

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

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**R.S., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Fort Worth, TX, Employer**

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**Docket No. 11-1280  
Issued: December 22, 2011**

*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 May 2, 2011 appellant filed a timely appeal from an April 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly found that an overpayment in compensation in the amount of \$3,130.45 was created for the period February 15 to March 12, 2011 as he returned to work on February 14, 2011; and (2) whether OWCP properly denied waiver of the recovery of the overpayment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On February 24, 2010 appellant, then a 36-year-old correctional officer, injured his left knee and left wrist while restraining an inmate. OWCP accepted the claim for left ganglion, left wrist sprain and left knee derangement of the medial meniscus. It paid wage-loss benefits and authorized a July 14, 2010 left knee arthroscopy with complete debridement and partial medial, complete lateral meniscectomy with complete synovectomy and an October 28, 2010 excision of the left dorsal ganglion. Appellant stopped work on March 17, 2010 and returned to work for brief intermittent periods. OWCP placed him on its periodic rolls, where he received compensation every 28 days through direct deposit.

In its April 12, 2010 acceptance letter, OWCP informed appellant that if he received a compensation check which included payment for a period in which he worked, he was to immediately return it in order to prevent an overpayment.

Appellant returned to full-time work on February 14, 2011. OWCP electronically paid him \$3,130.45 for the period February 15 to March 12, 2011.

On March 15, 2011 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,130.45 for the period February 15 to March 12, 2011 because he received compensation for total disability after he returned to full-time work on February 14, 2011. It further informed him of its preliminary determination that he was not at fault for accepting the direct deposit of \$3,246.39 as he did not have the requisite knowledge that such payment was incorrect at the time of deposit. OWCP calculated that it paid appellant compensation in the amount of \$3,246.39 every 28 days or \$115.94 a day and that he was entitled to compensation for one day. Thus, it calculated that appellant was overpaid \$115.94 x 27 days or \$3,130.45. OWCP requested that appellant submit the enclosed overpayment recovery questionnaire and supporting financial information within 30 days. It noted that waiver would be denied if he failed to furnish the information requested on the enclosed overpayment recovery questionnaire or any other information needed to address a request for waiver within the 30 days. No response was received from appellant within the allotted 30 days.

By decision dated April 18, 2011, OWCP finalized its finding that appellant received \$3,130.45 in an overpayment of compensation for the period February 15 to March 12, 2011 based on his receipt of compensation for disability after his return to full-time work on February 14, 2011. While appellant was not at fault in the creation of the overpayment, it found he was not entitled to waiver of the overpayment because he failed to supply the requested financial information necessary to make such a determination. Appellant was directed to repay the overpayment in full.

### **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, that 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> OWCP's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives compensation for total disability while working.<sup>4</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$3,130.45. The record supports that he continued to receive compensation from the date that he returned to work on February 14 through March 12, 2011. When an employee returns to work and ceases to have any loss of wages, he or she is no longer entitled to compensation for wage loss.<sup>5</sup> The record reflects that appellant received an automatic 28-day compensation payment for the period February 14 through March 12, 2011 in the amount of \$3,246.39, but was only entitled to compensation for one day in the amount \$115.94. The difference between the compensation paid of \$3,246.39 and the compensation due of \$115.94 is \$3,130.45. As appellant was not entitled to compensation after his return to work on February 14, 2011, OWCP properly found an overpayment of compensation occurred in the amount of \$3,130.45.

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

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within its discretion pursuant to statutory guidelines.<sup>6</sup> The 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 an 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>7</sup>

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

<sup>5</sup> See *Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>6</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>7</sup> See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulations<sup>8</sup> provide that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.<sup>9</sup> An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>10</sup>

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 in 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.<sup>11</sup>

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found appellant to be without fault and eligible for consideration of waiver with regards to its finding that he received an overpayment in the amount of \$3,130.45. The applicable regulations provide that the individual who receives an overpayment is responsible for providing financial information. Failure to submit the requested financial information within 30 days of the request shall result in the denial of the waiver.<sup>13</sup> Appellant did not provide any financial information to show that recovery of the overpayment would defeat the purpose of

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<sup>8</sup> 20 C.F.R. § 10.436.

<sup>9</sup> An individual's asset must exceed a resource based of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1)(b) (December 23, 2004).

<sup>10</sup> See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>11</sup> 20 C.F.R. § 10.437.

<sup>12</sup> *Id.* at § 10.438.

<sup>13</sup> See *Clinton E. Clinton, Jr.*, 49 ECAB 476 (1998). See also *Robert Ringo*, 53 ECAB 258 (2001).

FECA.<sup>14</sup> As he failed to submit the requested financial evidence, OWCP, pursuant to its regulations, properly denied waiver of recovery of the overpayment amount of \$3,130.45.<sup>15</sup>

On appeal, appellant contends that he was not afforded due process or notice prior to OWCP's April 18, 2011 decision. The Board notes that OWCP provided appellant with a preliminary notice of the overpayment and advised him of his opportunity to submit evidence if he disagreed with the fact or amount of overpayment. Further, appellant was provided with an overpayment action request and overpayment questionnaire, to which he did not respond, prior to the issuance of OWCP's April 18, 2011 final decision. While appellant offered some arguments on appeal with regard to waiver, the Board is precluded from considering those arguments for the first time on appeal.<sup>16</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,130.45 for the period February 15 to March 12, 2011. The Board further finds that OWCP properly denied waiver of such overpayment as appellant failed to submit the necessary financial information to establish that he was entitled to wavier of the overpayment.

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<sup>14</sup> Appellant likewise has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse due to the payment of the erroneous amount of compensation.

<sup>15</sup> As OWCP is not seeking recovery from continuing compensation, the Board does not have jurisdiction to review the manner of recovery of the overpayment. *See Miguel A. Muniz*, 54 ECAB 217 (2002).

<sup>16</sup> The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2011  
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