

entitled after returning to work between April 25 and May 7, 2011; and (2) whether it properly denied waiver of the overpayment.

FACTUAL HISTORY

On January 26, 2009 appellant, then a 51-year-old national technology specialist, sustained an injury to his abdomen, neck and back while unpacking a document reader. OWCP accepted his claim for abdominal wall hernia and temporary aggravation of cervical and lumbar degenerative disc disease. Appellant was placed on the periodic rolls and received wage-loss compensation benefits. He returned to full-time employment on April 25, 2011. Appellant continued, however, to receive compensation benefits by way of direct deposit through June 4, 2011.

In a June 8, 2011 letter, appellant informed OWCP that he was submitting a check in the amount of \$5,969.60, which represented an overpayment of compensation for the period May 8 to June 4, 2011.

On June 27, 2011 OWCP notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$2,827.92 as he had been paid wage-loss compensation for 13 days, April 25 to May 7, 2011, to which he was not entitled. Its calculations and worksheets reflect that he had received the gross amount of \$6,690.00 for the period April 10 to May 7, 2011. After the deductions for appellant's insurance premiums (health, life, dental and vision), the net compensation was \$5,969.60, based on a pay rate of \$2,192.62 a week and the augmented compensation rate of three-fourths. Appellant was, however, only entitled to compensation from April 10 to 24, 2011. OWCP calculated the correct gross entitlement to be \$3,583.93 and the correct net entitlement, after the deductions for his insurance premiums, to be \$3,141.68. Subtracting the correct net entitlement (\$3,141.68) from the previously-paid net amount (\$5,969.60) yielded \$2,827.92, which it determined to be the amount of the overpayment.

OWCP advised appellant of his right to request a telephone conference, a final decision based on the written evidence or a prerecoument hearing, if he objected to the decision or requested waiver of the overpayment. Appellant was advised to complete an overpayment recovery questionnaire and to submit supporting financial documents.

On July 18, 2011 appellant requested a decision on the written record and waiver of the overpayment on the grounds that repayment would create hardship. He submitted an overpayment recovery questionnaire and supporting documentation dated July 18, 2011. Appellant stated that his monthly income was \$5,960.00 a month and his monthly expenses were \$6,135.00 a month. He had two dependants, a wife and a 20-year-old son. Appellant listed his monthly expenses as follows: clothing -- \$200.00; utilities -- \$700.00; food -- \$450.00; rent/mortgage -- \$1,458.00; LA Federal Credit Union -- \$450.00; Chase -- \$147.00; 1st Tennessee Bank -- \$311.00; Discover -- \$200.00; Sears -- \$250.00; Volkswagen -- \$369.00; and other expenses -- \$1,000.00. Assets included: stocks totaling \$2,100.00; real estate valued at \$3,600.00; a savings account in the amount of \$5,200.00; a checking account in the amount of \$500.00; and personal property and other funds -- \$5,000.00, for a total of \$12,800.00.

By decision dated August 23, 2011, OWCP's hearing representative finalized the determination that appellant received an overpayment of compensation in the amount of \$2,827.92 as he received compensation to which he was not entitled after his return to work. Although appellant was found not to be at fault in creating the overpayment, he was not entitled to a waiver of recovery of the overpayment. Referencing financial information reflecting that his monthly income exceeded his expenses by more than \$50.00, the hearing representative found that appellant had not provided information to support that recovery would defeat the purpose of FECA or be against equity and good conscience.

OWCP's hearing representative noted that a claimant with two dependants would be precluded from receiving a waiver if he had assets in excess of \$8,960.00. Appellant had listed assets of \$12,800.00, which exceeded the asset limit. The hearing representative determined that appellant's actual monthly income, as reflected on his earnings and leave statement was \$6,454.57, as opposed to the \$5,960.00 amount appellant provided on his overpayment recovery questionnaire.³ He also found that the appellant's monthly expenses, as listed, totaled \$5,535.00, rather than \$6,135.00. The revised figures resulted in monthly income which exceeded monthly expenses by \$919.57. The hearing representative also noted that appellant provided no explanation or documentation for the "other expenses," which he listed at \$1,000.00.

LEGAL PRECEDENT -- ISSUE 1

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 duty.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

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,827.92. Therefore, the August 23, 2011 decision shall be affirmed as to fact and amount of overpayment.

Appellant does not contest the fact or amount of the overpayment. The evidence reflects that he returned to work on April 24, 2011 but continued to receive wage-loss compensation through May 7, 2011. OWCP's calculations and worksheets reflect that he received the gross amount of \$6,690.00 for the period April 10 to May 7, 2011. After the deductions for appellant's insurance premiums (health, life, dental and vision), the net compensation for that date range was \$5,969.60, based on a pay rate of \$2,192.62 a week at the augmented compensation rate of three-fourths. He was only entitled to compensation for 15 of those days April 10 to 24, 2011. OWCP correctly calculated the gross entitlement for that date to be \$3,583.93 and the correct net

³ Appellant's pay stub for the period June 19 to July 2 reflected biweekly income of \$2,979.03 or a monthly income of \$6,454.57 (26 x \$2,979.03 = \$77,454.78 annually or \$6,454.57 monthly).

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

entitlement, after the deductions for his insurance premiums, to be \$3,141.68. Subtracting the correct net entitlement (\$3,141.68) from the previously-paid net amount (\$5,969.60) totaled \$2,827.92, which represented the amount of the overpayment. The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$2,827.92.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁶ 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 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.⁷

Section 10.436 of the implementing federal regulations⁸ provide that recovery of an overpayment will defeat the purpose of FECA if it would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of FECA.”

Section 10.437 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.⁹ To establish a position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹⁰

ANALYSIS -- ISSUE 2

Although OWCP found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or 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 the overpayment.

⁶ 5 U.S.C. § 8129.

⁷ *Wade Baker*, 54 ECAB 198 (2002).

⁸ 20 C.F.R. § 10.436 (2009).

⁹ *Id.* at § 10.437.

¹⁰ *See Jorge O. Diaz*, 51 ECAB 124 (1999).

The Board finds that OWCP's hearing representative correctly determined appellant's monthly income to be \$6,454.57, based upon his current earnings and leave statement. The hearing representative also properly calculated appellant's expenses, as listed, to be \$5,535.00. Therefore, appellant's monthly income exceeds monthly expenses by \$919.57. In that his monthly income exceeds his expenses by more than \$50.00, appellant is not deemed to need substantially all of his current income to meet current ordinary and necessary living expenses¹¹ and has ample funds available for debt repayment. Additionally, his stated assets of \$12,800.00 far exceed the asset base allowed under OWCP procedures.¹² Therefore, OWCP properly concluded that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience. Therefore, the Board finds that it did not abuse its discretion in denying waiver of recovery.¹³

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$2,872.92 for the period April 25 to May 7, 2011. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹¹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (June 2009). ("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. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00."). See also *James Lloyd Otte*, 48 ECAB 334 (1997).

¹² See *id.* at Chapter 6.200.6(a) (Recovery of an overpayment will defeat the purpose of FECA if both the individual from whom recovery is sought needs substantially all of his income to meet ordinary and necessary living expenses and the individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependant, plus \$960.00 for each additional dependant). The Board notes that OWCP's hearing representative incorrectly found that the resource base in this case was \$8,960.00, based on two dependants. As appellant's son was 20 years old, and there was no evidence he qualified as a student he does not qualify as a dependant. The error is harmless, however, as the resource base is merely reduced by \$960.00 by the reduction of one dependant.

¹³ Regarding repayment of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *Ronald E. Ogden*, 56 ECAB 278 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board