

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

W.H., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL AIR)
STATION OCEANA, Virginia Beach, VA,)
Employer)
_____)

**Docket No. 21-0490
Issued: July 12, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 11, 2021 appellant filed a timely appeal from a January 13, 2021 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 to consider the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,132.19, for which he was without fault,

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 13, 2021 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.*

because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period June 1, 2019 through November 7, 2020, 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 \$626.70 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On May 7, 2003 appellant, then a 49-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on May 6, 2003 he sustained injuries to his knees, lower back, and neck while crawling through a confined space trailer during a training evaluation. He did not stop work. On August 13, 2003 OWCP accepted appellant's claim for an aggravated lumbar strain.³ The record reflects that it paid him wage-loss compensation on the periodic rolls, effective May 6, 2003.

Following participation in a vocational rehabilitation program, appellant returned to work on December 5, 2006 under an assisted reemployment contract for 20 hours a week as a storage facility rental clerk. OWCP paid him wage-loss compensation for the remaining hours. It subsequently found that appellant had 87 percent loss of wage-earning capacity (LWEC).

In an October 11, 2007 separation notice/exit interview, appellant indicated that he was terminated for cause because he was unable to perform his employment duties due to his medical condition. OWCP subsequently continued to pay him wage-loss compensation on the periodic rolls.

In an April 12, 2017 letter, OWCP advised appellant that FECA required that his continuing compensation benefits be reduced if he begins receiving SSA age-related retirement benefits based on his federal service. It indicated that he should advise OWCP immediately if he had been approved for, or was currently receiving, SSA age-related retirement benefits as his records indicated that he had turned 62, the minimum age at which an individual is eligible to receive SSA retirement benefits, within the last five years.

On July 14, 2020 OWCP requested that SSA provide information regarding appellant's retirement benefits based upon age and federal service. On November 9, 2020 SSA provided OWCP with a Federal Employees Retirement System (FERS)/SSA dual benefits worksheet setting forth his SSA age-related retirement benefit rates with FERS and without FERS from June through December 2019. The form reported that, with FERS, appellant was entitled to a monthly rate of \$1,977.70, effective June 2019 and \$2,009.30, effective December 2019 and without FERS, he was entitled to a monthly payment rate of \$1,285.30, effective June 2019 and \$1,305.80, effective December 2019.

³ The present claim was assigned OWCP File No. xxxxxx067. OWCP previously accepted appellant's claim for a low back sprain/strains under OWCP File No. xxxxxx460. Appellant also has prior claims for back injuries under OWCP File Nos. xxxxxx235 and xxxxxx726, which OWCP processed as short form closures. OWCP has administratively combined his claims, with OWCP File No. xxxxxx067 serving as the master file.

OWCP completed a FERS offset overpayment calculation worksheet on November 19, 2020. It calculated the amount that it should have offset from appellant's wage-loss compensation from June 1, 2019 through November 7, 2020. OWCP found that, effective June 1, 2019, the monthly offset was \$692.40 or \$639.14 every 28 days, and effective December 1, 2019, the monthly offset was \$703.50 or \$649.38 every 28 days. The form indicated that, from June 1 to November 30, 2019, appellant received an overpayment in the amount of \$4,177.23 and from December 1, 2019 to November 7, 2020 he received an overpayment in the amount of \$7,954.96. OWCP combined the amounts for each period and determined that it should have offset a total of \$12,132.19 from his wage-loss compensation.

In a letter dated November 19, 2020, OWCP advised appellant that, based on information provided by SSA regarding the amount of his age-related retirement benefits, which were attributable to federal service, his FECA wage-loss compensation had been adjusted. After the SSA offset, he was to receive net FECA wage-loss compensation of \$2,740.62 every 28 days.

On November 19, 2020 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$12,132.19 had been created because it failed to reduce appellant's wage-loss compensation payments for the period June 1, 2019 through November 7, 2020 to offset his SSA age-related retirement benefits that were attributable to federal service. It also determined that he 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 repayment method and advised him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP 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 precoupment hearing.

On December 16, 2020 appellant submitted a partially-completed Form OWCP-20 in which he requested waiver.

By decision dated January 13, 2021, OWCP finalized its November 19, 2020 preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$12,132.19 for the period June 1, 2019 through November 7, 2020, for which he was without fault. OWCP denied waiver of recovery of the overpayment, finding that he had not submitted a completed Form OWCP-20. It required recovery of the overpayment by deducting \$626.70 every 28 days from appellant's 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 duty.⁴ Section 8116 limits the right of an employee to receive compensation.

⁴ 5 U.S.C. § 8102(a).

While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's 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.⁶ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,132.19, for the period June 1, 2019 through November 7, 2020, 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 wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service from June 1, 2019 through November 7, 2020. Consequently, the fact of the overpayment has been 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 the SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS during the specific period of June 1, 2019 through November 7, 2020. OWCP provided its calculation for each relevant period based on the information reported by SSA on its dual benefits worksheet.

The Board has reviewed OWCP's overpayment calculation for the period June 1, 2019 through November 7, 2020 and finds that an overpayment of compensation in the amount of \$12,132.19 has been established.

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997).

⁸ *Supra* note 5. *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive recovery of an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.⁹ Section 8129 of FECA¹⁰ 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.¹¹

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.¹² 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 value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, and vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹³

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.¹⁴ To establish that, a valuable right has been relinquished, it must

⁹ See *T.D.*, Docket No. 20-0972 (issued January 28, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 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).

¹¹ *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹² 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Third-Party Subrogation Guidelines* 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).

¹³ *Id.* at Chapter 6.400.4b(3)(a)(b).

¹⁴ 20 C.F.R. § 10.437(a), (b).

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.¹⁵

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 of recovery of the overpayment.¹⁶

ANALYSIS -- ISSUE 2

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

The fact that a claimant is without fault in the creation of an overpayment does not preclude OWCP from recovering the overpayment.¹⁷ 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.¹⁸ Appellant, however, has the responsibility to provide the appropriate financial information and documentation to OWCP.¹⁹

In its November 19, 2020 preliminary overpayment determination, OWCP explained the importance of providing the completed Form OWCP-20 and supporting financial information. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. In response, appellant submitted a partially-completed Form OWCP-20 dated December 16, 2020 wherein he requested waiver because he was unaware and could not reasonably have been expected to know that OWCP paid compensation incorrectly. However, he did not include any of the supporting financial information requested by OWCP in its November 19, 2020 preliminary overpayment determination. As such, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²⁰

¹⁵ *Id.* at § 10.437(b)(1).

¹⁶ *Id.* at § 10.438.

¹⁷ *See George A. Rodriguez*, 57 ECAB 224 (2005); *Joyce O. Diaz*, 51 ECAB 124 (1999).

¹⁸ 20 C.F.R. § 10.436.

¹⁹ *Id.* at § 10.438; *see also N.J.*, Docket No. 19-1170 (issued January 10, 2020); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

²⁰ *D.H.*, Docket No. 19-0384 (issued August 12, 2019).

As appellant did not submit the information required under 20 C.F.R. § 10.438, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²¹

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's 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 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 any hardship.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$626.70 from appellant's continuing compensation payments, every 28 days.

OWCP provided a Form OWCP-20 to appellant with the November 19, 2020 preliminary overpayment determination. Appellant did not fully-complete the form or provide the necessary financial documentation to support his income and expenses prior to the final January 13, 2021 overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²³

As appellant did not submit the financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in requiring recovery of the \$12,132.19 overpayment at the rate of \$626.70 every 28 days from his continuing compensation payments.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$12,132.19 for the period June 1, 2019 through November 7, 2020 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an 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 \$626.70 from his continuing compensation payments every 28 days.

²¹ *Id.*

²² 20 C.F.R. § 10.441(a).

²³ *Id.* at § 10.438. *See also A.F.*, Docket No. 19-0054 (issued June 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board