

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

S.P., Appellant)	
)	
and)	Docket No. 24-0324
)	Issued: May 3, 2024
DEPARTMENT OF DEFENSE, MCCHORD)	
AIR FORCE BASE COMMISSARY,)	
McChord, WA, Employer)	
)	

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

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 8, 2024 appellant, through counsel, filed a timely appeal from a January 24, 2024 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 January 24, 2024 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 \$5,714.13 for the period August 1, 2022 through March 25, 2023, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 13, 2009 appellant, then a 53-year-old store worker leader, filed an occupational disease claim (Form CA-2) alleging that he sustained pain in his right hand, right palm, and left elbow, numbness in the last two fingers of the hands bilaterally, numbness in both wrists, and sharp pains in his thumbs causally related to factors of his federal employment. OWCP accepted the claim for bilateral cubital tunnel syndrome. It subsequently expanded its acceptance of the claim to include a bilateral lesion of the ulnar nerve, a left late effect of tendon injury, a right elbow and forearm sprain, and causalgia of the right upper limb. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning September 22, 2009 and on the periodic rolls beginning November 22, 2009.

An April 24, 2009 notification of personnel action, Standard Form (SF) 50, indicated that appellant's retirement plan was the Federal Employees Retirement System (FERS) and the Federal Insurance Contributions Act (FICA).

On May 19, 2022 OWCP sent a FERS/SSA dual benefits calculation form to SSA for completion.

On March 24, 2023 SSA completed a FERS/SSA dual benefits calculation form and provided appellant's monthly benefits with and without FERS from August through December 2022. SSA indicated that effective August 2022, appellant's SSA rate with FERS was \$1,562.60 and without FERS was \$860.90, and effective December 2022, his SSA rate with FERS was \$1,698.50 and without FERS was \$935.70.

In correspondence dated March 28, 2023, OWCP advised appellant that it was reducing his wage-loss compensation effective March 26, 2023 by the portion of his SSA benefits attributable to his federal service. It indicated that his new net compensation payment every 28 days would be \$2,711.54.

Appellant elected to receive retirement benefits from the Office of Personnel Management (OPM) in lieu of FECA compensation benefits from OWCP effective September 1, 2023.

On September 28, 2023 OWCP notified appellant of its preliminary overpayment determination that he had received a \$5,714.13 overpayment of compensation from August 1, 2022 through March 25, 2023 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. In the preliminary determination, OWCP explained its calculation of the overpayment. For the period August 1 through November 30, 2022, it found an overpayment of \$2,822.21 and for the period December 1, 2022 through March 25, 2023, it found an overpayment of \$2,891.92, which when yielded a total

overpayment of \$5,714.13. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other records to support his reported income and expenses. Additionally, OWCP provided an overpayment action request form and 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 prerecoument hearing.

In an October 13, 2023 overpayment action request form, appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He indicated his request for waiver of recovery of the overpayment as he was without fault in the creation of the overpayment. Appellant did not submit a completed OWCP-20 form.

On November 15, 2023 OWCP again requested that appellant complete an enclosed Form OWCP-20 so that it could consider waiver and determine a reasonable method of collection of the overpayment. It allotted him an additional 30 days for the submission of the requested information.

In a Form OWCP-20 dated December 11, 2023, appellant advised that he had monthly income of \$3,705.39 and monthly expenses of \$3,435.12. He also listed property or real estate assets not including his home of over \$450,000.00.

A telephonic prerecoument hearing was held on December 19, 2023. Appellant advised that he was able to submit \$200.00 per month to repay the overpayment. Counsel argued that OWCP failed to warn appellant of the potential for an overpayment if he got retirement and age-related SSA benefits and asserted that due to OWCP's delay he had given up the right to make a prompt repayment of a small amount. He also argued that appellant relied to his detriment on OWCP's ability to competently manage his case, and that he had been penalized by OWCP's failure to act.

By decision dated January 24, 2024, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$5,714.13 for the period August 1, 2022 through March 25, 2023 because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. She further found that he was without fault in the creation over the overpayment but denied waiver of recovery of the overpayment. OWCP's hearing representative noted that appellant had not submitted any financial documentation supporting his income, expenses, and assets. She required him to submit payments of \$200.00 per month as recovery of the overpayment.

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

⁴ 5 U.S.C. § 8102.

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 OWCP to reduce the amount of compensation by the amount of any SSA age-related 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 OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$5,714.13 for the period August 1, 2022 through March 24, 2023, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset.

OWCP paid appellant wage-loss compensation for total disability on the periodic rolls beginning November 22, 2009. Appellant received SSA age-related retirement benefits beginning August 1, 2022. As noted, a claimant cannot receive concurrent FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service.⁸ The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to his federal service. Accordingly, the Board finds that fact of overpayment has been established.⁹

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 appellant's SSA age-related retirement benefit rates with FERS and without FERS from August through December 2022. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$5,714.13. The Board has reviewed OWCP's calculations, and finds that it properly determined that appellant received prohibited dual benefits totaling \$5,714.13 for the period August 1, 2022 through March 25, 2023.¹⁰

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see B.M.*, Docket No. 23-0891 (issued January 30, 2024); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

⁸ *Supra* note 6; *see J.M.*, Docket No. 23-1186 (issued January 25, 2024); *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

⁹ *See K.S.*, Docket No. 23-1058 (issued January 18, 2024); *L.K.*, Docket No. 20-1574 (issued June 23, 2021); *S.H.*, Docket No. 20-1157 (issued December 23, 2020).

¹⁰ *See H.S.*, Docket No. 22-1040 (issued May 12, 2023); *J.S.*, Docket No. 22-0369 (issued June 7, 2022); *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 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.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 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.¹⁶

ANALYSIS -- ISSUE 2

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

¹¹ 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).

¹² *See C.K.*, Docket No. 23-0880 (issued January 12, 2024); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 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).

¹⁴ *Id.* at § 10.437(a)(b).

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

¹⁶ *Id.* at § 10.438(b).

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.¹⁷

In its September 28, 2023 preliminary overpayment determination, 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 appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. Appellant submitted a completed OWCP-20 form but did not provide any supporting financial documentation verifying the claimed income, expenses, and assets. OWCP, therefore, did not have the necessary current 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.¹⁸

Appellant had the responsibility to provide financial information to OWCP.¹⁹ As he failed to submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.²⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$5,714.13 for the period August 1, 2022 through March 25, 2023, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁷ See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.S.*, 59 ECAB 350 (2008).

¹⁸ *E.M.*, Docket No. 22-0081 (issued August 22, 2022); *D.C.*, Docket No. 19-0118 (issued January 15, 2020); *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

¹⁹ 20 C.F.R. § 10.438; *J.M.*, Docket No. 23-1186 (issued January 25, 2024); *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

²⁰ *J.M.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2024
Washington, DC

Alec J. Koromilas, 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