

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

R.L., Appellant)	
)	
and)	Docket No. 10-2412
)	Issued: August 23, 2011
DEPARTMENT OF STATE, AMERICAN)	
EMBASSY, Budapest, Hungary, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 30, 2010 appellant filed a timely appeal from a September 14, 2010 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.

ISSUE

The issue is whether OWCP properly denied waiver of a \$15,372.70 overpayment of compensation.

FACTUAL HISTORY

The case was before the Board on prior appeals. In a May 13, 2004 decision, the Board found appellant's pay rate should include the value of living quarters provided, as set forth in

¹ 5 U.S.C. § 8101 *et seq.*

5 U.S.C. § 8114(e).² The case was remanded to OWCP to determine the appropriate date for the pay rate determination, the value of the living quarters and a determination as to whether post allowance was appropriate in this case. In a June 5, 2006 decision, the Board found that the appropriate date to establish pay rate was the date of injury, July 4, 1998.³ OWCP had found an overpayment of compensation was created due to the application of an incorrect pay rate date. As to fact and amount of an overpayment, the Board noted there remained a question as to the value of the living quarters provided and the case was remanded for further development. By order dated November 30, 2007, the Board remanded the case again for further development as to the value of the living quarters provided.⁴ In a decision dated July 14, 2009, the Board affirmed the finding of a \$15,372.70 overpayment of compensation.⁵ The Board remanded the case on the issue of waiver, noting that the financial evidence of record was nearly three years old at the time of a July 2, 2008 OWCP decision.

By decision dated September 3, 2010, the Board set aside an October 1, 2009 OWCP decision regarding waiver of the overpayment.⁶ The Board noted that OWCP made no findings with respect to the denial of waiver. The history of the case is provided in the prior Board decisions and orders and is incorporated herein by reference.

On return of the case record, OWCP issued a September 14, 2010 decision denying waiver of the overpayment. It noted the information provided on an overpayment recovery questionnaire (OWCP-20) dated August 9, 2009, which included evidence regarding assets such as amounts in the Thrift Savings Plan (TSP) and Individual Retirement Accounts (IRA).

LEGAL PRECEDENT

Section 8129(b) of FECA⁷ provides: “Adjustment or recovery by the United States may not be made when 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.”⁸ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against

² Docket No. 03-18 (issued May 13, 2004). OWCP accepted that appellant sustained an avulsion fracture of the right ankle on July 4, 1998 in Budapest, Hungary. An issue arose with respect to the proper pay rate for compensation purposes, and the Board found the value of living quarters provided to appellant should be included. Appellant had also received a schedule award for a 20 percent right leg permanent impairment by decision dated May 9, 2001.

³ Docket No. 06-282 (issued June 5, 2006).

⁴ Docket No. 07-1093 (issued November 30, 2007).

⁵ Docket No. 08-2406 (issued July 14, 2009).

⁶ Docket No. 10-115 (issued September 3, 2010).

⁷ 5 U.S.C. § 8101 *et seq.*

⁸ *Id.* at § 8129(b).

equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

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 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.⁹ For waiver under the “defeat the purpose of [FECA]” standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹⁰

Recovery of an overpayment is considered to be against “equity and good conscience” under 20 C.F.R. § 10.437 “when any individual who received an overpayment would experience financial hardship in attempting to repay the debt.” In addition, recovery is considered to be against “equity and good conscience” when an individual, in reliance on such payments or notice of such payments, “gives up a valuable right or changes his or her position for the worse.”

An individual’s liquid assets “include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.”¹¹ 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 and furnishings/supplies....”¹²

ANALYSIS

The issue of waiver, as noted above, requires that OWCP show recovery of the overpayment would not “defeat the purpose of [FECA]” or be against “equity and good conscience.” In order to “defeat the purpose of [FECA]” it must be established that a claimant needs substantially all current income to meet current ordinary and necessary living expenses and that assets do not exceed the established limit (currently \$8,000.00 for a claimant with a spouse and \$960.00 for each additional dependent.) In other words, if nonexempt assets exceed the established limit, then recovery of the overpayment would not “defeat the purpose of [FECA].”

In this regard, the evidence provided by appellant, with his August 9, 2009 OWCP-20 and accompanying statement, indicated that he had over \$139,000 in his TSP account, with \$26,300.24 in a Roth IRA, \$14,303.64 in a traditional IRA and \$46,273.13 in a joint 401(k) plan with his wife. Appellant has argued that retirement savings are exempt from recovery in an overpayment of compensation, without citing relevant authority. The Board has specifically held that a claimant’s contributions to the TSP and earnings from those contributions are considered

⁹ OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁰ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

¹¹ Federal (FECA) Procedure Manual, *supra* note 9 (May 2004).

¹² *Id.*

assets which OWCP may consider in determining waiver.¹³ In addition, assets in an IRA have also been found to be properly considered as nonexempt assets for recovery of an overpayment.¹⁴

The Board finds that the evidence clearly establishes that appellant has nonexempt assets exceeding the established limit. Therefore, recovery of the overpayment would not “defeat the purpose of [FECA].”

With respect to the “against equity and good conscience” standard, the availability of assets indicates that appellant would not experience financial hardship in attempting to repay the debt. The factors considered regarding financial hardship are substantially the same as those for “defeat the purpose of [FECA]” and, as noted above, appellant has significant available assets.¹⁵ Moreover, there was no evidence presented that appellant had given up a valuable right or changed his position for the worse in reliance on the overpayment. Appellant argues on appeal that his situation is similar to an example cited in OWCP procedures, where a claimant is placed on the periodic rolls, resigns his job and withdraws his contributions in the federal retirement system under the assumption that he would receive regular monthly benefits.¹⁶ When it is discovered that the award was erroneous, he is unable to get his job back or secure other employment and detrimental reliance on the overpayment as established. The evidence of record does not establish that a similar situation was presented in this case. There is no probative evidence that appellant resigned his job in reliance on the overpayment of compensation in this case. Appellant indicated that he had to retire due to age requirements in the Foreign Service.

The Board finds that recovery of the overpayment would not “defeat the purpose of [FECA]” nor be against “equity and good conscience.” OWCP therefore properly denied waiver of the overpayment.

On appeal, appellant argues that OWCP improperly denied waiver. He notes that he continues to have medical problems; but the issue here is the recovery of the overpayment under the standards noted above. Appellant asserts that OWCP’s claims examiner is retaliatory and abusive. There is no evidence that a denial of waiver in this case is abusive. The waiver issue is determined in accord with FECA, Board precedent and regulatory authority and the Board finds the evidence supported the denial of waiver. Appellant again noted that a “small part” of his savings was represented by an Equal Employment Occupational Commission award that he states is exempt from being recovered. He does not provide additional detail. As the Board noted in *Hahn*,¹⁷ retirement funds that are available for withdrawal may be considered for waiver determinations. The evidence of record indicated that appellant had significant assets in excess

¹³ *Eloise K. Hahn*, Docket No. 01-1199 (issued June 25, 2002); *see also P.C.*, Docket No. 10-1386 (issued April 26, 2011).

¹⁴ *See Alfonso C. Gonzalez*, 45 ECAB 200 (1993); *see also Billy L. Durham*, Docket No. 99-978 (issued November 30, 2000); *Tony C. Settle*, Docket No. 94-2496 (issued December 2, 1996).

¹⁵ *See Jan K. Fitzgerald*, 51 ECAB 659 (2000); Federal (FECA) Procedure Manual, *supra* note 9, Chapter 6.200.6(b)(1) (June 2009).

¹⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.6(b)(3) (June 2009).

¹⁷ *Supra* note 13.

of the established limit. Appellant also cites the case of *Groseclose v. Bowen*,¹⁸ which involved Social Security benefits and an “equity and good conscience” clause. This case involved a claimant who was not aware that one of his minor children was receiving Social Security benefits in error and the Court of Appeals found recoupment of the overpayment would be against equity and good conscience. The case cited did not involve FECA and the present case is factually distinguishable.¹⁹ There is no evidence that the denial of waiver was based on an overly narrow definition of “against equity and good conscience.” Based on the well-established standards for waiver of an overpayment, the Board finds OWCP properly denied waiver in this case.

CONCLUSION

The Board finds OWCP properly denied waiver of the \$15,372.70 overpayment in this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 14, 2010 is affirmed.

Issued: August 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees’ Compensation Appeals Board

Alec J. Koromilas, Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

¹⁸ 809 F2d 502 (8th Cir. 1987).

¹⁹ The Board notes that findings of administrative agencies with respect to entitlement to benefits under a specific statutory authority have no bearing on compensation entitlement under FECA. See *Daniel Deparini*, 44 ECAB 657 (1993); *Burney L. Kent*, 6 ECAB 378 (1953).