination, dated January 28, 2020, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. It advised him that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant did not provide the requested Form OWCP-20 or otherwise submit financial information

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<sup>13</sup> 20 C.F.R. § 10.438.

<sup>14</sup> *Id.* at §§ 10.434-10.437.

<sup>15</sup> *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 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).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at § 10.436.

<sup>19</sup> *Id.* at § 10.438; *J.C., supra* note 10; *S.P., Docket No. 19-1318* (issued July 31, 2020).

necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

Accordingly, as appellant has not submitted the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.

### **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.<sup>20</sup>

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation 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 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 hardship.<sup>21</sup>

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$338.43 every 28 days from appellant's continuing compensation payments.

OWCP provided appellant a Form OWCP-20 with its January 28, 2020 preliminary overpayment determination. It afforded him the opportunity to provide appropriate financial information and documentation to OWCP. Appellant, however, did not complete the Form OWCP-20 or otherwise provide the necessary financial information to support his income and expenses prior to the final March 3, 2020 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>22</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>23</sup> As appellant did not submit financial information as requested, the Board finds that OWCP properly required recovery of the \$15,542.18 overpayment at the rate of \$338.43 every 28 days from his continuing compensation payments.<sup>24</sup>

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<sup>20</sup> *Id.* at § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at § 10.438(a).

<sup>23</sup> *J.A.*, Docket No. 19-1946 (issued July 13, 2020); *Frederick Arters*, 53 ECAB 397 (2002); *supra* note 15 at Chapter 6.500.2 (September 2018).

<sup>24</sup> *See J.A., id.; E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,542.18 for the period February 1, 2014 through January 4, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without 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 \$338.43 every 28 days from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 3, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2022  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board