

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

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R.P., Appellant )

and )

DEPARTMENT OF THE INTERIOR, BUREAU )  
OF INDIAN AFFAIRS, FORT BELKAMP )  
AGENCY, Harlem, MT, Employer )  
\_\_\_\_\_ )

**Docket No. 22-1008  
Issued: December 9, 2022**

*Appearances:*

*Alan J. Shapiro, Esq., 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  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 21, 2022 appellant, through counsel, filed a timely appeal from a June 13, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) 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 June 13, 2022 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 \$33,994.42 during the period August 1, 2015 through September 11, 2021, 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 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 \$516.92 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On January 24, 2011 appellant, then a 57-year-old range conservationist, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to the body and head when he slipped on ice while in the performance of duty. On the reverse side of the claim form, the employing establishment noted appellant's retirement system as Federal Employees Retirement System (FERS). OWCP accepted the claim for concussion with brief loss of consciousness and post-concussion syndrome. Appellant stopped work on January 24, 2011. OWCP paid him wage-loss compensation on the supplemental rolls effective March 11, 2011 and the periodic rolls effective January 15, 2012.

On August 4, 2021 OWCP forwarded a FERS/SSA dual benefits form to SSA requesting information from SSA regarding appellant's potential receipt of dual benefits.

On August 24, 2021 OWCP received a completed FERS/SSA dual benefits form from SSA bearing that date. SSA reported appellant's SSA age-related retirement benefit rates with and without a FERS offset. The form indicated that the SSA rate with FERS was \$1,351.40 effective August and December 2015; \$1,355.40 effective December 2016; \$1,382.50 effective December 2017; \$1,421.20 effective December 2018; \$1,443.90 effective December 2019; and \$1,462.60 effective December 2020. The form further indicated that the SSA rate without FERS was \$905.20 effective August and December 2015; \$907.90 effective December 2016; \$926.00 effective December 2017; \$951.90 effective December 2018; \$967.10 effective December 2019; and \$979.60 effective December 2020.

On September 13, 2021 OWCP notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$33,994.45 as he had received FECA wage-loss compensation benefits for the period August 1, 2015 through September 11, 2021 that had not been reduced by the portion of his SSA age-related retirement benefits attributable to his federal service, and that this portion of his SSA benefit was a prohibited dual benefit. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit 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. Additionally, it provided an overpayment action request form and notified him 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 precoupment hearing.

On September 24, 2021 appellant requested a prerecoupment hearing before OWCP's Branch of Hearings and Review. He requested waiver as he was found to be without fault in the creation of the overpayment. Appellant submitted the same form again, dated September 29, 2021, and noted his additional disagreement that the overpayment occurred. In an attached Form OWCP-20, he advised that his total monthly income included \$2,465.00 in SSA benefits. Appellant further advised that his monthly expenses totaled \$2,550.00. He noted that he had assets of cash on hand of \$25.00, as well as checking and savings account balances of \$150.00 and \$18,000.00, respectively, for total assets of \$18,175.00.

By decision dated November 17, 2021, a hearing representative completed a preliminary review, vacating the September 13, 2021 preliminary decision. The hearing representative remanded the case for OWCP to explain how appellant's overpayment was calculated.

In a memorandum to the file dated December 17, 2021, OWCP completed a FERS offset overpayment calculation. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$33,994.42. OWCP found that during the 122-day period from August 1 to November 30, 2015 appellant received an overpayment of \$1,794.61; during the 366-day period from December 1, 2015 to November 30, 2016 an overpayment of \$5,383.82; during the 365-day period from December 1, 2016 to November 30, 2017 an overpayment of \$5,384.75; during the 365-day period from December 1, 2017 to November 30, 2018 an overpayment of \$5,493.05; during the 365-day period from December 1, 2018 to November 30, 2019 an overpayment of \$5,647.07; during the 366-day period from December 1, 2019 to November 30, 2020 an overpayment of \$5,753.04; and for the 285-day period from December 1, 2020 to September 11, 2021 an overpayment of \$4,538.08. On December 17, 2021 OWCP notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$33,994.42 as he had received FECA wage-loss compensation benefits for the period August 1, 2015 through September 11, 2021 that had not been reduced by the portion of his SSA age-related retirement benefits attributable to his federal service, and that this portion of his SSA benefit was a prohibited dual benefit. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP again requested that appellant complete an enclosed Form OWCP-20 and submit supporting financial documentation.

On December 28, 2021 appellant requested a prerecoupment hearing before OWCP's Branch of Hearings and Review. He requested waiver as he was found to be without fault in the creation of the overpayment. Appellant again submitted his request on January 3, 2022. In an attached Form OWCP-20, he reported that his monthly income totaled \$6,238.00. Appellant further advised that his monthly expenses totaled \$5,845.70. Appellant noted that he had assets totaling \$9,500.00, respectively, for total assets of \$9,559.00. On April 8, 2022 OWCP received a substantial number of financial documents from appellant indicating his asset balances as well as his expenses.

The hearing was held on March 31, 2022. During the hearing, counsel indicated that appellant had about \$6,200.00 in monthly income, but that it was not all SSA benefits, with total monthly expenses of about \$5,800.00.

By decision dated June 13, 2022, the hearing representative finalized OWCP's preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$33,994.42 for the period August 1, 2015 through September 11, 2021. The hearing

representative calculated and explained the overpayment. The hearing representative further found that while appellant was without fault in the creation of the overpayment, waiver of recovery of the overpayment was denied. He required repayment at the rate of \$516.92 every 28 days deducted from his continuing compensation payments.

### **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>4</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>5</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 federal service of the employee.<sup>6</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>7</sup>

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

The Board finds that OWCP has established that appellant received an overpayment of compensation in the amount of \$33,994.42 during the period August 1, 2015 through September 11, 2021, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits, without appropriate offset.

As previously noted, a claimant cannot receive both FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>8</sup> The evidence of record establishes that appellant had concurrently received wage-loss compensation benefits and SSA age-related retirement benefits that were attributable to federal service during the period August 1, 2015 to September 11, 2021. Consequently, the fact of overpayment has been established.<sup>9</sup>

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.

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</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>7</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *D.W.*, Docket No. 20-1533 (issued May 27, 2021); *M.R.*, Docket No. 20-0427 (issued October 30, 2020); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>9</sup> *See L.B.*, Docket No. 19-1322 (issued January 27, 2020).

The Board has reviewed the calculation of benefits received by appellant for the period August 1, 2015 through September 11, 2021 and finds that an overpayment of compensation in the amount of \$33,994.42 has been established. 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 appellant's SSA rate with FERS and without FERS for the period August 1, 2015 to September 11, 2021. OWCP provided its calculations of the amount that it should have offset during the 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 August 1, 2015 to September 11, 2021 and finds that OWCP properly calculated an overpayment of compensation in the amount of \$33,994.42.<sup>10</sup>

### **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.<sup>11</sup>

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.<sup>12</sup>

Recovery of an overpayment will defeat the purpose of FECA if 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.<sup>13</sup> Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>14</sup>

OWCP's regulations provide 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. The information is also used to

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<sup>10</sup> *N.V.*, Docket No. 20-0080 (issued January 21, 2022).

<sup>11</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see M.C.*, Docket No. 19-0699 (issued February 12, 2020).

<sup>12</sup> *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>13</sup> 20 C.F.R. § 10.436(a)-(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a.(2) (September 2020).

<sup>14</sup> *Id.* at § 10.437(a)(b).

determine the repayment schedule, if necessary.<sup>15</sup> Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

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

On the Form OWCP-20 appellant reported that his monthly income totaled \$6,238.00 and his monthly expenses totaled \$5,845.70. As appellant's monthly income exceeded his ordinary and necessary living expenses by more than \$50.00, he did not need substantially all of his income for ordinary and necessary living expenses.<sup>17</sup>

Appellant also did not establish that he was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience. He did not provide any financial information demonstrating that he would experience severe financial hardship in attempting to repay the debt or that he gave up a valuable right in reliance on his wage-loss compensation benefits. Accordingly, appellant has not established that recovery of the overpayment was against equity and good conscience.<sup>18</sup>

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.<sup>19</sup>

### **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>

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<sup>15</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>16</sup> *Id.* at § 10.438(b).

<sup>17</sup> *See M.C.*, Docket No. 19-0699 (issued February 12, 2020).

<sup>18</sup> *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>19</sup> *See supra* note 15.

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

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

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

The Board finds that OWCP properly required recovery of the overpayment by deducting \$516.92 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring repayment of the overpayment by deducting \$516.92 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information he submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$516.92 from appellant's continuing compensation every 28 days.<sup>22</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$33,994.42 during the period August 1, 2015 through September 11, 2021, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation 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 \$516.92 from appellant's continuing compensation every 28 days.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).