



## **FACTUAL HISTORY**

The case was before the Board on a prior appeal. OWCP accepted that appellant had sustained bilateral knee strain, lumbar and cervical strains, and bilateral elbow contusions in the performance of duty on February 28, 2003. Appellant stopped working on the date of injury and began receiving wage-loss compensation as of April 22, 2003. As the Board noted, OWCP used a pay rate for compensation purposes of \$915.56 per week, based on an annual pay rate of \$42,808.00 plus night differential and Sunday premium pay.

On March 21, 2006 appellant's compensation was terminated by decision of that same date for refusal of suitable work. Following development of the evidence, on September 22, 2010 OWCP accepted major depression and pain disorder as employment related. On June 24, 2011 it retroactively paid compensation for wage loss commencing March 21, 2006. The weekly rate of pay for compensation purposes was \$882.51. The employing establishment indicated that appellant's date-of-injury pay rate was \$42,588.00 annually, with an additional night differential of \$2,181.43, and \$1,151.24 in Sunday premium pay.

On September 26, 2011 OWCP issued a preliminary determination that an overpayment of \$5,246.27 occurred from April 22, 2003 to March 20, 2006 due to an incorrect rate of pay. It also found appellant was not at fault in creating the overpayment. On October 12, 2011 appellant requested a telephone conference with the district office on the issue of waiver. She also submitted an OWCP-20 overpayment recovery questionnaire. OWCP finalized its overpayment determination by decision dated January 9, 2012.

The Board issued an order remanding the case on December 12, 2012,<sup>2</sup> finding that the January 9, 2012 decision was premature, as appellant had requested a telephone conference and submitted evidence. OWCP had failed to acknowledge the telephone conference request or properly consider the evidence. The case was remanded for a telephone conference and proper consideration of the evidence on waiver.

By letter dated July 29, 2013, OWCP requested that appellant complete a new OWCP-20 form and submit supporting financial documents regarding monthly income, expenses, and assets. It indicated that a telephone conference would be held with respect to the preliminary finding of an overpayment.

On August 12, 2013 appellant submitted an appeal request form requesting a prerecoupment hearing with the Branch of Hearings and Review. She submitted an OWCP-20 form dated August 12, 2013 reporting \$2,925.06 in household monthly income and \$5,598.00 in monthly expenses. As to assets, appellant reported \$20.00 in cash, \$50.00 in a checking account and \$2,500.00 in other personal property. She submitted additional financial evidence on August 27, 2013. The evidence included insurance company statements addressed to appellant's spouse with respect to automobile insurance covering four vehicles: a 2000 Ford Expedition, 2003 Jeep Wrangler, 2004 Volkswagen Jetta, and 2006 Chevrolet Corvette.

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<sup>2</sup> Docket No. 12-1275 (issued December 12, 2012).

A telephone conference was held with an OWCP claims examiner on April 23, 2014. The memorandum of the conference (Form CA-110) noted that appellant's spouse had social security disability benefits of \$1,050.00 per month. The claims examiner also noted appellant had insurance on four vehicles, but expenses would include only ordinary and necessary living expenses.

By decision dated May 1, 2014, OWCP determined that appellant was not entitled to a hearing with the Branch of Hearings and Review at this time. It indicated that the Board had remanded the case for action by the district office.

By decision dated May 16, 2014, OWCP found an overpayment of \$5,246.27 had been created. It denied waiver of the overpayment. OWCP found that appellant's assets exceeded the maximum \$8,000.00, stating "[t]he equity or full value of any of the 2 vehicles listed or the lowest insurance premiums amounts (\$370.10 and \$381.20) would both bring the claimants total asset base above \$8,000.00." No additional specific findings as to the value of the vehicles were provided. OWCP found recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.

### **LEGAL PRECEDENT -- ISSUE 1**

Under 5 U.S.C. § 8101(2), "'monthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."

Section 8114(d) of FECA provides:

"Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of his 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; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week."

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

The record establishes that for the period April 22, 2003 to March 20, 2006 appellant had received compensation based on a pay rate of \$915.56 per week. A September 23, 2003 pay rate

calculation, for the date of injury and date disability began, found that appellant had a base annual salary of \$42,808.00, or \$823.23 per week. OWCP added \$51.41 per week in night differential pay, and \$40.92 per week in Sunday premium pay.

The employing establishment had indicated on the claim form that appellant's base salary on the date of injury was \$42,558.00. In a May 10, 2006 CA-7 form, the employing establishment reported that the base salary on the date of injury was \$42,558.00, and appellant had earned \$2,181.43 in night differential pay and \$1,151.24 in Sunday premium pay in the year prior to the date of injury. No contrary evidence was presented. OWCP properly found that based on the probative evidence of record that appellant's rate of pay was \$882.51 per week.

As appellant was paid compensation based on a weekly pay rate for compensation purposes of \$915.56 instead of \$882.51, an overpayment of compensation occurred. To calculate the amount of the overpayment, OWCP compared the amount appellant had actually received in wage-loss compensation for the period April 22, 2003 to March 20, 2006 to the amount she should have received with a correct pay rate of \$882.51. It found an overpayment of \$5,246.27 had occurred. No contrary evidence was presented. Appellant did not provide any specific argument as to fact or amount of the overpayment. The Board therefore finds that the evidence of record establishes an overpayment of \$5,246.27 was created during the period April 22, 2003 to March 20, 2006.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA<sup>3</sup> 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."<sup>4</sup> 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 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 section 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.<sup>5</sup> For waiver under the "defeat the purpose" of FECA standard, appellant must show that he needs substantially all

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Id.* at § 8129(b).

<sup>5</sup> 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) (June 2009).

of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.<sup>6</sup>

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; (b) the 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.

With respect to the consideration of appellant's assets and the applicable resource base amount, OWCP procedures state: "Non-Liquid Assets may 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, vehicle(s) (*i.e.*, any vehicles above the two allowed per immediate family), jewelry, and artwork."<sup>7</sup>

### ANALYSIS -- ISSUE 2

In the present case, OWCP made a determination that recovery of the overpayment would not defeat the purpose of FECA. This determination was not based on excess income over expenses, but on a finding that appellant's assets exceeded the resource base of \$8,000.00 for an individual with a spouse. OWCP may, as noted above, include as assets the "fair market value of an owner's equity" in property that includes automobiles over the two allowed per immediate family. In this case, it found that appellant had four automobiles, based on the insurance premium statements in the record. OWCP determined that the value of any two of the vehicles, including the vehicles with the lowest insurance premiums, would exceed the resource base of \$8,000.00.

While OWCP may include the value of vehicles over the two allotted per family, in this case it did not support its findings with any evidence. It did not raise the issue with appellant to properly determine the "owner's equity" in the vehicles. As to the fair market value, OWCP did not provide any specific documentation or evidence. It did not request evidence from appellant as to the fair market value of any vehicle owned, or refer to any source or authority as to a fair market value for a specific vehicle. OWCP cannot simply make its own estimate as to the value of an asset, but must properly document its findings with relevant evidence.<sup>8</sup>

The Board accordingly finds that OWCP did not properly deny waiver of the overpayment in this case. OWCP did not properly make findings as to the fair market value of an owner's equity in the automobiles. The case will be remanded to OWCP for proper findings as to waiver of the overpayment.

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<sup>6</sup> See *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(4) (June 2009).

<sup>8</sup> See *Janis S. Wilson*, Docket No. 04-760 (issued October 11, 2005) (hearing representative estimated the value of a boat on his own without providing additional documentation or evidence as to the fair market value).

### **LEGAL PRECEDENT -- ISSUE 3**

A claimant may request a prerecoupment hearing within 30 days of the written notice of a preliminary notice of an overpayment.<sup>9</sup> The failure to request a hearing within the 30-day time period constitutes a waiver of the right.<sup>10</sup>

### **ANALYSIS -- ISSUE 3**

In the present case, appellant had requested a telephone conference with OWCP within 30 days of the September 26, 2011 preliminary overpayment determination. As the Board noted in the prior appeal, she was entitled to a telephone conference. Following remand to OWCP, a telephone conference was held on April 23, 2014.

With respect to a request for a prerecoupment hearing before a representative of the Branch of Hearings and Review, appellant did not submit her hearing request until August 12, 2013. This was not timely filed within 30 days of the preliminary overpayment notice dated September 26, 2011. As noted above, failure to timely submit the request results in a waiver of the right. The Board finds that OWCP properly found in its May 1, 2014 decision that appellant was not entitled to a prerecoupment hearing with the Branch of Hearings and Review.

### **CONCLUSION**

The Board finds that OWCP properly found that an overpayment of compensation of \$5,246.27 was created from April 22, 2003 to March 20, 2006, due to an incorrect pay rate. The Board further finds that OWCP did not make proper findings as to waiver of the overpayment. With respect a prerecoupment hearing before the Branch of Hearings and Review, OWCP properly denied the request.

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<sup>9</sup> 20 C.F.R. § 432.

<sup>10</sup> *Id.* See also *R.C.*, Docket No. 14-1383 (issued December 5, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 16, 2014 is affirmed with respect to fact and amount of overpayment, but set aside and remanded as to waiver. The May 1, 2014 decision is affirmed.

Issued: April 22, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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