

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

_____)
B.E., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Lexington, KY, Employer)
_____)

Docket No. 22-0423
Issued: December 1, 2022

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 24, 2022 appellant filed a timely appeal from September 20 and December 13, 2021 merit decisions 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 has met her burden of proof to modify a May 17, 2013 loss of wage-earning capacity (LWEC) determination; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,091.10

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 13, 2021 decision, appellant submitted additional evidence to OWCP. 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.*

for the period January 1, 2020 through February 27, 2021, 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; (3) whether OWCP properly denied waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$305.03 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

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

On April 22, 2004 appellant, then a 49-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her neck and right upper extremity due to factors of her federal employment. She indicated that she first became aware of the injuries on April 16, 2004 and related them to her employment on April 20, 2004. OWCP accepted appellant's claim for disc herniation at the C6-7 level with radiculopathy and she underwent OWCP-authorized anterior cervical discectomy/fusion surgery at C6-7 on September 30, 2004. In December 2009, it expanded the acceptance of her claim to include C5-6 herniated disc with degenerative changes. OWCP later found that appellant was entitled to wage-loss compensation for disability from work retroactive to April 24, 2008 and placed her on the periodic rolls.

In March 2012, appellant's rehabilitation counselor determined that she was capable of earning wages in the constructed position of receptionist, a position listed in the Department of Labor's *Dictionary of Occupational Titles*. The counselor determined that state labor market surveys demonstrated that the position was reasonably available within appellant's commuting area with an average salary of \$318.00 per week. The physical requirements of the position included frequent lifting of up to 10 pounds, occasional lifting of up to 20 pounds, frequent handling/fingering, and occasional stopping. These physical requirements were within the October 25, 2012 work restrictions of Dr. Theodore T. Le, a Board-certified orthopedic surgeon who served as an OWCP referral physician.⁴

By decision dated May 17, 2013, OWCP issued a formal LWEC determination based upon appellant's ability to earn \$318.00 per week as a receptionist and it adjusted her wage-loss compensation commencing June 2, 2013 based on this determination. On May 2, 2014 appellant requested reconsideration. By decision dated July 15, 2014, OWCP denied modification of the May 17, 2013 LWEC determination. On January 7, 2015 appellant again requested reconsideration and submitted April 22 and September 18, 2014 reports from Dr. Mark Delomas, a Board-certified anesthesiologist, who noted restrictions as "no lifting greater than 20 [pounds], [and] avoiding overhead lifting, reaching, repetitive bending and twisting of the neck." By

³ *Order Remanding Case*, Docket No. 16-1761 (issued December 21, 2016); *Order Remanding Case*, Docket No. 18-1654 (issued August 20, 2019); *Order Remanding Case*, Docket No. 20-1100 (issued May 7, 2021).

⁴ Dr. Le indicated that appellant could intermittently lift up to 25 pounds.

decision dated February 9, 2015, OWCP denied modification of the May 17, 2013 LWEC determination.

On February 12, 2016 appellant requested reconsideration. Dr. Delomas submitted a December 11, 2014 report, in which he diagnosed several cervical, shoulder, and wrist conditions, and a September 9, 2015 report of Dr. Karim Rasheed, a Board-certified anesthesiologist, who diagnosed several cervical conditions.

By decision dated February 29, 2016, OWCP denied appellant's February 12, 2016 request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board and, by order dated December 21, 2016,⁵ the Board set aside the February 29, 2016 decision and remanded the case to OWCP for further development. The Board found that she had raised the issue of whether modification of the May 17, 2013 LWEC determination was warranted and directed OWCP to consider this matter on remand and issue an appropriate decision. On remand, OWCP issued an April 12, 2017 decision in which it determined that appellant had not met her burden of proof to modify its May 17, 2013 LWEC determination.

On July 10, 2018 appellant requested reconsideration, arguing that her employment-related medical condition had materially changed such that modification of OWCP's May 17, 2013 LWEC determination was warranted. She submitted a January 11, 2018 report from Dr. Robert D. Owen, a Board-certified neurosurgeon, who noted her complaints of left-sided neck pain radiating into the left hand, diagnosed cervical disc disorder with radiculopathy, and recommended anterior cervical discectomy/fusion surgery at C5-6. Appellant also submitted an April 23, 2018 report from Dr. John J. Vaughan, a Board-certified orthopedic surgeon, who noted that she reported experiencing increased cervical pain, which radiated into her left arm. Dr. Vaughan indicated that a December 1, 2017 magnetic resonance imaging (MRI) scan of her cervical spine showed a moderate-disc herniation at C5-6 with moderate stenosis, which was not present in a 2013 cervical spine MRI scan and he recommended anterior cervical discectomy/fusion surgery at C5-6. Appellant submitted a copy of the December 1, 2017 MRI scan.

By decision dated July 25, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the July 10, 2018 request was untimely filed and failed to demonstrate clear evidence of error.

Appellant submitted additional reports, dated February 7, April 24, September 6, and October 8, 2019, in which Dr. Rasheed reported physical examination findings and diagnosed several cervical conditions.

Appellant appealed to the Board and, by order remanding case dated August 20, 2019,⁶ the Board set aside the July 25, 2018 decision and remanded the case to OWCP for further development. The Board found that she had raised the issue of whether modification of the

⁵ Docket No. 16-1761 (issued December 21, 2016).

⁶ Docket No. 18-1654 (issued August 20, 2019).

May 17, 2013 LWEC determination was warranted, and it directed OWCP to issue a *de novo* decision after evaluating the new evidence submitted by appellant to determine if modification of the prior LWEC determination was warranted.

By decision dated November 1, 2019, OWCP determined that appellant had not met her burden of proof to modify its May 17, 2013 LWEC determination.

Appellant submitted an October 29, 2019 report in which Dr. Vaughan indicated that she complained of increased left upper extremity pain. A December 2, 2019 MRI scan revealed normal alignment of the cervical spine. In a December 31, 2019 report, Dr. Vaughan noted that it appeared that appellant's C5-6 herniation had resolved. Appellant also submitted records from a September 2, 2020 hospital visit during which Dr. Rasheed administered an intra-articular injection in her neck.

Appellant then appealed to the Board. By order remanding case dated May 7, 2021,⁷ the Board set aside the November 1, 2019 decision, finding that OWCP did not review evidence received prior to the issuance of its November 1, 2019 decision, *i.e.*, the January 11, 2018 report from Dr. Owen, the April 23, 2018 report from Dr. Vaughan, and the December 1, 2017 MRI scan. The Board remanded the case for OWCP to fully consider all of the evidence that was submitted prior to the issuance of the November 1, 2019 decision followed by an appropriate decision regarding her request for modification of the May 17, 2013 LWEC determination.

On January 27, 2021 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits form to SSA for completion.⁸

On February 3, 2021 SSA completed the FERS/SSA dual benefits form, which indicated that appellant received SSA age-related retirement benefits that were attributable to federal service commencing January 2020.⁹ SSA provided appellant's SSA age-related retirement benefit rates with and without a FERS offset as follows: beginning January 2020, the SSA rate with FERS was \$1,162.50 and without FERS was \$1,013.30; and beginning December 2020 the SSA rate with FERS was \$1,177.60 and without FERS was \$1,026.50.

On February 25, 2021 OWCP prepared a FERS offset overpayment calculation worksheet, based on the benefits rates provided by SSA, wherein it noted the calculations of appellant's overpayment from January 1, 2020 through February 27, 2021. It determined: for the period January 1 through November 30, 2020 appellant received an overpayment of \$1,647.76; and for the period December 1, 2020 through February 27, 2021 appellant received an overpayment of \$443.34.

On February 25, 2021 OWCP advised appellant that, effective February 28, 2021, it was adjusting her wage-loss compensation to offset the portion of her SSA age-related retirement

⁷ Docket No. 20-1100 (issued May 7, 2021).

⁸ The case record indicates that appellant's retirement coverage was under FERS.

⁹ In a form signed on January 7, 2010, appellant elected to receive FECA compensation instead of Office of Personnel Management retirement benefits.

benefits attributable to her federal service. It informed her that the portion of the SSA benefits that she earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

On May 21, 2021 OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$2,091.10 for the period January 1, 2020 through February 27, 2021, because she received FECA wage-loss compensation benefits and SSA age-related retirement benefits attributable to her federal service, without an appropriate offset. 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 rate of recovery, and advised her that she could request waiver of recovery of the overpayment. OWCP further requested that she provide 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 provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a precoupment hearing.

On June 10, 2021 OWCP received an overpayment action request form, signed on June 10, 2021 in which appellant requested waiver of recovery of the overpayment. It also received an overpayment recovery questionnaire (Form OWCP-20), signed on June 10, 2021 in which she listed \$2,520.00 in monthly income, \$2,190.00 in monthly expenses, and \$4,439.00 in assets. Appellant requested an oral telephone hearing with a representative of OWCP's Branch of Hearing and Review. During the October 5, 2021 hearing, she indicated that the financial information reported on the submitted overpayment recovery questionnaire had not changed.

By decision dated September 20, 2021, OWCP determined that appellant failed to meet her burden of proof to modify the May 17, 2013 LWEC determination. It discussed the evidence referenced by the Board in its May 7, 2021 decision, as well as other evidence of record, and determined that it was insufficient to require modification of the May 17, 2013 LWEC determination.

By decision dated December 13, 2021, OWCP's hearing representative finalized the May 21, 2021 preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$2,091.10 for the period January 1, 2020 through February 27, 2021, because she received FECA wage-loss compensation benefits and SSA age-related retirement benefits attributable to her federal service, without an appropriate offset. It further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because her monthly income exceeded her monthly expenses by more than \$50.00. OWCP discussed appellant's financial circumstances, including the amount of her FECA compensation, and required recovery of the overpayment by deducting \$305.03 from her continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹⁰ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.¹¹ An employee's actual earnings generally best reflect his or her wage-earning capacity.¹² Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹³ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her disabled condition.¹⁴

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹⁵ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁶ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to postinjury or subsequently acquired conditions.¹⁷

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.¹⁸ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through

¹⁰ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

¹¹ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹² *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹³ *Id.*

¹⁴ 5 U.S.C. § 8115(a); *MaryJo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁵ *M.A.*, 59 ECAB 624, 631 (2008).

¹⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

¹⁷ *N.J.*, 59 ECAB 171, 176 (2007); *id.* at Chapter 2.816.4c (June 2013).

¹⁸ *Id.* at Chapter 2.813.7b (February 2011).

contact with the state employment service or other applicable service.¹⁹ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.²⁰

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.²¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to modify the May 17, 2013 LWEC determination.

The Board first finds that appellant has not shown that OWCP's original May 17, 2013 LWEC determination was, in fact, erroneous.²³ In March 2012, appellant's rehabilitation counselor properly determined that appellant was capable of earning wages in the selected position of receptionist. The rehabilitation counselor indicated that a state labor market survey showed that the receptionist position was reasonably available within appellant's commuting area with an average wage of \$318.00 per week. OWCP properly relied on the rehabilitation counselor's opinion that appellant was vocationally capable of working as a receptionist and that the position was reasonably available.²⁴ Moreover, the evidence of record shows that the physical requirements of the position were within the best measure of appellant's work capability at the time. The physical requirements of the position included frequent lifting of up to 10 pounds, occasional lifting of up to 20 pounds, frequent handling/fingering, and occasional stopping. These physical requirements were within the October 25, 2012 work restrictions of Dr. Le, an OWCP referral physician, who indicated that appellant could intermittently lift up to 25 pounds. OWCP properly applied the principles set forth in the *Shadrick* decision to calculate the percentage of appellant's LWEC.²⁵

¹⁹ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); *id.* at Chapter 2.816.6 (June 2013).

²⁰ 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

²¹ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

²² *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

²³ *See id.*

²⁴ *See M.P.*, Docket No. 18-0094 (issued June 26, 2018) (the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and that OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available).

²⁵ *See supra* note 20.

Appellant claimed that there was a material change in the nature and extent of her employment-related condition such that she could no longer work as a receptionist. She submitted a July 10, 2013 report from Dr. Vaughan, who indicated that her C5-6 herniation had worsened and might require surgery in the future.

In April 22 and September 18, 2014 reports, Dr. Delomas noted restrictions as “no lifting greater than 20 [pounds], [and] avoiding overhead lifting, reaching, repetitive bending, and twisting of the neck.” In a December 11, 2014 report, he diagnosed several cervical, shoulder, and wrist conditions.

In a September 9, 2015 report, Dr. Rasheed diagnosed several cervical conditions. A December 1, 2017 MRI scan of appellant’s cervical spine showed a moderate disc herniation at C5-6 with moderate stenosis.

In a January 11, 2018 report, Dr. Owen noted her complaints of left-sided neck pain radiating into the left hand, diagnosed cervical disc disorder with radiculopathy, and recommended anterior cervical discectomy/fusion surgery at C5-6.

In an April 23, 2018 report, Dr. Vaughan indicated that appellant reported experiencing increased cervical pain. In reports dated February 7, April 24, September 6, and October 8, 2019, Dr. Rasheed reported physical examination findings and diagnosed several cervical conditions. Appellant also submitted an October 29, 2019 report in which Dr. Vaughan indicated that she complained of increased left upper extremity pain. In a December 31, 2019 report, Dr. Vaughan noted that it appeared that her C5-6 herniation had resolved.

A December 2, 2019 MRI scan revealed normal alignment of the cervical spine.

Appellant also submitted records from a September 2, 2020 hospital visit during which Dr. Rasheed administered an intra-articular injection in her neck.

The Board finds, however, that these reports are of no probative value with respect to appellant’s claim that there was a material change in the nature and extent of the employment-related condition such that she could no longer work as a receptionist.²⁶ These reports do not contain such an opinion and, therefore, appellant has not established such a basis for modifying the May 17, 2013 LWEC determination.²⁷

The Board further finds that the record does not establish that appellant was subsequently retrained or vocationally rehabilitated after OWCP adjusted her compensation per its May 17,

²⁶ The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee’s condition or disability is of no probative value on the issue of causal relationship. *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁷ *See supra* note 21.

2013 LWEC determination.²⁸ For these reasons, appellant has not met her burden of proof to modify the May 17, 2013 LWEC determination.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

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.²⁹ 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.³⁰

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.³¹ 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.³²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,091.10, for the period January 1, 2020 through February 27, 2021 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability due to her accepted employment injury beginning May 15, 2004. A claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.³³ The evidence of record establishes that, while appellant was receiving wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement

²⁸ *See id.*

²⁹ 5 U.S.C. § 8102.

³⁰ *Id.* at § 8116.

³¹ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

³² FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

³³ *M.R.*, Docket No. 20-0427 (issued October 30, 2020).

benefits that were attributable to her federal service without an appropriate offset. Accordingly, the Board finds that fact of overpayment has been established.³⁴

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 a dual benefits calculation form from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided appellant's age-related retirement benefit rates with FERS and without FERS for specific periods January 1, 2020 through February 27, 2021. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$2,091.10. The Board has reviewed OWCP's calculation of dual benefits received by her for the period January 1, 2020 through February 27, 2021 and finds that she received an overpayment of compensation in the amount of \$2,091.10.³⁵

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.³⁶ Section 8129 of FECA³⁷ provides that an overpayment must be recovered 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery 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.³⁸

According to 20 C.F.R. § 10.436, 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 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.³⁹ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market

³⁴ See *K.H.*, Docket No. 18-0171 (issued August 2, 2018).

³⁵ See *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

³⁶ See *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

³⁷ 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

³⁸ See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

³⁹ 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. *Supra* note 16 at 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).

value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401 (k)), jewelry, and artwork.⁴⁰

According to 20 C.F.R. § 10.437 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.⁴¹ To establish that, a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.⁴²

ANALYSIS -- ISSUE 3

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.⁴³

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As properly determined by OWCP, appellant's monthly income exceeds her monthly ordinary and necessary expenses by approximately \$330.00. The evidence of record reflects that appellant had \$2,520.00 in monthly income, \$2,190.00 in monthly expenses, and \$4,438,67 in assets.

As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.⁴⁴ Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets exceed the allowable resource base. The Board finds that appellant has not established that she was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience

⁴⁰ *Id.* at Chapter 6.400.4b(3)(a), (b).

⁴¹ 20 C.F.R. § 10.437(a), (b).

⁴² *Id.* at § 10.437(b)(1).

⁴³ *Id.* at § 10.436.

⁴⁴ *See supra* note 42.

severe financial hardship in attempting to repay the debt, or that she relinquished a valuable right, or changed her position for the worse in reliance on the payment which created the overpayment.⁴⁵

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.⁴⁶ Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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."⁴⁷

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly required recovery of the overpayment by deducting \$305.03 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$305.03 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on her. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$305.03 from her continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant has not met her burden of proof to modify the May 17, 2013 LWEC determination. The Board further finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$2,091.10, for the period January 1, 2020 through February 27, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. The Board also finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$305.03 from appellant's continuing compensation payments every 28 days.

⁴⁵ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

⁴⁶ *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

⁴⁷ 20 C.F.R. § 10.441; see *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the September 20 and December 13, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 1, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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