

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

P.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Islandia, NY, Employer)
-----)

**Docket No. 21-0859
Issued: May 12, 2023**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 19, 2021 appellant, through counsel, filed a timely appeal from an April 28, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to 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 The Board notes that following the April 28, 2021 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 \$3,141.14 for the period March 1 through November 7, 2020, 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; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 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 as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 15, 2002 appellant, then a 47-year-old clerk, filed a notice of recurrence (Form CA-2a) alleging that on that date he developed lower back pain from lifting trays of mail and twisting his back while in the performance of duty. He noted that the pain he experienced was similar in nature to the pain he experienced in his previously accepted claim under OWCP File No. xxxxxx961. On December 5, 2002 OWCP informed appellant that it was developing his claimed recurrence as a new traumatic injury claim and assigned OWCP File No. xxxxxx144. Appellant stopped work on November 16, 2002. On May 24, 2010 OWCP accepted the claim for lumbar subluxation.

On December 13, 2002 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) for the period November 30 through December 13, 2002. On the reverse side of the claim form, the employing establishment indicated that appellant was enrolled in the Federal Employees Retirement System (FERS) retirement plan. In a March 3, 2003 letter, OWCP authorized wage-loss compensation for total disability on the periodic rolls, effective February 8, 2003.⁵

Following the Board's September 11, 2012 decision,⁶ on March 13, 2014 OWCP again authorized wage-loss compensation for total disability on the periodic rolls.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 12-117 (issued September 11, 2012) (the Board found that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 8, 2011 as he had not refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2)).

⁵ Appellant elected to receive FECA benefits effective May 8, 2011.

⁶ *Supra* note 4.

On October 22, 2020 OWCP forwarded a FERS/SSA dual benefits calculation transmittal to the SSA to determine whether appellant received SSA age-related retirement benefits based on federal service.

On October 24, 2020 OWCP received the completed FERS/SSA dual benefits calculation worksheet from SSA, which reported that appellant had been in receipt of age-related retirement benefits since March 2020. The form listed his SSA age-related retirement benefit rates with and without a FERS offset. It noted that beginning March 2020 the monthly SSA rate with FERS was \$1,864.00 and without FERS was \$1,485.90.

In a November 6, 2020 letter, OWCP informed appellant that he had been receiving dual FERS and SSA age-related retirement benefits without an appropriate offset. It further informed him that his FECA wage-loss compensation benefits must be adjusted based on the FERS portion of SSA age-related retirement benefits that were attributable to federal service. OWCP indicated that appellant's FECA benefits would be reduced to \$1,915.06 every 28 days.

On November 9, 2020 OWCP completed a FERS offset overpayment calculation worksheet. It determined the overpayment amount by multiplying the daily FERS offset amount by the 252 days for the period March 1 through November 7, 2020, which resulted in a total overpayment of \$3,141.14.

On November 12, 2020 OWCP issued a preliminary overpayment determination, finding an overpayment of compensation in the amount of \$3,141.14 had been created for the period March 1 through November 7, 2020, because OWCP failed to deduct appellant's FERS offset from his FECA wage-loss compensation. It found him without fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. Additionally, it informed him that, within 30 days, he could request a final decision based on the written evidence or a prerecouplement hearing. OWCP requested that he complete the overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. It afforded appellant 30 days to respond.

On December 22, 2020 appellant requested a prerecouplement hearing before a representative of OWCP's Branch of Hearings and Review and further requested waiver of recovery of the overpayment. He provided a completed Form OWCP-20 and listed his monthly income as \$4,761.74 including \$729.00 in SSA benefits and his monthly expenses as \$4,304.67 including \$826.91 for mortgage, \$300.00 for food, \$250.00 for utilities, \$1,760.71 in monthly credit card payments, and \$1,163.05 in personal loans. Appellant indicated that he had funds of \$5,454.00 including \$50.00 in cash, \$3,604.00 in a checking account, and \$1,800.00 in savings. The hearing was held on March 1, 2021.

OWCP subsequently received an additional completed Form OWCP-20 dated March 10, 2021, wherein appellant advised that he had household monthly income of \$5,690.00⁷ including SSA benefits of \$747.00. He listed monthly expenses of \$826.19 for a mortgage, \$300.00 for food, \$601.76 for utilities, and \$526.71 for other miscellaneous expenses including medical and

⁷ Appellant did not otherwise specify the source of this income.

dental, automobile costs and personal necessities. Appellant listed a monthly payments of \$1,300.00 for monthly credit card payments, and \$1,877.76 in monthly loan payments. He totaled his monthly expenses as \$3,177.76.⁸ Appellant listed his assets totaling \$4,911.50, including \$50.00 in cash, \$132.00 in a checking account, and \$4,729.20 in savings. Appellant did not provide any supporting financial documentation.

By decision dated April 12, 2021, OWCP's hearing representative found that appellant had received an overpayment of compensation in the amount of \$3,141.14 for the period March 1 through November 7, 2020. He found appellant without fault in the creation of the overpayment, but denied waiver of recovery. OWCP's hearing representative determined that appellant's monthly income of \$5,690.00 exceeded his expenses by more than \$50.00. He found that appellant's accepted monthly expenses included \$826.19 in mortgage, \$300.00 for food, \$601.76 for utilities, \$526.21 for miscellaneous expenses or \$2,254.16. OWCP's hearing representative also found that appellant had monthly expenses including a home loan of \$1,064.05, a personal loan of \$813.71, and one credit card of \$550.00 or \$2,427.76. He determined that the additional \$750.00 in credit debt each month could not be considered to avoid counting miscellaneous living expenses twice,⁹ and that therefore, the evidence of record was insufficient to establish that recovery would defeat the purpose of FECA. OWCP's hearing representative further found that there was no evidence that appellant gave up a valuable right or changed in position for the worse such that recovery of the overpayment would be against equity and good conscience. He required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

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.¹⁰ 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.¹¹

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.¹² FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA

⁸ The Board notes that the total listed monthly expenses including all credit card payments and loans is \$5,431.91.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4.b.(2)(e) (September 2020).

¹⁰ 5 U.S.C. § 8102(a).

¹¹ *Id.* at § 8116.

¹² 20 C.F.R. § 10.421(d); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,141.14 for the period March 1 through November 7, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.

In its April 28, 2021 decision, OWCP found that an overpayment of compensation was created for the period March 1 through November 7, 2020. 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.¹⁴ The information provided by SSA indicated that appellant received age-related SSA retirement benefits that were attributable to federal service during the period March 1 through November 7, 2020. Consequently, the fact of overpayment has been established.¹⁵

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-related SSA retirement benefits that were attributable to federal service. SSA provided appellant's age-related retirement benefit rates with FERS, and without FERS for the period commencing March 1 through November 7, 2020. OWCP then provided its calculations for the relevant period based on a FERS offset calculation worksheet and in its November 12, 2020 preliminary overpayment determination.

The Board has reviewed OWCP's calculations of benefits received by appellant for the period March 1 through November 7, 2020 and finds that an overpayment of compensation in the amount of \$3,141.14 was created.¹⁶

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.¹⁷

¹³ FECA Bulletin No. 97-09 (issued February 3, 1997); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

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

¹⁵ *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

¹⁶ *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁷ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

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.¹⁸

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.¹⁹ 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 \$50.00.²⁰

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.²¹

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.²² 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.²³

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 of recovery of the overpayment 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

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

¹⁹ 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).

²⁰ *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

²¹ 20 C.F.R. § 10.437(a)(b).

²² *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²³ *Id.* at § 10.438(b).

conscience.²⁴ OWCP considered appellant's financial information, as reported in his statements, to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses, or that his assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics. OWCP procedures provide that 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.²⁵ Appellant submitted an overpayment recovery questionnaire on March 10, 2021.

OWCP's hearing representative determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. Appellant advised that he had household monthly income of \$5,690.00 and listed total monthly expenses of \$5,431.91. His monthly income exceeded his monthly expenses by \$258.09, more than the \$50.00 required.

OWCP's hearing representative further excluded an additional \$750.00 in credit card payments to avoid duplicate costs for miscellaneous expenses. He determined that appellant's allowable monthly expenses totaled \$4,681.91. OWCP's hearing representative found that appellant's monthly income of \$5,690.00 and his monthly expenses of \$4,681.91 yielded a monthly surplus of \$1,008.08.

An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²⁶ As appellant's current income exceeds his ordinary and necessary living expenses by at least \$258.09, he does not need substantially all of his income for ordinary and necessary living expenses.²⁷

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant has not submitted evidence to substantiate that

²⁴ *Id.* at § 10.436.

²⁵ 20 C.F.R. § 10.436. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if the monthly income does not exceed monthly expense by more than \$50.00. 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determination*, Chapter 6.400.4a (September 2020).

²⁶ *Id.*; *N.B.*, *supra* note 13.

²⁷ As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether his assets exceed the allowable resource base. *N.B.*, *id.*; *J.W.*, Docket No. 16-1355 (issued January 10, 2017).

he would experience severe financial hardship in attempting to repay the debt, or that in reliance on such payment he gave up a valuable right or changed his position for the worse. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.²⁸

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.²⁹

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that, 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 the error is discovered or his or her attention is called to the 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 factors, so as to minimize any hardship.³⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

In setting the recovery rate at \$200.00, OWCP explained how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.³¹ Thus, it did not abuse its discretion in setting the rate of recovery.³² The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$200.00 every 28 days.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$3,141.14 for the period March 1 through November 7, 2020, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation, without an appropriate offset. The Board further finds that OWCP

²⁸ *N.J.*, *supra* note 20; *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁹ *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

³⁰ 20 C.F.R. § 10.441(a); *A.F.*, *supra* note 17; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

³¹ *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

³² *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$200.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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