

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

B.J., Appellant)

and)

U.S. POSTAL SERVICE, NORTH TEXAS)
PROCESSING & DISTRIBUTION CENTER,)
Coppell, TX, Employer)

Docket No. 24-0599
Issued: July 16, 2024

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 May 9, 2024 appellant filed a timely appeal from December 14, 2023 and March 20, 2024 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,797.36 for the period February 17 through October 14, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits,

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 20, 2024 decision, OWCP received additional evidence. 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.*

without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether it properly required recovery of the overpayment by deducting \$386.49 from appellant's continuing schedule award payments every 28 days; and (4) whether appellant has greater than 24 percent permanent impairment of the lungs for which she previously received a schedule award.

FACTUAL HISTORY

On January 21, 2022 appellant, then a 67-year-old mechanical parts repair technician, filed a traumatic injury claim (Form CA-1) alleging that on January 2, 2022 she contracted COVID-19 while in the performance of duty. She stopped work on the date of injury and returned to work on October 15, 2022. OWCP accepted the claim for COVID-19 and subsequently expanded its acceptance of the claim to include post-COVID-19 condition, unspecified. It paid appellant wage-loss compensation for total disability on the supplemental rolls from February 17 through June 18, 2022 and on the periodic rolls from June 19 through December 3, 2022.

On December 1, 2022 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

On June 29, 2023 SSA forwarded a completed FERS/SSA dual benefits form OWCP. The form reported appellant's age-related retirement benefit rates with and without FERS for the period May 2020 through January 2023. Beginning in May 2020 appellant's SSA rate with FERS was \$1,480.10 and without FERS was \$887.10. Beginning December 2020, the SSA rate with FERS was \$1,499.30 and without FERS was \$898.60. Beginning January 2021, the SSA rate with FERS was \$1,540.80 and without FERS was \$898.60. Beginning December 2021, the SSA rate with FERS was \$1,631.70 and without FERS was \$951.60. Beginning January 2022, the SSA rate with FERS was \$1,698.50 and without FERS was \$956.50. Beginning December 2022, the SSA rate with FERS was \$1,846.20 and without FERS was \$1,039.70. Beginning January 2023, the SSA rate with FERS was \$1,867.00 and without FERS was \$1,042.10.

In a September 25, 2023 impairment rating evaluation report, Dr. Greg Gardner, an osteopathic Board-certified family physician, noted the accepted conditions of COVID-19 and post COVID-19 condition, unspecified. He reported that appellant complained of chest pain, shortness of breath, and a cough. Dr. Gardner also noted her current medications of albuterol, Tylenol, and Advair. On examination of appellant's lungs, he noted normal breath sounds on both the left and right side and no dyspnea, coughing, sputum production, or hemoptysis. Dr. Gardner reviewed medical records and diagnostic testing. He referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and determined that appellant had a Class 1 impairment with a severity of grade C, with no grade modifiers, which resulted in six percent permanent impairment of the whole person for pulmonary dysfunction. Dr. Gardner opined that appellant reached maximum medical improvement (MMI) on the date of his evaluation, September 25, 2023.

In a preliminary overpayment determination dated October 3, 2023, OWCP notified appellant of its preliminary finding that she had received an overpayment of compensation in the amount of \$5,797.36 for the period February 17 through October 14, 2022 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation

³ A.M.A., *Guides* (6th ed. 2009).

without an appropriate offset. It noted the amount that it should have offset each 28-day compensation period from February 17 through March 1, 2022, and from March 5 through October 14, 2022. OWCP found that, from February 17 through March 1, 2022, appellant received an overpayment of \$318.00 and from March 5 through October 14, 2022, she received an overpayment of \$5,479.36. It added these overpayment amounts for each period to find a total overpayment of \$5,797.36. OWCP advised appellant of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and a Form OWCP-20 and submit supporting financial documentation. Additionally, it notified her that she could request a final decision based on the written evidence, or a prerecoupment hearing. OWCP allotted 30 days for appellant to respond. She did not submit any evidence in response to the October 3, 2023 preliminary overpayment determination.

On October 27, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On October 30, 2023 OWCP routed Dr. Gardner's September 25, 2023 report, along with the case record and a statement of accepted facts (SOAF) to Dr. David I. Krohn, a Board-certified internist serving as an OWCP district medical adviser (DMA), for review and a determination of appellant's date of MMI and permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a November 22, 2023 report, Dr. Krohn reviewed the medical record, including Dr. Gardner's September 25, 2023 medical report, and noted that appellant's claim was accepted for COVID-19 and post COVID-19 condition, unspecified. Referring to Table 5-4, page 88, of the A.M.A., *Guides*, he noted that her forced vital capacity (FVC) corresponded with a Class 3 impairment, default grade C, which correlated to 32 percent whole person impairment. Dr. Krohn assigned a grade modifier for functional history (GMFH) of 1 for "dyspnea controlled with constant treatment" and a grade modifier for physical examination (GMPE) of 1 for "physical findings not present with continuous treatment." He explained that the modifiers moved the grade two positions to the left, resulting in 24 percent whole person impairment. Dr. Krohn found appellant reached MMI on September 25, 2023. He disagreed with Dr. Gardner's six percent whole person impairment rating, as appellant's FVC of 59 percent corresponded with a Class 3 impairment, not a Class 1 impairment.

By decision dated December 14, 2023, OWCP finalized the October 3, 2023 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$5,797.36 for the period February 17 through October 14, 2022 because it had failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It found her without fault in the creation of the overpayment but denied waiver of recovery of the overpayment because the evidence of record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$386.49 from appellant's continuing schedule award compensation payments every 28 days.

By separate decision dated December 14, 2023, OWCP granted appellant a schedule award for 24 percent permanent impairment of the lungs. The award ran for 74.88 weeks from September 25, 2023 through March 2, 2025, and was based on Dr. Krohn's November 22, 2023 report.

On December 21, 2023 appellant requested a review of the written record with respect to the December 14, 2023 schedule award decision by a representative of OWCP's Branch of Hearing and Review.

By decision dated March 20, 2024, OWCP's hearing representative affirmed the December 14, 2023 schedule award decision.

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 his or her duty.⁴ 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.⁵

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,797.36 for the period February 17 through October 14, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

In its December 14, 2023 decision, OWCP found that an overpayment of compensation was created for the period February 17 through October 14, 2022. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot concurrently receive 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 received SSA age-related retirement benefits that were attributable to federal service for the period February 17 through October 14, 2022 without an appropriate offset. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation during the period February 17 through October 14, 2022.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

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

⁸ 20 C.F.R. § 10.421(d); *L.D.*, Docket No. 21-0447 (issued September 28, 2021); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, *supra* note 6.

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided the SSA rates with FERS and without FERS for specific periods commencing May 2020. OWCP set forth its calculations of the amount that should have been offset during each relevant period based on the information provided by SSA and determined that appellant received an overpayment in the amount of \$5,797.36. The Board has reviewed OWCP's calculation of benefits received by appellant for the period February 17 through October 14, 2022 and finds that an overpayment of compensation in the amount of \$5,797.36 was created.⁹

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.¹⁰ Thus, a finding that appellant was without fault does not automatically result in waiver 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

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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.¹² An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ Also, 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.¹⁴ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁵ Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat,

⁹ See *M.D.*, Docket No. 21-0725 (issued January 25, 2023); *W.C.*, Docket No. 20-1241 (issued February 9, 2021).

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *L.A.*, Docket No. 22-1383 (issued June 14, 2023); *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436(a)(b).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁴ *Id.* at Chapter 6.400.4a(2).

¹⁵ *Id.* at Chapter 6.400.4b(3).

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.¹⁶

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.¹⁷

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.¹⁸ 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.¹⁹ Failure to submit the requested information within 30 days of the request shall result in a denial of waiver of recovery of the overpayment, and no further request for waiver shall be considered until the requested information is furnished.²⁰

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 adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²¹ Appellant, however, had the responsibility to provide the appropriate financial documentation to OWCP.²²

In its preliminary overpayment determination dated October 3, 2023, OWCP explained the importance of providing the completed Form OWCP-20 and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised her that it would deny waiver if she failed to furnish the requested financial information in a timely manner. Appellant did not complete a Form OWCP-20 and did not provide any supporting financial documentation within the allotted time period following the October 3, 2023 preliminary overpayment determination. OWCP, therefore, 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.²³

¹⁶ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁷ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁸ *Id.* at 10.438(a).

¹⁹ *Id.*; *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²⁰ *Id.* at § 10.438(b).

²¹ 20 C.F.R. § 10.436.

²² 20 C.F.R. § 10.438; *V.B.*, Docket No. 20-0976 (issued January 26, 2021).

²³ *J.M.*, Docket No. 24-0356 (issued May 24, 2024); *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

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

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁴ Section 10.441(a) of the regulations provides:

“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 soon as the error is discovered or his or her attention is called to 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 facts, so as to minimize any hardship.”²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$386.49 from appellant's continuing schedule award payments every 28 days.

As noted, appellant did not provide the necessary financial information to support her income, expenses and assets prior to the final overpayment decision. When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²⁶ The Board finds, therefore, that OWCP properly required recovery of the overpayment by deducting \$386.49 from appellant's continuing schedule award payments every 28 days.

LEGAL PRECEDENT -- ISSUE 4

The schedule award provisions of FECA²⁷ and its implementing regulations²⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. OWCP has

²⁴ See *K.W.*, Docket No. 23-1166 (issued February 14, 2024); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁵ 20 C.F.R. § 10.441(a).

²⁶ *C.B.*, Docket No. 24-0285 (issued April 24, 2024); *J.A.*, Docket No. 19-1946 (issued July 13, 2020); *Frederick Arters*, 53 ECAB 397 (2002).

²⁷ *Supra* note 1.

²⁸ 20 C.F.R. § 10.404.

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.²⁹

OWCP's procedures provide that all claims involving impairment of the lungs will be evaluated by first establishing the class of respiratory impairment, following the A.M.A., *Guides* as far as possible. Awards are based on the loss of use of both lungs and the percentage for the applicable class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable in the schedule award.³⁰

Although FECA does not specifically provide for compensation for whole person impairment, the measurement of lung function warrants special consideration. Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* page 88, provides whole person impairment ratings based on a designated Class (0-4) of impairment. Depending on the assigned class, the range of whole person impairment due to pulmonary dysfunction is 0 to 65 percent.

OWCP's procedures provide that lung impairment should be evaluated in accordance with the A.M.A., *Guides* insofar as possible. It further provides that schedule awards are based on the loss of use of both lungs, and the percentage for the particular class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.³¹

ANALYSIS -- ISSUE 4

The Board finds that appellant has not met her burden of proof to establish greater than 24 percent permanent impairment of the lungs, for which she previously received a schedule award.

In an impairment evaluation dated September 25, 2023, Dr. Gardner diagnosed COVID-19 and post-COVID-19 condition, unspecified. He documented appellant's subjective complaints and examination findings and reviewed her spirometry results. Using Table 5-4 on page 88 of the A.M.A., *Guides*, Dr. Gardner found a Class 1 impairment of the lungs, with no grade modifiers, due to pulmonary dysfunction, which yielded a default value of six percent.

Dr. Krohn, the DMA, reviewed Dr. Gardner's impairment evaluation on November 22, 2023. He disagreed with his finding that appellant had Class 1 impairment due to pulmonary dysfunction. Dr. Krohn explained that he utilized Table 5-4, page 88, which placed appellant's FVC of 59 percent of predicted into a Class 3 impairment, with a default impairment of 32 percent. He applied a GMFH of 1 for dyspnea controlled with constant treatment and a GMPE of 1 for physical findings not present with continuous treatment and, utilizing the net adjustment formula, found 24 percent whole person impairment. The Board has reviewed the opinion of Dr. Krohn and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue. Accordingly, OWCP properly accorded the

²⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

³⁰ *Id.* at Chapter 2.808.5c(1) (February 2013).

³¹ *Id.*; *supra* note 29 at Chapter 3.700.4d(1)(c).

weight of the medical evidence to Dr. Krohns' opinion regarding permanent impairment under the A.M.A., *Guides*.³²

There is no current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing greater than 24 percent permanent impairment of the lungs. Accordingly, appellant has not met her burden of proof.³³

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.³⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,797.36 for the period February 17 through October 14, 2022, 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 finds that OWCP properly denied waiver of recovery of that overpayment. The Board finds OWCP properly required recovery of the overpayment by deducting \$386.49 from appellant's continuing schedule award payments every 28 days. The Board further finds that appellant has not met her burden of proof to establish greater than 24 percent permanent impairment of the lungs for which she previously received a schedule award.

³² See *C.S.*, Docket No. 21-1345 (issued February 21, 2023).

³³ See *J.C.*, Docket No. 21-0426 (issued October 12, 2021).

³⁴ On appeal appellant argues that OWCP should not have deducted a lump sum of \$5,532.21 from her December 14, 2023 schedule award as the method of recovery of an October 18, 2023 final overpayment determination. However, the October 18, 2023 final overpayment determination is outside of the Board's jurisdiction. 20 C.F.R. § 501.3(e).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2023 and March 20, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 16, 2024
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