

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

A.R., Appellant)	
)	
and)	Docket No. 24-0399
)	Issued: May 23, 2024
U.S. POSTAL SERVICE, BURLINGTON POST OFFICE, Burlington, WI, Employer)	
)	

Appearances:

*Michael J. Watson, Esq., for the appellant¹
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 March 4, 2023 appellant, through counsel, filed a timely appeal from a November 28, 2023 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$38,106.41 (reduced to \$27,471.36), during the

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.*

period June 1, 2022 through May 20, 2023, 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 February 11, 2016 appellant, then a 59-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2016 she sustained an injury to her left side, and her left shoulder and ankle when lifting heavy items while in the performance of duty. She stopped work on January 27, 2016. On March 3, 2016 OWCP accepted the claim for contusion of the left shoulder, left wrist sprain, left ankle ligament sprain, contusion of the left hip and thigh, and abrasion of the right forearm. It paid appellant wage-loss compensation on the supplemental rolls as of March 27, 2016, and on the periodic rolls from May 29, 2016 through May 20, 2023.

On April 10, 2023 appellant completed an election of benefits form choosing to retroactively receive OPM retirement benefits, in lieu of FECA wage-loss compensation benefits, effective June 1, 2022.

In a letter dated June 2, 2023, OWCP advised OPM that appellant elected OPM retirement benefits, effective June 1, 2022. It related that an overpayment of compensation in the amount of \$38,106.41 had been created, as appellant concurrently received OPM retirement benefits and FECA wage-loss compensation for the period June 1, 2022 through May 20, 2023. OWCP requested that OPM reimburse OWCP in the amount of \$38,106.41 for FECA benefits paid from June 1, 2022 through May 20, 2023.

In a letter dated July 28, 2023, OPM confirmed that payments were made to appellant effective June 1, 2022. It further advised OWCP that it had collected \$10,000.00 of the overpayment from appellant's accrued annuity for repayment to OWCP. However, OPM related that it would be unable to collect the remaining balance until OWCP provided a collection schedule, and OPM was able to verify that appellant was given due process. In an amended letter dated August 18, 2023, it advised OWCP that due to system error it had been unable to collect any of the \$38,106.41 debt. OPM further advised that it could not collect this overpayment on OWCP's behalf until a certification was provided that due process had been given, with a collection schedule, number of installments due, and the amount of each installment.

On September 5, 2023 OWCP issued a preliminary overpayment determination that an overpayment was created in the amount of \$38,106.41, for the period June 1, 2022 through May 20, 2023, because appellant received prohibited dual benefit payments. It explained that the overpayment occurred because appellant concurrently received both FECA compensation benefits and OPM retirement benefits during the period, which resulted in a prohibited dual benefit payment. OWCP provided appellant with its calculations listing the FECA compensation benefits that she received after her election of OPM benefits on June 1, 2022. Its calculations showed that appellant received FECA benefits from June 1 through December 31, 2022, in the amount of \$22,709.45; from January 1 through March 25, 2023, in the amount of \$8,875.41; consumer price index (CPI) increase for the period March 1 through 25, 2023 in the amount of \$186.61; and for the period March 26 through May 20, 2023, in the amount of \$6,334.94, for a total of \$38,106.41. OWCP further determined that appellant was without fault in the creation of the overpayment

because she could not have been aware that the payments were incorrect at the time that she received them. OWCP requested that she complete an enclosed 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 her reported 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 prerecoupment hearing.

Appellant completed the Form OWCP-20 on September 19, 2023, requesting that OWCP issue a decision based on the written evidence. She requested waiver of recovery of the overpayment as she was found without fault, and indicated that she could not afford to pay back the overpayment. For her monthly income, she listed Social Security benefits in the amount of \$1,930.00, a pension from a private employer in the amount of \$316.00, and OPM benefits in the amount of \$671.00. Appellant listed her monthly expenses as: rent \$1,206.00; food \$400.00; clothing \$200.00; utilities \$400.00; and other miscellaneous expenses \$400.00. She listed debts to include a finance company, \$28,000.00, with a monthly payment of \$732.00, and well drilling, \$4,000.00, with a monthly payment of \$500.00. She denied having any valuable property or real estate, and listed \$23.57 in cash on hand, \$10.11 in her checking account, and \$20.00 in her savings account.

In a letter dated October 18, 2023, appellant's representative noted that appellant was providing supporting documentation, including bank statements and receipts, to support that she was unable to repay the overpayment. On October 23, 2023 appellant provided financial documentation including bank account statements from June to October 2023, which was overdrawn by \$148.59 dollars in June, overdrawn by \$4.40 cents in July, \$598.29 balance in August, and \$65.75 balance in October. Appellant submitted a Social Security Benefit Statement reflecting she received \$23,551.20 in benefits for 2022; and a statement from Social Security advising that, after August 9, 2023, she would receive \$1,930.00 each month. She included a September 19, 2022 electric bill in the amount of \$160.15; a recurring payment of \$21.07 to an internet service; a delinquent amount of \$1,238.32 (regular payment of \$739.68) on a current balance of \$31,788.23 with a credit company, and an August 28, 2023 check payable to the finance company in the amount of \$3,000.00, policy renewal premiums from an insurance company dated July 16 and October 16, 2023 for quarterly payments in the amount of \$213.25; a mortgage monthly payment summary in the amount of \$1,006.96; vehicle gasoline, grocery, hair, optical, medical, shopping, magazine subscription, survey, storage, attorney fee receipts; and documentation of payments to an individual.

By decision dated November 28, 2023, OWCP finalized the preliminary overpayment determination. Regarding waiver of recovery of the overpayment, it found that appellant's total monthly income was \$2,917.00, based upon \$671.00 in OPM benefits, \$1,930.00 in SSA benefits, and \$316.00 in private employer pension. OWCP found that her total monthly expenses were, \$2,581.11 based upon the information submitted by appellant. The total \$2,581.11 supported monthly expenses included: mortgage \$1,006.96; food \$400.00; clothing \$200.00; a finance company \$732.00; an insurance company \$71.08; electric \$150.00; and internet services \$21.07. OWCP calculated that the monthly funds available for debt repayment were \$285.89 (\$2,917.00 - \$2,581.11 - \$50.00). It explained that the evidence of record failed to establish that appellant needed substantially all of her current income to meet current ordinary and necessary living

expenses, as she did not submit sufficient financial documents to support the monthly income/expenses indicated on the OWCP-20 Form, and therefore she did not qualify for a full waiver of the overpayment under the provisions of FECA. However, OWCP further determined that appellant qualified for a partial waiver and explained that with the 28-day repayment amount set at \$143.08, repayment would take 301.27 months which was greater than appellant's life expectancy of 192 months based on actuarial tables. To determine the amount of partial waiver, OWCP multiplied the \$143.08 payment by the 192 months life expectancy to calculate a repayment amount of \$27,471.36. It determined that the overpayment should be waived in part by \$10,635.05, leaving a balance of \$27,471.36 based upon appellant's age. OWCP explained that the monthly repayment amount would be \$155.00 ($\$143.08 \times 13/12$), which would allow for collection of the debt while still providing the ability to meet ordinary and necessary living expenses.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ 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.⁴

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶ OWCP's procedures also explain that the employee must make an election between FECA and OPM retirement benefits. The employee has the right to elect the monetary benefit which is the more advantageous.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$38,106.41 (reduced to \$27,471.36), during the period June 1, 2022 through May 20, 2023, for which she was without fault, as she concurrently received OPM retirement benefits and FECA wage-loss compensation benefits.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997); *see also* R.S., Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

The clear language of section 8116(a) of FECA and section 10.421(a) of OWCP's implementing regulations prohibits the receipt of FECA wage-loss benefits and a federal annuity.⁸ As appellant received FECA benefits while concurrently electing to receive OPM retirement benefits, an overpayment of compensation was created.⁹

In a letter dated July 28, 2023, OPM advised OWCP that it began payments to appellant effective June 1, 2022. OWCP thereafter determined that an overpayment in the amount of \$38,106.41 had been created, as appellant continued to be paid FECA compensation after her election of OPM retirement benefits for the period June 1, 2022 through May 20, 2023. While OPM initially indicated that it had collected \$10,000.00 towards reimbursement to OWCP, by amended letter dated August 18, 2023 it advised OWCP that due to a system failure it had not collected any reimbursement of the overpayment. The evidence of record therefore does not establish that OWCP was reimbursed by OPM for the overpayment.¹⁰

OWCP's preliminary overpayment determination explained that the overpayment occurred because appellant was paid FECA workers' compensation between June 1, 2022 and May 20, 2023, during the period she elected OPM retirement benefits. OWCP provided its calculations for the above-noted time period and properly calculated that from June 1, 2022 through May 20, 2023, appellant received FECA workers' compensation in the amount of \$38,106.41, which was a prohibited dual benefit.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$38,106.41, for the period June 1, 2022 through May 20, 2023.

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 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.¹²

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

⁸ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a).

⁹ See *E.F.*, Docket No. 18-1320 (issued March 13, 2019); *E.H.*, Docket No. 15-0312 (issued August 19, 2016); *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁰ See *E.H.*, Docket No. 15-0312 (issued August 19, 2016).

¹¹ 5 U.S.C. § 8129(a)-(b).

¹² See *S.R.*, Docket No. 20-1416 (issued September 8, 2022); *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).

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 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 \$50.00.¹⁴ 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.¹⁵

Section 10.437 of OWCP's implementing regulations provides that 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.¹⁶ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁷

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. As noted above, even if a claimant is found without fault in the creation of the overpayment, recovery of the overpayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁸

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA as she has not shown that she needed substantially all of her current income to meet ordinary and necessary living expenses. Appellant submitted information regarding her income and expenses, including documentation regarding some of her expenses. However, OWCP explained that she did not provide sufficient financial information to support all of the monthly expenses listed on the Form OWCP-20. Based on the evidence of record, the Board finds that OWCP properly determined that appellant had income which exceeded her expenses by

¹³ 20 C.F.R. § 10.436(a)(b).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁵ *Id.* at Chapter 6.400.4a(2) (September 2020).

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

¹⁷ *Supra* note 14 at Chapter 6.400.4c(3) (September 2020).

¹⁸ *Id.*

more than \$50.00 per month and, therefore, appellant did not need substantially all of her income to meet ordinary and necessary living expenses.

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

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$38,106.41 (reduced to \$27,471.36), during the period June 1, 2022 through May 20, 2023, for which she was without fault, as she concurrently received OPM retirement benefits and FECA wage-loss compensation benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 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

¹⁹ *Id.*