



## **FACTUAL HISTORY**

OWCP accepted that on June 9, 2011 appellant, then a 40-year-old transportation security officer, sustained a thoracic or lumbosacral neuritis or radiculitis in the performance of duty. Appellant received wage-loss compensation for total disability effective July 24, 2011 for which she was placed on periodic rolls.

In a decision dated October 28, 2011, OWCP issued a preliminary finding that an overpayment of \$1,924.56 arose from July 24 to September 24, 2011 because appellant was paid at an incorrect pay rate. It found appellant without fault and explained that she should have received compensation based on a weekly pay rate of \$688.66 instead of \$973.78. OWCP explained that the initial weekly pay rate had included incorrect amounts for Sunday premium and night differential, which were corrected effective September 25, 2011. The documents indicated that appellant was being overpaid night differential in the amount of \$259.20 a week whereas she should have received \$6.48 a week. It also indicated that her Sunday premium was overpaid in the amount of \$64.80 a week whereas the correct amount was \$32.40 a week. These amounts were overpaid for the period July 24 to September 24, 2011 and OWCP provided a memorandum containing calculation of this overpayment totaling \$1,924.56. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment, she was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On November 16, 2011 appellant requested a preresoupment hearing and submitted a completed overpayment recovery questionnaire. She indicated that the overpayment occurred through no fault of her own and requested a waiver. Appellant reported approximately \$7,555.00 as income. Her expenses were reported as \$2,231.98 a month, including \$335.98 for rent, \$400.00 for food, \$200.00 for clothing, \$800.00 for utilities and \$496.00 for miscellaneous household expenses. Appellant also included various debts being paid totaling \$2,637.56 a monthly installment. She reported four children as dependents and a total of \$1,170.00 in her checking account.

At the March 8, 2012 preresoupment hearing, appellant testified that she only earned a monthly income of \$1,600.00 from her employment at the Transportation Security Administration. She stated that she listed the total monthly income as \$7,555.00 because she included the monthly income from her father's children who lived with her at the time of her overpayment. Appellant stated that she provided no support for her 22-year-old son but provided support for her 20-year-old daughter who was in college. OWCP requested pay stubs verifying her current monthly take home pay from her employing establishment, as well as pay stubs of her children's father's earnings. OWCP's hearing representative requested additional financial information clarifying the household income and members of the household, documentation in support of household expenses claimed, copies of the last monthly statement for each current debt, copies of federal income tax returns and more recent statements regarding all bank accounts and funds. Appellant testified that she did not know how much her compensation payments would be or should have been. The hearing representative allowed 30 days for a response and an opportunity to submit documentation of financial information. No response or supporting financial documentation was received.

By decision dated May 18, 2012, the Branch of Hearings and Review found that there was an overpayment in the amount of \$1,924.56 for the period July 24 to September 24, 2011. It further found that appellant was not at fault in the creation of the overpayment because she was not and could not have been aware that she was not entitled to the payment received. OWCP's hearing representative determined that the overpayment was not subject to waiver because appellant did not submit the requested financial information to determine her income, expenses, liabilities or funds. Thus, there was no evidence in the record that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

### **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 his duty.<sup>2</sup> Section 8129(a) of FECA provides, in pertinent part:

When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.<sup>3</sup>

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,924.56. The record reflects that she received an overpayment of compensation for the period July 24 to September 24, 2011 due to incorrect amounts for Sunday premiums and an improper rate of night differential, which were corrected effective September 25, 2011. As to the amount, OWCP provided an explanation for its calculations. The documents indicated that appellant was being overpaid night differential in the amount of \$259.20 a week whereas she should have received \$6.48 a week. Appellant's Sunday premium was overpaid in the amount of \$64.80 a week whereas the correct amount was \$32.40 a week. This resulted in an overpayment for the period July 24 to September 24, 2011 in the amount of \$1,924.56. Appellant has not submitted any evidence disputing the fact and amount of the overpayment and the Board finds that she received a \$1,924.56 overpayment.

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

<sup>4</sup> *Id.* at § 8116(a).

## LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>5</sup> These statutory guidelines are found in section 8129(b) of FECA which states: Adjustment or recovery (of an overpayment) 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 this subchapter or would be against equity and good conscience.<sup>6</sup> If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

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 her 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.<sup>7</sup> According to 20 C.F.R. § 10.437, 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 position for the worse.<sup>8</sup> 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.<sup>9</sup>

## ANALYSIS -- ISSUE 2

Appellant submitted a completed overpayment recovery questionnaire with financial information outlining her income, expenses and assets. However, at the March 8, 2012 hearing, OWCP's hearing representative requested additional information and documentation related to her monthly income and expenses. Appellant did not submit the requested information. Further, she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation prior to the issuance of OWCP's May 18, 2012 decision.

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<sup>5</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). 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, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

<sup>8</sup> *Id.* at § 10.437(a)(b).

<sup>9</sup> *Id.* at § 10.437(b)(1).

As appellant did not submit complete financial information, there was insufficient evidence before OWCP establishing that recovery of the overpayment would defeat the purpose of FECA or would be against equity or good conscience.<sup>10</sup> As she failed to submit the requested information, as required by section 10.438 of its regulations, she was not entitled to a waiver.<sup>11</sup> The Board finds that OWCP properly denied waiver of recovery of the \$1,924.56 overpayment of compensation.<sup>12</sup>

On appeal, appellant argues that she did not submit the required financial documentation because she was diagnosed with cancer on March 17, 2012 and that her medical conditions were causing her severe financial hardship. She further alleged that her financial circumstances had changed for the worse, but OWCP's overpayment determination with respect to waiver was based on information and documentation it received regarding appellant's financial circumstances at the time of its May 18, 2012 decision. The Board's consideration of this matter is limited to the sufficiency of OWCP's actions at the time it issued its May 18, 2012 decision. The waiver issue is determined in accord with FECA, Board precedent and regulatory authority and the Board finds the evidence submitted prior to OWCP's decision supported the denial of waiver.<sup>13</sup>

### CONCLUSION

The Board finds that appellant received a \$1,924.56 overpayment of compensation for the period July 24 to September 24, 2011. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

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<sup>10</sup> *Id.* at 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>11</sup> *Id.*

<sup>12</sup> *M.S.*, Docket No. 11-96 (issued August 17, 2011).

<sup>13</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2013  
Washington, DC

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

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

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