

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

_____)	
W.T., Appellant)	
)	
and)	Docket No. 20-1218
)	Issued: February 26, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Garden City, NJ, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 26, 2020 appellant filed a timely appeal from a March 20, 2020 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 \$26,319.86 during the period December 1, 2013 through January 1, 2020, for which he was not at fault, as he concurrently received Social Security

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits without 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 \$859.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On August 14, 1996 appellant, then a 48-year-old motor vehicle operator, filed a claim for a traumatic injury (Form CA-1) alleging that he sustained neck and right shoulder injuries on September 28, 1995 when he was loading a postal container of mail and a bag extending above the top of the postal container hit the overhead door forcing the door forward and then back, causing the door to strike his head.

Following extensive medical development, by decision dated January 7, 2003, OWCP accepted the claim for C4-7 disc herniations, and permanent aggravation of preexisting discogenic spondylosis with myelopathy. It later expanded the acceptance of appellant's claim to include brain stem contusion without open wound. OWCP paid him wage-loss compensation on the supplemental rolls from October 8, 2000 through May 17, 2003 and on the periodic rolls from May 18, 2003 through February 29, 2020.

A January 17, 2003 letter from the employing establishment listed appellant's retirement coverage as the Federal Employees Retirement System (FERS).

On an EN1032 form dated December 10, 2013, appellant replied "No" as to whether he was in receipt of SSA benefits as part of an annuity for federal service. On EN1032 forms dated December 12, 2014, December 9, 2015, and December 16, 2016, appellant continued to reply "No" to the same query. On EN1032 forms dated December 28, 2017, and January 3 and December 29, 2019, appellant continued to reply "No" to the same query, but explained that he was in receipt of SSA benefits related to retirement and Medicare.

On December 11, 2019 OWCP requested information from SSA regarding appellant's possible FERS/SSA dual benefits.

On January 28, 2020 OWCP received a completed FERS/SSA dual benefits calculation form from SSA dated December 11, 2019, wherein SSA calculated appellant's SSA age-related retirement benefit rates with and without a FERS offset. The form indicated that appellant's SSA rate with FERS was: \$1,994.10 effective December 2013; \$2,027.90 effective December 2014 and December 2015; \$2,033.90 effective December 2016; \$2,074.50 effective December 2017; \$2,132.50 effective December 2018; and \$2,166.60 effective December 2019. The form further indicated that appellant's SSA benefit rate without FERS was: \$1,649.80 effective December 2013; \$1,677.80 effective December 2014 and December 2015; \$1,682.80 effective

³ Docket No. 08-2469 (issued July 9, 2009); Docket No. 02-0266 (issued October 21, 2002).

December 2016; \$1,716.40 effective December 2017; \$1,764.40 effective December 2018; and \$1,792.60 effective December 2019. SSA noted that appellant became entitled to age-related retirement benefits in December 2013.

OWCP completed a FERS offset calculation form on February 7, 2020. It determined the 28-day FERS offset amount for the days in each period and computed a total overpayment of \$26,319.86. This form indicated: from December 1, 2013 through November 30, 2014, appellant received an overpayment of compensation in the amount of \$4,142.95; from December 1, 2014 through November 30, 2015 he received an overpayment of compensation in the amount of \$4,212.74; from December 1, 2015 through November 30, 2016 he received an overpayment of compensation in the amount of \$4,224.28; from December 1, 2016 through November 30, 2017 he received an overpayment of compensation in the amount of \$4,224.77; from December 1, 2017 through November 30, 2018 he received an overpayment of compensation in the amount of \$4,309.01; from December 1, 2018 through November 30, 2019, he received an overpayment of compensation in the amount of \$4,429.34; and from December 1, 2019 through February 1, 2020, he received an overpayment of compensation in the amount of \$776.77.

On December 19, 2019 and February 7, 2020 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$26,319.86 as he had received FECA wage-loss compensation benefits for the period December 1, 2013 through February 1, 2020 that had not been reduced by the portion of his SSA age-related retirement benefits attributable to his federal service, and that this portion of her SSA benefit was a prohibited dual benefit. It further advised him of its preliminary determination that he was not at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On February 10, 2020 OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA age-related retirement benefits attributable to his federal service, his FECA wage-loss compensation had been adjusted.

In a completed Form OWCP-20 dated March 19, 2020, appellant advised that his monthly income included \$3,005.80 in SSA benefits and \$5,310.41 in other income, for a total monthly income of \$8,316.21. He further advised that his monthly expenses included \$1,534.75 for housing, \$1,402.00 for food, \$150.00 for clothing, \$1,046.48 for utilities, and \$2,029.20 for other expenses. Appellant noted monthly installment credit card debt totaling approximately \$2,158.82. He provided documentation supporting his reported debts and utility expenses. OWCP obtained additional data during a telephone conference on March 20, 2020. Appellant's reported monthly income included \$2,160.66 in SSA benefits for himself and \$839.20 for his spouse, as well as \$3,014.83 in FECA benefits for himself and \$2,295.57 for his spouse. His expenses included \$600.00 for food, \$150.00 for clothing, \$1,461.10 for housing, \$281.75 for electricity, \$200.00 for water, \$300.00 for telephone service, \$281.61 for loan payments on a vehicle, \$300.00 for gas and oil, loan payments of \$1,728.82, and \$316.00 on four credit cards. Appellant's total combined income was \$8,310.26 per month while total household expenses were \$5,619.28.

By decision dated March 20, 2020, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$26,319.86 because the SSA/FERS offset was not applied to FECA payments for the period December 1, 2013 through January 1, 2020. It further found that he was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, because he had income after expenses sufficient to allow him to repay the debt and such repayment would not be against good equity and conscience. OWCP found that appellant's adjusted household expenses based on the evidence amounted to \$5,617.00, while his total household income was \$8,316.21. It required recovery of the overpayment by deducting \$859.00 from appellant's continuing compensation payments beginning March 29, 2020.

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.⁴ 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.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$26,319.86 because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period December 1, 2013 through January 1, 2020 without appropriate offset.

The record indicates that, while appellant was receiving wage-loss compensation under FECA, he also received SSA age-related retirement benefits attributable to his federal service during the relevant period. A claimant cannot receive both compensation for wage loss and SSA

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

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

age-related retirement benefits attributable to federal service for the same period.⁸ Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of SSA benefits that were 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. The SSA provided the SSA rate with FERS and without FERS for specific periods from December 1, 2013 through January 1, 2020. OWCP provided its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period December 1, 2013 through January 1, 2020 in its December 19, 2019 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 1, 2013 through January 1, 2020 and finds that an overpayment in the amount of \$26,319.86 was created.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.¹⁰ 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.¹¹

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹² Section 10.436 provides that 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 expense, and, also, if the beneficiary's assets do not exceed a specified amount

⁸ See *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

⁹ See *L.W.*, *supra* note 6; *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.438.

¹² *Id.* at §§ 10.434-10.437.

as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁴ 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 \$50.00.¹⁵

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 was required to 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.¹⁶

The Board finds that the documentation of record supports that appellant had \$8,310.21 in monthly income and \$5,617.00 in monthly expenses, and thereby his monthly income exceeded his monthly ordinary and necessary expenses by more than \$50.00.¹⁷ OWCP properly arrived at these figures by carefully reviewing the documentation and determining that it did not support some claimed monthly expenses or only supported portions of them.¹⁸

The Board further finds that 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 and that his assets do not exceed the allowable resource base. As noted above, appellant's monthly income exceeds his monthly ordinary and necessary expenses by more than \$50.00. As his current income exceeds his current ordinary and living expenses by more than \$50.00, he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.¹⁹ Because appellant has not met the first prong of the two-prong test of whether recovery of the

¹³ *Id.* at § 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 2018). 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).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.436.

¹⁷ *See supra* note 13.

¹⁸ *See J.B.*, Docket No. 16-0796 (issued August 19, 2016).

¹⁹ *Supra* note 13.

overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether his assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²⁰

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive 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.²¹

Section 10.441 of OWCP's regulations provides that, when an overpayment of compensation has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon 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 hardship.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deduction of \$859.00 from appellant's continuing compensation every 28 days.

The record supports that, in requiring repayment of the \$26,319.86 overpayment of compensation by deducting \$859.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by him as well as the factors set forth in section 10.441. Therefore, OWCP properly required recovery of the overpayment by deducting \$859.00 from his compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$26,319.86 for the period December 1, 2013 through January 1, 2020, for which he was not at fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss

²⁰ See *J.B.*, *supra* note 18; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²¹ 20 C.F.R. § 10.441; see *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²² *Id.*

compensation benefits without 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 \$859.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board