

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

N.B., Appellant)

and)

DEPARTMENT OF THE ARMY, CIVILIAN)
PERSONNEL OPERATIONS CENTER,)
Taegu, Korea, Employer)

**Docket No. 12-539
Issued: May 24, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 7, 2012 appellant filed a timely appeal from a July 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation and denying waiver. 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 overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$38,040.79 because she was paid at an inaccurate rate; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly required repayment of the overpayment in the amount of \$400.00 per month.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 5, 2003 appellant, then a 57-year-old human resources specialist, filed an occupational disease claim alleging that she developed an emotional condition due to factors of her federal employment. She stopped work on June 10, 2003. OWCP accepted appellant's claim for temporary episodic schizophrenic disorder and depression. It paid her compensation for total disability on the periodic rolls beginning February 8, 2004. OWCP determined that appellant's weekly pay rate was \$1,254.50 per week based on a date of injury of February 8, 2004.

On March 23, 2009 OWCP notified appellant of its preliminary determination that she received an overpayment of \$12,626.60 because it paid her compensation from February 8, 2004 to August 2, 2008 using an inaccurate pay rate. In an August 18, 2009 decision, an OWCP hearing representative remanded the case for further development to clarify discrepancies in appellant's pay rate.

On November 4, 2009 OWCP notified appellant of its preliminary determination that she received an overpayment of \$12,626.60 because it paid her compensation from February 8, 2004 to August 2, 2008 using an inaccurate pay rate. In a May 14, 2010 decision, an OWCP hearing representative set aside the preliminary determination of overpayment and remanded the case for further development on the pay rate issue. He determined that appellant's pay rate should have been based upon a June 10, 2003 disability date, the date appellant stopped working due to her accepted condition, rather than the date she went into leave-without-pay status.

A memorandum dated September 8, 2010 from the employing establishment reflects that appellant's annual base pay on June 10, 2003 was \$56,659.00.² For one year prior to June 10, 2003, appellant received additional pay for service overseas as follows: post differential -- \$1,651.70; remote post allowance -- \$1,205.80; and subsistence of quarters allowance -- \$435.20, or average weekly payments of \$31.76, \$23.19 and \$8.37, respectively. In an internal pay rate memorandum dated September 8, 2010, OWCP found that, effective June 10, 2003, her base weekly pay was \$1,089.60 and that she received additional (average) weekly pay of \$63.32, for a total weekly pay rate of \$1,152.92.

The record contains an electronic payment history, with a September 8, 2010 run date, reflecting that appellant received compensation in the net amount of \$320,703.08 for the period February 8, 2004 through August 28, 2010.

On September 10, 2010 OWCP notified appellant of its preliminary determination that she received an overpayment of \$38,040.79 because it paid her compensation from February 8, 2004 to August 28, 2010 using an inaccurate pay rate. It found that it had paid her at the weekly rate of \$1,254.50, rather than the correct weekly rate of \$1,152.92. OWCP calculated the overpayment by subtracting the amount of compensation that appellant should have received using a pay rate date of June 10, 2003, \$282,695.89, from the amount that she actually received,

² A notification of personnel action dated May 18, 2003 reflected that appellant's base pay was \$56,659.00.

\$320,736.68, to find an overpayment of \$38,040.79.³ It advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. It also notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On September 26, 2010 appellant requested a prerecoupment hearing. She challenged the amount of the overpayment, contending that it was based on an incorrect pay rate and requested waiver. Appellant argued that her husband should not be responsible for repaying the debt, as she was not married when the overpayment was created, and that her husband could leave at anytime and refuse to contribute to its repayment. She and her husband supported an adult daughter, who was a full-time student, and a 22-year-old granddaughter. Appellant argued that she would have purchased a less expensive house and car had she known she was being overpaid.

Appellant submitted a completed overpayment recovery questionnaire and supporting documentation reflecting monthly income of \$6,716.72, consisting of: compensation benefits -- \$3,616.58; husband's social security -- \$1,524.00; husband's veterans' administration benefits -- \$123.00 + \$868.14 (\$991.14); and rental income -- \$585.00. Monthly expenses of \$7,989.39 were delineated as follows: household food -- \$655.41; clothing -- \$350.00; utilities -- \$779.68; gas -- \$357.25; mortgage on rental property -- \$676.95; mortgages on primary residence -- \$1,474.00; real estate and property tax -- \$1,437.85; taxes on rental property -- \$66.25; credit union -- \$482.00 + \$474.00 = \$956.00; Belk -- \$10.00; Chase -- \$225.00; funeral home -- \$50.00; tithe to church -- \$360.00; timeshare -- \$155.00. Appellant also stated that she pays \$320.00 per week to the city and county for taxes. She listed checking and savings account balances of \$7,400.00.

At the October 9, 2010 hearing, appellant reiterated her contention that the pay rate used to determine the overpayment was incorrect. She contended that the June 23, 2003 earnings and leave statement submitted reflected a weekly pay rate of \$1,174.00, not \$1,152.00, on the date of injury.⁴ Appellant testified that the mortgage against her second home (a trailer), which was valued at \$71,000.00, was equal to or greater than its current market value and that she and her husband had unsuccessfully attempted to sell the property. She testified that she and her husband had unpaid debt in excess of \$6,000.00 for medical services not covered by insurance. Appellant provided a letter dated May 20, 2011 with attached medical bills from CACI Collection Agency documenting the obligation and stated that a repayment plan had not yet been established. She testified that an SBA disaster loan was recently obtained in the amount \$18,800.00 to repair storm damage to the rental property, but a payment plan was not yet in place. Appellant testified that she paid for car insurance and property tax for her unemployed daughter and granddaughter,

³ OWCP noted that appellant was paid at the 2/3 rate until October 9, 2006 when she married. Thereafter, appellant was paid at the augmented rate (3/4).

⁴ Appellant submitted an earnings and leave statement dated June 26, 2003 reflecting a basic annual pay rate of \$56,569.00. For a two-week period, she received regular pay of \$2,172.00; postdifferential of \$108.80 and postallowance of \$44.94.

as well as \$113.90 for life insurance.⁵ She indicated that her husband was responsible for repayment of student loans incurred for college classes.

In a letter dated April 28, 2011, OWCP requested additional information and supporting documentation, including an updated overpayment recovery questionnaire, in order to clarify appellant's current necessary living expenses. Specifically it requested: mortgage statements for real estate properties; statements from her town and/or state showing any additional tax premiums that she was required to pay real estate, automobiles, or any other applicable property; statements from her insurance company showing any additional monthly or annual insurance premiums that she was required to pay on real estate, automobiles, or for any other reason; receipts for money paid for household food and clothing (including personal necessities or necessary household items) for the past three months; utility statements for the past three months; a list of any additional automobile expenses (with receipts showing payment) incurred the past year; a list of her uncovered medical and dental expenses for the past year, with receipts showing payment; and statements showing minimum payments for any other installment loans and credit cards that she or her husband must repay on a monthly basis.

On May 23, 2011 appellant submitted a revised overpayment recovery questionnaire reflecting monthly income of \$6,757.44 (including compensation benefits of \$3,657.30). She stated that she had savings in the amount of \$20,149.35, of which \$18,870.00 was designated for repayment of a loan for home repairs;⁶ checking account assets of \$1,843.00 and cash in the amount of \$20.00. Appellant submitted numerous documents supporting her monthly expenses in the claimed amount of \$7,268.87,⁷ which she identified as follows: \$1,017.00 primary residence mortgage (includes taxes and insurance); \$516.00 primary residence second mortgage; \$91.00 primary residence SBA loan for roof repair; \$586.69 rental property mortgage; \$66.25 rental property city tax; \$34.75 rental property insurance; \$32.88 time-share maintenance fee; \$12.92 time-share special assessment fee; \$956.00 car loan payments, two vehicles; \$302.83 car insurance; \$18.00 roadside assistance; \$39.74 city and county taxes, two vehicles; \$200.00 miscellaneous repairs; \$206.44 average gasoline for vehicles; \$40.00 credit card payments; \$350.00 food; \$150.00 clothing; \$50.00 per month miscellaneous personal expenses; \$26.00 legal insurance; \$24.50 umbrella insurance policy; \$31.00 security alarm; \$83.00 water; \$281.00 electric; \$180.00 telephone/cable/internet; \$59.00 cell phone; \$92.08 Christian school tuition; \$1,041.11 church charitable contributions (tithe);⁸ taxes on three additional vehicles in the

⁵ The Board notes that appellant did not identify either the owner or the beneficiary of the life insurance policy.

⁶ Appellant submitted bills from contractors for roof repairs totaling approximately \$20,000.00.

⁷ The Board notes that appellant initially listed her total expenses as \$5,340.00. However, documents presented reflected a higher amount. Appellant's overpayment recovery questionnaire did not address the previously identified monthly Chase expense (\$225.00) or the \$50.00 monthly funeral expense.

⁸ The claimant provided statements supporting that she and her husband paid \$15,000.00 in 2009 (\$1,250.00 per month average) and \$13,000.00 in 2010 (\$1,083.33 per month average) for charitable church contributions. Canceled checks support that the claimant paid \$3,160.00 for charitable church contributions for the months February to May 2011. This yields a current monthly average payment of \$790.00 for 2011. The claimant's monthly average payment for church charitable contributions for the prior three years (2009 to 2011) is therefore \$1,041.11.

amounts of \$27.20, \$76.03 and \$80.33 for 2011; payments to contractors for numerous plumbing repairs in 2011 in the total amount of \$1,905.00 (\$162.50/mo.); and \$434.73 for automobile and life insurance for her daughter and granddaughter.

By decision dated July 12, 2011, OWCP's hearing representative finalized the overpayment of \$38,040.79 because appellant received compensation based on an inaccurate pay rate.⁹ He determined that she was without fault and found that her assets were less than the amount specified by the Bureau of Labor Statistics and therefore did not alone disqualify her for a waiver.¹⁰ The hearing representative denied waiver finding that she did not need her current income to meet her necessary living expenses. He found that the overpayment should be recovered by deducting the amount of \$400.00 per month from appellant's continuing compensation payments.

The hearing representative found that appellant's monthly income was \$7,062.22.¹¹ He found that appellant had allowable monthly expenses in the amount of \$6,488.19. Of the expenses identified by appellant, the hearing representative disallowed expenses for appellant's daughter and granddaughter as discretionary, including \$113.90 for life insurance. He considered only expenses related to vehicles driven by appellant and her husband to be necessary. The hearing representative disallowed appellant's obligation to repay an \$18,000.00 SBA disaster loan and medical bills exceeding \$6,000.00, stating that they could not be considered current necessary monthly living expenses because no payment plan was in place. He disallowed the claimed student loans because payment on those loans was apparently deferred.

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.¹² Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at

⁹ The hearing representative found that appellant's weekly rate of pay on the date of disability, June 10, 2003, was \$1,152.92.

¹⁰ The hearing representative found that the \$20,000.00 savings account balance, which resulted from loans obtained to pay for repairs to the roof of her home due to storm damage, should not be considered when determining her liquid assets. He also found that the mortgage against appellant's second home, which is valued at \$71,000.00, was equal to or greater than its current market value and, therefore, its effective value was \$0.00 for purposes of determining assets to qualify for a waiver. The claimant's total amount used to determine eligibility for waiver was \$1,863.00.

¹¹ The record reflects that appellant received compensation benefits every four weeks in the amount of \$3,657.30, for a monthly net benefit of \$3,962.08. Appellant's monthly income, including her husband's social security payment of \$1,524.00, Veterans' Administration benefits of \$991.14, and rental income of \$585.00 totaled \$7,062.22.

¹² *Supra* note 1 at section 8102.

the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.¹³

Section 8114(d)(1) states that average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay-- (A) was fixed, the average annual earnings are the annual rate of pay.”¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of \$38,040.79 for the period February 8, 2004 through August 28, 2010 because OWCP paid wage-loss compensation at an incorrect pay rate.

Pay rate for compensation purposes is either the monthly pay at the time of injury, the time disability began or at the time disability recurs if the recurrence is more than six months after returning to full-time work.¹⁵ In this case, appellant stopped work on June 10, 2003 due to her accepted emotional condition. Therefore, her pay rate should have been based on her monthly pay on that date.¹⁶ Instead, OWCP used February 8, 2004, the date appellant began receiving compensation benefits, rather than her disability date to establish her pay rate for compensation purposes, resulting in an overpayment.

The record establishes that appellant's annual base pay on June 10, 2003 was \$56,659.00. The employing establishment provided documentation that for one year prior to June 10, 2003, she received additional pay for service overseas as follows: post differential -- \$1,651.70; remote post allowance -- \$1,205.80; and subsistence of quarters allowance -- \$435.20, or average weekly payments of \$31.76, \$23.19 and \$8.37, respectively, resulting in a base weekly pay rate of \$1,152.92 (\$1,089.60 base pay + additional (average) weekly pay of \$63.32). The Board finds that appellant's weekly pay rate for compensation purposes on June 10, 2003, the date disability began, was \$1,152.92.¹⁷

¹³ *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

¹⁴ 5 U.S.C. § 8114(d)(1).

¹⁵ *See supra* note 3.

¹⁶ The record reflects that appellant returned to work for a short period after June 10, 2010 and stopped work completely on June 23, 2010. The Board notes that appellant return to work on June 23, 2010 does not constitute a recurrence occurring more than six months after returning to full-time work

¹⁷ Appellant contends that the overpayment was based on an incorrect pay rate. She provided a June 23, 2003 earnings and leave statement reflecting a weekly pay rate of \$1,174.00, not \$1,152.00, on the date of injury. The Board notes, however, that as appellant worked for substantially the whole year immediately preceding the injury in a position for which an annual rate of pay was fixed, her average annual earnings are the annual rate of pay. 5 U.S.C. § 8114(d)(1). Therefore, OWCP correctly determined the rate of pay on the date of disability based on the average earnings for the prior year.

The evidence of record shows that appellant received total compensation in the amount of \$320,703.08 for the period February 8, 2004 through August 28, 2010, based on a weekly pay rate of \$1,254.50. Documentation provided by OWCP establishes that appellant should have received the amount of \$282,695.89 for the applicable period, based upon a weekly pay rate of \$1,152.92, resulting in an overpayment of \$38,040.79. The Board will affirm the July 12, 2011 decision as to the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of FECA and the implementing regulations, 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.¹⁸ Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁹ Section 10.434 provides that, if OWCP finds the recipient of an overpayment was not at fault, repayment will be required unless: (a) Adjustment or recovery of the overpayment would defeat the purpose of FECA; or (b) Adjustment or recovery of the overpayment would be against equity and good conscience.²⁰

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of FECA if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²¹ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.²² An individual's liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.²³ 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 and supplies.²⁴

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the individual, in reliance on such payments or on notice

¹⁸ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.437.

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ *Id.* at § 10.434.

²¹ 20 C.F.R. § 10.436. OWCP procedures provide that 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, *supra* note 6, Chapter 6.200.6(a) (June 2009).

²² *Desiderio Martinez*, 55 ECAB 245 (2004).

²³ *See supra* note 21.

²⁴ *Id.*

that such payments would be made, gives up a valuable right or changes his or her position for the worse.²⁵ 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.²⁶

ANALYSIS -- ISSUE 2

Since appellant was found to be without fault, repayment of the overpayment will be required unless recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²⁷ In order to establish that recovery would defeat the purpose of FECA by causing severe financial hardship, she must establish both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her liquid and nonliquid asset base does not exceed the specified amount set by the Bureau of Labor Statistics, in this case \$8,960.00.²⁸ Both of these conditions must be met for appellant to establish that she would experience severe financial hardship upon repayment of this debt and qualify for a waiver on that basis. The Board finds that this case requires further development as to whether she is entitled to waiver of the overpayment. Therefore, the July 12, 2011 decision will be remanded on this issue.

The evidence of record established that appellant's assets included: cash -- \$20.00; checking account -- \$1,843.00; and savings account -- \$20,149.35. Appellant explained and provided documentation to support that the \$20,000.00 savings account balance resulted from loans obtained to pay for repairs to the roof of her home due to storm damage. She provided bills from contractors for roof repair totaling approximately \$20,000.00. The hearing representative found, and the Board agrees, that this sum will not be considered when determining the claimant's liquid assets. The evidence also shows that the mortgage against appellant's second home, which is valued at \$71,000.00, is equal to or greater than its current market value. Therefore, its effective value is \$0.00 for purposes of determining assets to qualify for a waiver. The claimant's total listed assets that will be used to determine her eligibility for waiver are therefore \$1,863.00. As appellant's assets are less than the amount specified by the Bureau of Labor Statistics, they alone do not disqualify her for a waiver.

In denying waiver of the overpayment, the hearing representative determined that appellant did not require all of her income to meet ordinary and necessary expenses. He found that appellant had allowable monthly expenses of \$6,488.19 and a monthly income of \$7,062.22, consisting of appellant's compensation benefits of \$3,962.08, her husband's social security payment of \$1,524.00, husband's Veterans' Administration benefits of \$991.14, and husband's rental income of \$585.00. As appellant's income exceeded her expenses, the hearing representative found that she was not entitled to waiver.

²⁵ 20 C.F.R. § 10.437.

²⁶ *Id.* at § 10.437(b).

²⁷ *Id.* at § 10.434.

²⁸ *See supra* note 20.

The Board notes that, without the husband's monthly income, appellant's income would not exceed her expenses. OWCP regulations provide that an individual's total income includes any funds which may be reasonably considered available for her use.²⁹ In this case, the hearing representative included the husband's income in determining appellant's ability to repay the overpayment amount. OWCP procedures provide, however, that the spouse's income will not be considered available to the overpaid spouse unless he was living in the household both at the time the overpayment was created, as well when waiver is considered.³⁰ The evidence shows that appellant was not married until October 9, 2006, 32 months after she began receiving compensation payments based on an incorrect pay rate. Therefore, the spouse's income was incorrectly included during this period of time for purposes of determining appellant's ability to repay the overpayment.

The hearing representative found that appellant's monthly payment of \$113.90 for life insurance for her daughter and grandchild was discretionary. Therefore, he did not consider it to be a necessary expense. The hearing representative did not, however, ascertain who owned the life insurance policies and who, therefore, was legally obligated to make the required monthly payments. If the policies belong to appellant, then the monthly payments would be considered an ordinary and necessary monthly expense.

The hearing representative also disallowed appellant's obligation to repay an \$18,000.00 SBA disaster loan and verified medical bills exceeding \$6,000.00, stating that they could not be considered current necessary monthly living expenses because no payment plan was in place. The evidence, however, clearly establishes that appellant was obligated to repay both amounts, which would likely result in large monthly payments, although she had not yet received a payment plan by the date of the hearing representative's decision. OWCP procedures are designed to obtain documentation adequate to determine a claimant's ability to repay an overpayment amount. If the evidence provided is insufficient for a hearing representative to make such a determination, then he should request such documentation at the hearing.³¹ In this case, the hearing representative did not advise appellant that her SBA loan and medical debt would not be considered if she failed to provide a payment plan.

The Board will set aside the July 12, 2011 decision with respect to the issue of waiver of the overpayment. The case is remanded to OWCP for further development of this matter. After such development it deems necessary, OWCP shall issue an appropriate decision regarding appellant's request for waiver of the overpayment.

²⁹ 20 C.F.R. § 10.322(b).

³⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(2) (September 1994).

³¹ *See id.* at Chapter 6.200.6a(4) (October 2004).

CONCLUSION

The Board finds that appellant received an overpayment of \$38,040.79 because she was paid at an inaccurate rate. The Board further finds that OWCP improperly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment. The decision is set aside and remanded for further development on the issue of waiver.³²

Issued: May 24, 2012
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

³² In view of the Board's holding on the waiver issue, it will not address the rate of repayment issue.