

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

M.O., Appellant)	
)	
and)	Docket No. 22-1376
)	Issued: May 1, 2024
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE,)	
Whiskeytown, CA, Employer)	
)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 19, 2022 appellant filed a timely appeal from a September 14, 2022 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 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 \$10,697.05, during the period April 25, 2021

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 14, 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.*

through June 18, 2022, for which she was without fault, as she concurrently received Office of Personnel Management (OPM) retirement benefits and FECA wage-loss compensation; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 26, 2019 appellant, then a 34-year-old forester, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her lower back when she twisted wrong as she sat down in her desk chair while in the performance of duty. OWCP initially accepted the claim for lumbar ligament sprain. It subsequently expanded acceptance of the claim to include lumbar intervertebral disc herniation and lumbar spondylosis with myelopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls as of November 20, 2019, and on the periodic rolls as of April 25, 2021. Appellant retired effective April 24, 2021.

On November 30, 2021 appellant completed an Election of Benefits (Form CA-1105), indicating her election of OPM retirement benefits, effective April 25, 2021, in lieu of FECA wage-loss compensation. OWCP, however, continued to pay her wage-loss compensation for temporary total disability through June 18, 2022.

On July 11, 2022 OWCP informed OPM that appellant had elected to receive OPM retirement annuity benefits effective April 25, 2021 in lieu of FECA wage-loss compensation. It requested reimbursement from OPM in the amount of \$12,874.20 for the period April 25, 2021 through June 18, 2022, and requested that OPM commence retirement annuity payments retroactive to April 25, 2021.

In a letter dated August 2, 2022, OPM advised OWCP that it had begun payment of retirement benefits to appellant, effective April 25, 2021. It further indicated that it collected \$5,000.00 from her accrued annuity to be applied toward her overpayment. OPM informed OWCP that it was unable to collect the remaining balance until a collection schedule was verified and appellant was afforded due process.

On August 11, 2022 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the net amount of \$10,697.05 during the period April 25, 2021 through June 18, 2022. It explained that the overpayment was the result of her receipt of FECA wage-loss compensation through June 18, 2022 after having elected receipt of OPM retirement benefits effective April 25, 2021. OWCP determined that appellant was without fault in the creation of the overpayment. It provided a calculation of the overpayment and requested that she complete an overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method and advised her that she 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, and canceled checks, pay slips, and any other records that support income and expenses. Additionally, it provided an overpayment action request form and notified her 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 September 9, 2022 OWCP received a check in the amount of \$5,000.00 from OPM.

On September 11, 2022 OWCP received appellant's request for waiver, asserting financial hardship. Appellant submitted a completed Form OWCP-20 wherein she requested that OWCP decide on the written evidence regarding possible waiver of recovery of the overpayment. In this form she reported assets totaling \$220,600.00. Appellant reported monthly income totaling \$1,723.97. Appellant reported monthly expenses totaling \$2,642.18. Accompanying her request for waiver was supporting financial documentation.

By decision dated September 14, 2022, OWCP finalized the preliminary overpayment determination finding that an overpayment of compensation in the amount of \$10,697.05 had been created during the period April 25, 2021 through June 18, 2022. It found that appellant was without fault in the creation of the overpayment. OWCP further found that waiver of recovery of the overpayment was not warranted. It noted that since the issuance of the preliminary overpayment determination that it had received \$5,000.00 towards the debt. It also related that it had not received a response from appellant to its preliminary overpayment notice and found that: "[t]here is no evidence to substantiate that you are financially unable to repay the balance of the debt in full or that you are requesting a waiver of the overpayment. Therefore, you should arrange for submission of payment in the amount of \$475.00 by personal check or money order."

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁴ It provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁵

Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

OWCP's procedures also explain that the employee must make an election between FECA benefits and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,697.05 during the period April 25, 2021 through June 18, 2022 as she concurrently received OPM retirement benefits and FECA wage-loss compensation. On April 24, 2021 appellant retired from the employing establishment. On November 30, 2021 she completed a Form CA-1105 indicating her election of OPM retirement benefits effective April 25, 2021. OPM confirmed that it paid her benefits effective April 25, 2021. OWCP, however, continued to pay appellant wage-loss compensation for temporary total disability for the period April 25, 2021 through June 18, 2022. Therefore, the Board finds fact of overpayment is established.

To determine the amount of the overpayment, OWCP provided its calculations for the time period April 25, 2021 through June 18, 2022 and calculated that appellant had received net FECA compensation in the amount of \$10,697.05. It received a letter from OPM dated August 2, 2022, which related that it had begun to make payments to her effective April 25, 2021, and that it had collected \$5,000.00 from her annuity towards repayment of the overpayment. On September 9, 2022 OWCP received a check in the amount of \$5,000.00 from OPM.

As OPM collected and paid OWCP \$5,000.00 from appellant's annuity towards repayment of a potential overpayment, the Board finds that the overpayment at the time of the final overpayment decision, dated September 14, 2022, was \$5,697.05. OWCP is not entitled to receive duplicate reimbursement. The Board has explained the impropriety of such duplication, which essentially would require that appellant repay the overpayment twice.⁹

As of the final overpayment decision dated September 14, 2022, the Board finds that the amount of the overpayment is modified to \$5,697.05.

LEGAL PRECEDENT -- ISSUE 2

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 he or she was without fault does not automatically result in waiver of the overpayment.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see also S.P.*, Docket No. 22-0908 (issued November 23, 2022); *V.B.*, Docket No. 19-1874 (issued June 4, 2020); *R.S.*, Docket No. 11-428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

⁹ *J.G.*, Docket No. 18-1794 (issued March 25, 2019); *S.F.*, Docket No. 17-1935 (issued August 13, 2018); and *R.R.*, Docket No. 18-0032 (issued May 3, 2018).

¹⁰ *Supra* note 1.

OWCP must 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

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding 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.¹³

In the September 14, 2022 final overpayment decision, OWCP related that it had not received a response to its preliminary overpayment notice and found that: “[t]here is no evidence to substantiate that you are financially unable to repay the balance of the debt in full or that you are requesting a waiver of the overpayment.”

Appellant, however, had requested waiver on September 11, 2022 and had submitted a Form OWCP-20, along with supporting financial documentation. In the case of *William A. Couch*,¹⁴ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its final overpayment decision dated September 14, 2022, OWCP failed to consider and address all financial evidence submitted by appellant in support of waiver of recovery of the overpayment. As such, it failed to follow its procedures by properly discussing all the evidence of record. It is crucial that OWCP consider and address all evidence relevant to the subject matter

¹¹ *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

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. Its 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. *Supra* note 9 at Chapter 6.400.4a(2) and (3) (September 2020).

¹³ *Id.* at § 10.436.

¹⁴ 41 ECAB 548 (1990); *see also C.W.*, Docket No. 23-0096 (issued October 2, 2023); *J.R.*, Docket No. 22-0464 (issued April 18, 2023); *S.H.*, Docket No. 19-1582 (issued May 26, 2020).

properly submitted prior to the issuance of its final decision, as the Board's decisions are final regarding the subject matter appealed.¹⁵

The Board thus finds that this case is not in posture for decision with regard to the issue of waiver of recovery of the overpayment. On remand, OWCP shall review all evidence of record regarding waiver of the overpayment. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,697.05 during the period April 25, 2021 through June 18, 2022 as she concurrently received OPM retirement benefits and FECA wage-loss compensation. The Board also finds that the case is not in posture for decision with regard to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2022 decision of the Office of Workers' is affirmed in part as modified and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 1, 2024
Washington, DC

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

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

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

¹⁵ See *C.W., id.*; *C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *William A. Couch, id.*