

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

J.R., Appellant)	
)	
and)	Docket No. 23-0222
)	Issued: August 17, 2023
DEPARTMENT OF THE AIR FORCE,)	
WRIGHT PATTERSON AIR FORCE BASE)	
COMMISSARY, Dayton, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On December 2, 2022 appellant, through counsel, filed a timely appeal from a November 16, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA), and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 16, 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 \$54,324.66, for the period August 1, 2018 through March 26, 2022, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery by deducting \$370.86 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 22, 2007 appellant, then a 54-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right arm when he picked up a 40-pound bag of dog food and felt a pull in the right shoulder and arm while in the performance of duty. On March 5, 2007 OWCP accepted the claim for sprains of the right shoulder and upper arm unspecified site, and ribs. On July 11, 2007 it expanded the acceptance of the claim to include sprain of shoulder (suprascapular area), right sprain of shoulder (infraspinatus area), and right sprain of shoulder (rotator cuff). OWCP paid appellant wage-loss compensation on the supplemental rolls as of September 30, 2007, and on the periodic rolls effective June 8, 2008.

On October 4, 2021 OWCP contacted SSA to obtain information as to whether an offset of SSA age-related retirement benefits and FECA wage-loss compensation was required.

On November 22, 2021 OWCP received from SSA a November 22, 2021 dual benefits form, which indicated that appellant had been in receipt of SSA age-related retirement benefits since August 2018. The form reported appellant's SSA age-related retirement benefit rates with and without a FERS offset. Beginning August 2018, the SSA rate with FERS was \$1,276.70, and without FERS was \$96.00; beginning December 2018, the SSA rate with FERS was \$1,312.40, and without FERS was \$98.60; beginning December 2019, the SSA rate with FERS was \$1,333.30, and without FERS was \$100.10; beginning December 2020, the SSA rate with FERS was \$1,350.60, and without FERS was \$101.40; and beginning December 2021, the SSA rate with FERS was \$1,430.20, and without FERS was \$107.30.

A FERS offset overpayment calculation worksheet dated April 25, 2022 indicated that appellant had been in receipt of FECA compensation and SSA age-related retirement benefits for the period August 1, 2018 through March 26, 2022. OWCP calculated a FERS offset amount of \$4,748.75 for the period August 1 through November 30, 2018; \$14,605.62 for the period December 1, 2018 through November 30, 2019; \$14,879.71 for the period December 1, 2019 through November 30, 2020; \$15,031.58 for the period December 1, 2020 through November 30,

⁴ Docket No. 10-1314 (issued March 8, 2011).

2021; and \$5,059.00 for the period December 1, 2021 through March 26, 2022. It found that the overpayment totaled \$54,324.66.

On May 26, 2022 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$54,324.66, had been created for the period August 1, 2018 through March 26, 2022, because appellant had received concurrent benefits under both FECA and SSA without the mandatory offset being applied. It found that he was without fault in the creation of the overpayment, requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method, and advised him that he could request waiver of recovery of the overpayment. OWCP further requested that appellant 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. It noted that under 20 C.F.R. § 10.438 failure to submit the requested information within 30 days would result in the denial of waiver and no further request for waiver would be considered until the requested information was provided. Additionally, OWCP provided an overpayment action request form and further notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoupment hearing.

On June 2, 2022 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant completed the Form OWCP-20 on June 13, 2022. He listed monthly income totaling \$4,070.00, expenses totaling \$2,130.00, and assets totaling \$127,349.00. Appellant did not provide any supporting financial documentation.

A prerecoupment hearing was held on October 13, 2022. During the hearing, appellant testified that he could pay \$1,000.00 per month toward the debt.

On November 15, 2022 OWCP received bank statements documenting some of appellant's assets, and a handwritten expense statement.

By decision dated November 16, 2022, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$54,324.66 for the period August 1, 2018 through March 26, 2022, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. She also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative noted that appellant offered testimony during the hearing that he was willing to repay \$1,000.00 per month toward the debt. She therefore required recovery of the overpayment, in part, by deducting \$370.86 from his continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁵ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his

⁵ 5 U.S.C. § 8101 *et seq.*

or her federal employment.⁶ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁷ Section 8116(a) provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type.

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.⁸ FECA Bulletin No. 97-09 states 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$54,324.66, for the period August 1, 2018 through March 26, 2022, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

In its November 16, 2022 decision, OWCP found that an overpayment of compensation was created for the period August 1, 2018 through March 26, 2022. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period August 1, 2018 through March 26, 2022.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing August 1, 2018 through March 26, 2022. In its May 26, 2022 preliminary overpayment determination, OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$54,324.66.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period August 1, 2018 through March 26, 2022, and finds that an overpayment of compensation in the amount of \$54,324.66 was created.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

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

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

¹⁰ 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

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.¹¹ 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.¹²

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. 20 C.F.R. § 10.436(a)(b) establishes that for an individual with no eligible dependents the asset base is \$6,200.00.¹³

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.¹⁴

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 determine the repayment schedule, if necessary.¹⁵

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 must be considered, and repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he

¹¹ *Id.* at § 8129(a)-(b).

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

¹³ 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).

¹⁴ 20 C.F.R. § 10.437(a)(b).

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

¹⁶ 5 U.S.C. § 8129.

requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.¹⁷

The Board finds that appellant has not met the standard for waiver of recovery of the overpayment because his assets exceed the allowable asset base for an individual with no eligible dependents of \$6,200.00. The evidence of record is, therefore, insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.¹⁹

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.²⁰ Section 10.441(a) of OWCP's implementing regulations provides that if an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.²¹ 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 \$370.86 from appellant's continuing compensation payments every 28 days.

The hearing representative noted that appellant testified during the hearing that he was able to pay \$1,000.00 per month toward the debt. The hearing representative therefore required recovery of the overpayment, in part, by deducting \$370.86 from his continuing compensation payments every 28 days.

The record supports that in requiring repayment of the overpayment by deducting \$370.86 from appellant's continuing compensation payments every 28 days, OWCP took into consideration the financial information he provided 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

¹⁷ 20 C.F.R. § 10.436.

¹⁸ *Id.* at § 10.438.

¹⁹ *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

²⁰ *See P.G.*, Docket No. 22-1073 (issued December 28, 2022); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²¹ 20 C.F.R. § 10.441(a).

²² *Id.*

required recovery of the overpayment by deducting \$370.86 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that an overpayment of compensation was created in the amount of \$54,324.66, for the period August 1, 2018 through March 26, 2022, for which appellant was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. The Board also finds that OWCP properly denied waiver of recovery of the overpayment, and that OWCP properly required recovery by deducting \$370.86 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2023
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