

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

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J.C., Appellant )

and )

COMMODITY FUTURES TRADING )  
COMMISSION, DEPARTMENT OF )  
ENFORCEMENT, Washington, DC, Employer )  
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**Docket No. 22-1296  
Issued: May 3, 2023**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 6, 2022 appellant filed a timely appeal from a June 13, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted due to the complexity of the issues on appeal. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would not serve a useful purpose. Therefore, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the June 13, 2022 decision, appellant submitted additional evidence to OWCP. 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 \$51,171.88, for the period June 1, 2016 through December 4, 2021, for which she was without fault, because she 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 \$461.54 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On December 10, 2002 appellant, then a 55-year-old secretary, filed traumatic injury claim (Form CA-1) alleging that on December 3, 2002 she sustained an injury when a cabinet fell and struck her head while in the performance of duty. She stopped work on December 3, 2002. OWCP initially accepted appellant's claim for cervical strain, contusions of the neck, left shoulder, and face. It paid her wage-loss compensation on the supplemental rolls, effective December 3, 2002 and on the periodic rolls, effective February 23, 2003. OWCP later expanded the acceptance of appellant's conditions to include displacement of cervical intervertebral disc without myelopathy; aggravation of cervical spondylosis without myelopathy/radiculopathy; impingement syndrome of the left shoulder; and contusions of the scalp and back.

In a form signed on October 22, 2011, appellant elected to receive FECA compensation instead of compensation under the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS).

On October 21, 2021 OWCP sent a FERS/SSA dual benefits form to SSA for completion.

On October 2021 OWCP received a FER/SSA dual benefits form completed by SSA on that date, which indicated that appellant received SSA age-related retirement benefits that were attributable to federal service commencing June 1, 2016. SSA provided her age-related retirement benefit rates with and without a FERS offset from June 1, 2016 as follows: beginning June 1, 2016 the SSA rate with FERS was \$1,942.00 and without FERS was \$1,219.00; beginning December 1, 2016 the SSA rate with FERS was \$1,948.00 and without FERS was \$1,222.00; beginning January 1, 2017 the SSA rate with FERS was \$2,000.00 and without FERS was \$1,256.00; beginning December 1, 2017 the SSA rate with FERS was \$2,040.00 and without FERS was \$1,281.00; beginning December 1, 2018 the SSA rate with FERS was \$2,097.00 and without FERS was \$1,316.00; beginning December 1, 2019 the SSA rate with FERS was \$2,131.00 and without FERS was \$1,337.90; and beginning December 1, 2020 the SSA rate with FERS was \$2,158.70 and without FERS was \$1,355.00.

OWCP completed a FERS offset overpayment calculation worksheet, based on the benefits rates provided by SSA, wherein it noted the calculations of appellant's overpayment from June 1, 2016. It determined: for the period June 1 through November 30, 2016, appellant received an overpayment of \$4,361.84; for the period December 1 through 31, 2016, appellant received an overpayment of \$741.96; for the period January 1 through November 30, 2017, appellant received an overpayment of \$8,192.18; for the period December 1, 2017 through November 30, 2018, appellant received an overpayment of \$9,133.02; for the period December 1, 2018 through November 30, 2019, appellant received an overpayment of \$9,397.75; for the period December 1, 2019 through November 30, 2020, appellant received an overpayment of \$9,570.70; and for the

period December 1, 2020 through December 4, 2021, appellant received an overpayment of \$9,774.45. Based on these figures, it calculated the total overpayment amount of \$51,171.88.

In a December 14, 2021 letter, OWCP advised appellant that it was adjusting her wage-loss compensation to offset the portion of her SSA age-related retirement benefits attributable to her federal service. It informed her that the portion of the SSA benefits that she earned as a federal employee was part of the FERS retirement package and that FECA did not allow the simultaneous receipt of workers' compensation and federal retirement benefits.

In a preliminary overpayment determination dated January 3, 2022, OWCP notified appellant of its preliminary finding that she received an overpayment of compensation in the amount of \$51,171.88 for the period June 1, 2016 through December 4, 2021, because she received FECA wage-loss compensation benefits and SSA age-related retirement benefits, without an appropriate offset. It determined that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable rate of recovery, and advised her that she could request waiver of recovery of the overpayment. It further requested that she 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. OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a precouplement hearing.

On February 4, 2022 OWCP received an overpayment action request form, signed on January 29, 2022 in which appellant requested a precouplement hearing regarding possible waiver of recovery of the overpayment. It also received a Form OWCP-20, signed on January 30, 2022 accompanied by various tax records and bills/statements regarding her monthly expenses. In the Form OWCP-20 and attachments, appellant listed \$9,464.45 in monthly income, \$11,137.42 in monthly expenses, and \$8,126.47 in assets. On March 25, 2022 OWCP received a revised Form OWCP-20, updated on March 22, 2022 in which she listed \$9,465.71 in monthly income, \$11,435.98 in monthly expenses, and \$7,737.96 in assets. It also received additional tax records and bills/statements regarding monthly expenses.

During the April 7, 2022 precouplement hearing, appellant provided testimony regarding her monthly income, monthly expenses, and assets. She asserted that she would not have purchased a second house in May 2019 if she had not received the monies presently being declared as an overpayment. Appellant further reported that her daughter paid the mortgage, taxes, and insurance for this house. OWCP received additional financial documents after the hearing.

By decision dated June 13, 2022, OWCP's hearing representative finalized the preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$51,171.88, for the period June 1, 2016 through December 4, 2021, because appellant received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset. The hearing representative further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery, because appellant had not shown both that she needed substantially all of her current income to meet ordinary and necessary living expenses, and that her assets did not exceed the allowable resource base. Office's hearing representative determined that the evidence supported a finding that appellant had \$8,390.63 in

monthly income, \$7,188.21 in monthly expenses, and \$10,937.96 in assets.<sup>4</sup> The assets were comprised of \$8,738.77 in a Credit Union account, \$1,930.34 in a bank account, and \$268.35 in the checking account of appellant's spouse. The hearing representative further found that appellant had not provided any evidence to support that she relied on such payments or relinquished a valuable right or changed her position for the worse in reliance on payments received as part of the overpayment. Office's hearing representative required recovery of the overpayment by deducting \$461.54 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$51,171.88, for the period June 1, 2016 through December 4, 2021, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset.

The case record establishes that appellant received SSA age-related retirement benefits beginning June 1, 2016. OWCP paid her wage-loss compensation for disability from June 1, 2006 through December 4, 2021. As noted, a claimant cannot concurrently receive FECA wage-loss

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<sup>4</sup> With respect to monthly expenses, Office's hearing representative determined that a number of appellant's claimed expenses were not supported by the financial documentation of record or were already included in monthly payments made on credit card debt. The hearing representative noted that appellant's daughter paid the mortgage, taxes, and insurance for a second house, and determined that these amounts would not be included in appellant's monthly expenses.

<sup>5</sup> 5 U.S.C. § 8102.

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

compensation and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> Accordingly, the Board finds fact of overpayment has been established.<sup>10</sup>

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received a dual benefits calculation form from SSA with respect to appellant's SSA age-related retirement benefits attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods June 1, 2016 through December 4, 2021. 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 \$51,171.88. The Board has reviewed OWCP's calculation of dual benefits received by her for the period June 1, 2016 through December 4, 2021 and finds that an overpayment of compensation in the amount of \$51,171.88 was created.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA<sup>11</sup> 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 appellant was without fault does not automatically result in waiver of recovery 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.<sup>12</sup>

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.<sup>13</sup> An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, 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.<sup>14</sup>

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<sup>9</sup> *M.R.*, Docket No. 20-0427 (issued October 30, 2020). *See also N.B., id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>10</sup> *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

<sup>11</sup> 5 U.S.C. § 8129(1)-(b); *A.C.*, *supra* note 9; *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>12</sup> *A.C., id.*; *see V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>13</sup> 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's 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. *Id.* at Chapter 6.400.4a(2).

<sup>14</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

According to 20 C.F.R. § 10.437 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.<sup>15</sup> To establish that, a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>16</sup>

Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver of recovery of the overpayment.<sup>17</sup>

### 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 of recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>18</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As she has assets of \$10,937.46, her assets exceed the allowable resource base of a claimant, like herself, who has a spouse, *i.e.*, \$10,300.00.<sup>19</sup> Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.

The Board finds that appellant has not established that she was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt, or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>20</sup> Appellant claimed that she changed her position for the worse by purchasing a second house in reliance on the payments, which created the overpayment. However, the Board has held that the conversion of an

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<sup>15</sup> 20 C.F.R. § 10.437(a), (b).

<sup>16</sup> *Id.* at § 10.437(b)(1).

<sup>17</sup> *Id.* at § 10.438.

<sup>18</sup> *Id.* at § 10.436.

<sup>19</sup> *See supra* note 12.

<sup>20</sup> *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

overpayment into a different form from which a claimant derived some benefit, such as her house purchase in the present case, does not constitute a loss for this purpose.<sup>21</sup>

The Board thus 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.<sup>22</sup> Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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."<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$461.54 from appellant's continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$461.54 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on her. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$461.54 from her continuing compensation payments every 28 days.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$51,171.88, for the period June 1, 2016 through December 4, 2021, 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 further finds that OWCP properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$461.54 from her continuing compensation payments every 28 days.

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<sup>21</sup> See *K.K.*, Docket No. 09-207 (issued October 2, 2009). See also *supra* notes 14 and 15.

<sup>22</sup> *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>23</sup> 20 C.F.R. § 10.441; see *A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2023  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

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