

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

_____)	
W.C., Appellant)	
)	Docket No. 20-1241
and)	Issued: February 9, 2021
)	
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, NELLIS AIR)	
FORCE BASE, NV, 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 June 30, 2020 appellant filed a timely appeal from a May 12, 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.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$54,495.41 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 for the period October 1, 2015 to January 4, 2020; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly

¹ 5 U.S.C. § 8101 *et seq.*

required recovery of the overpayment by deducting \$479.25 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 5, 2001 appellant, then a 51-year-old grocery manager, filed an occupational disease claim (Form CA-2) alleging that she developed extreme stress due to the employing establishment's failure to provide a safe work environment. She noted that she first became aware of her condition, and first realized its relationship to her federal employment on April 24, 2001. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on May 2, 2001. Appellant's retirement coverage was noted as Federal Employees Retirement System (FERS). OWCP subsequently accepted her claim for anxiety disorder. It paid appellant wage-loss compensation on the daily rolls as of April 2, 2002 and on the periodic rolls as of August 2, 2002.

On November 20, 2019 SSA forwarded a completed FERS/SSA dual benefits calculation form to OWCP. The form indicated that, beginning in October 2015, appellant's SSA rate with FERS was \$1,112.90 and without FERS was \$71.40, beginning in December 2015 her SSA rate with FERS was \$1,112.90 and without FERS was \$71.40, beginning in December 2016 her SSA rate with FERS was \$1,116.20 and without FERS was \$71.60, beginning in December 2017 her SSA rate with FERS was \$1,138.50 and without FERS was \$73.00, and beginning in December 2018 her SSA with FERS was \$1,170.30 and without FERS was \$75.00.

In a February 4, 2020 notice of telephone call (Form CA-110), OWCP notified appellant that her compensation would be offset by the portion of her SSA age-related retirement benefits attributable to her federal service.

In a preliminary determination dated April 8, 2020, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$54,495.41² because her wage-loss compensation benefits had not been reduced for the period October 1, 2015 through January 4, 2020 by the portion of her SSA benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA amount with and without FERS for the stated period and adding this amount to find a total overpayment of \$54,495.41. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. Additionally, it notified her that she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP allotted 30 days for appellant to respond.

On April 20, 2020 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. She indicated that she was requesting waiver of recovery of the overpayment because she had provided correct and complete information

² The Board notes that the preliminary overpayment determination had calculated an overpayment in the amount of \$54,495.40, not \$54,495.41.

as required by SSA and OWCP. Appellant contended that she should not be held responsible for an overpayment that occurred without her knowledge.

On May 5, 2020 appellant submitted a Form OWCP-20 dated May 4, 2020, which indicated that she had a monthly income of \$8,144.58, including FECA compensation benefits of \$1,917.67 for herself and \$2,028.31 for her spouse, SSA benefits of \$1,044.00 for herself and \$1,113.00 for her spouse, and other retirement income of \$2,041.60 for her spouse. She reported that her monthly expenses included: \$3,065.43 for rent or mortgage, \$600.16 for food; \$250.00 for clothing; \$1,180.09 for utilities; \$800.00, \$150.00, and \$100.00 for Navy Federal Credit Union; \$143.00 for Home Depot; \$46.50 for Military Star; \$12.96 for Hulu; \$29.50 for Prime Video; \$14.06 for Netflix; \$2.99 for Apple iCloud storage; \$137.72 for Allstate automobile insurance (last payment); \$163.02 for Allstate automobile insurance starting May 7, 2020; \$98.54 for Allstate life insurance; \$229.79 for USAA automobile insurance; \$15.10 for AGI travel insurance; \$8.00 for AGI life insurance; and \$694.94 for Lincoln Automotive Financial Services, totaling \$7,737.86. Appellant indicated that she had available assets of \$125.00 cash on hand, \$7,745.85 in a checking account, and \$7,013.43 in a savings account, totaling \$14,884.28.

By decision dated May 12, 2020, OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$54,495.41 for the period October 1, 2015 through January 4, 2020 for which she was not at fault, because her FECA compensation payments were not offset by the portion of her SSA age-related retirement benefits attributable to her federal service. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery because the evidence of record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$479.25 from appellant's continuing wage-loss compensation 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 duty.³ However, section 8116 also 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 When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

Section 10.421(d) of OWCP's implementing regulations requires that it reduce the amount of compensation by the amount of any SSA benefits that are attributable to the federal service of

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8129(a).

the employee.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 appellant received an overpayment of compensation in the amount of \$54,495.41 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period October 1, 2015 to January 4, 2020.

In its May 12, 2020 decision, OWCP found that an overpayment of compensation was created for the period October 1, 2015 to January 4, 2020. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. As noted, a claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning October 1, 2015. OWCP, however, neglected to offset her FECA benefits until January 4, 2020. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period October 1, 2015 through January 4, 2020.

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 SSA age-related retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rates with FERS and without FERS for the period October 1, 2015 through January 4, 2020. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2015 through January 4, 2020 and finds that an overpayment of compensation in the amount of \$54,495.41 was created.⁹

⁶ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

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

⁸ 5 U.S.C. § 8116(d)(2); *see R.D.*, Docket No. 19-1598 (issued April 17, 2020); *C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

⁹ *See M.S.*, Docket No. 18-0740 (issued February 4, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

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.¹⁰

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 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.¹¹ 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 \$50.00.¹²

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.¹³ 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.¹⁴

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 or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁵

¹⁰ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹¹ 20 C.F.R. § 10.436. OWCP's procedures provide that the 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 Determinations*, Chapter 6.400.4a (3) (September 2018).

¹² Federal (FECA) Procedure Manual *id.* at Chapter 6.400.4(a)(3) (September 2018).

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

¹⁴ FECA Procedure Manual, *supra* note 11 at Chapter 6.400.4c(3) (September 2018).

¹⁵ 20 C.F.R. § 10.436.

Appellant provided her current monthly income and expenses in Form OWCP-20 on May 5, 2020 as well as a summary of her liquid assets. OWCP properly determined that she listed available assets totaling \$14,884.28. This amount exceeds the base asset amount of \$10,300.00 for individuals with a spouse or dependent.¹⁶ It was therefore unnecessary for OWCP to consider whether appellant's monthly income exceeds her monthly ordinary and necessary expenses by more than \$50.00.¹⁷ OWCP therefore properly denied waiver of recovery.

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.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$479.25 from appellant's continuing compensation payments every 28 days.

In setting the recovery rate, OWCP explained that the factors set forth at 20 C.F.R. § 10.441(a) had been considered to minimize hardship, while liquidating the debt, as appellant had financial resources sufficient for more than ordinary needs.¹⁹ As noted, appellant submitted a Form OWCP-20 on May 5, 2020 showing that she had available assets totaling \$14,884.28, which included \$125.00 cash on hand, \$7,745.85 in a checking account, and \$7,013.43 in a savings account. Thus, OWCP did not abuse its discretion in setting the rate of recovery.²⁰ The Board therefore finds that OWCP properly required recovery of the overpayment from appellant's continuing compensation payments at the rate of \$479.25 every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$54,495.41 for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset for the period October 1, 2015 to January 4, 2020. The Board further finds that OWCP properly denied waiver

¹⁶ *Supra* note 11; *see R.D.*, *supra* note 8.

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.441(a); *see C.M.*, *supra* note 8.

¹⁹ *See J.C.*, Docket No. 20-0204 (issued October 16, 2020); *D.S.*, Docket No. 18-1447 (issued July 22, 2019).

²⁰ *See J.C.*, *id.*; *T.G.*, Docket No. 17-1989 (issued June 5, 2018); *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

of recovery of the overpayment and properly required recovery of the overpayment by deducting \$479.25 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 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