

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

C.W., Appellant	)	
	)	
and	)	<b>Docket No. 11-1338</b>
	)	<b>Issued: December 19, 2011</b>
	)	
U.S. POSTAL SERVICE, POST OFFICE,	)	
North Little Rock, AR, Employer	)	
	)	

*Appearances:*  
C.B. Weiser, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 11, 2011 appellant, through his attorney, filed a timely appeal from a November 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he received an overpayment of compensation and denying waiver. 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 overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$24,017.94 because he was paid at an inaccurate rate; and (2) whether OWCP properly denied waiver of the overpayment.

**FACTUAL HISTORY**

On July 3, 2007 appellant, then a 48-year-old maintenance manager, filed an occupational disease claim alleging that he sustained major depression, generalized anxiety and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

panic attacks due to factors of his federal employment. He stopped work on April 12, 2007. OWCP accepted the claim for an episode of recurrent major depression, dysthmic disorder and phobic disorders. It approved leave buyback from April 13, 2007 to January 25, 2008 and paid appellant compensation for total disability on the periodic rolls beginning February 16, 2008. OWCP determined that his weekly pay rate was \$1,723.98 per week based on a date of injury of May 15, 2000.

By decision dated November 10, 2009, OWCP terminated appellant's compensation benefits effective November 22, 2009 as the weight of the evidence from his attending physician established that he could return to his regular work duties.<sup>2</sup>

In an internal memorandum dated March 26, 2010, OWCP noted that it correctly calculated appellant's pay rate as \$1,723.98 but found that the date of injury of May 15, 2000 was used rather than April 12, 2007, the date that he was last exposed to the factors to which he attributed his condition. As it used an incorrect date of injury, it had included consumer price index (CPI) adjustments in his pay rate beginning May 15, 2000. In a worksheet dated April 2, 2010, OWCP determined that it had paid appellant \$135,871.70 using a pay rate date of May 15, 2000. It calculated that it should have paid him \$111,853.76 using a pay rate date when disability began of April 13, 2007, which resulted in an overpayment of \$24,017.94.

On April 9, 2010 OWCP notified appellant of its preliminary determination that he received an overpayment of \$24,017.94 because it paid him compensation from February 16, 2008 to November 15, 2009 using an inaccurate pay rate. It found that it had used an incorrect date to determine his pay rate and thus had applied inaccurate cost-of-living increases. OWCP calculated the overpayment by subtracting the amount of compensation that appellant should have received using a pay rate date of April 13, 2007, \$111,853.76, from the amount that he actually received using incorrect CPI adjustments, \$135,871.70, to find an overpayment of \$24,017.94. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On May 7, 2010 appellant requested a prerecoupment hearing.<sup>3</sup> He challenged the amount of the overpayment and requested waiver. Appellant submitted a completed overpayment recovery questionnaire providing his income and expenses and information regarding his assets, including a statement documenting over \$100,000.00 in his Thrift Savings Plan (TSP) account. In an accompanying letter, he related, "When I was off work April 12, 2007 through November 15, 2010, my doctor advised me to get out of the house and do activities I enjoyed. This was to get my mind off my job and help with my anxiety/reoccurring depression." Appellant took 30 trips to visit acreage that he owned in the mountains and that he also took several family vacations. He estimated that he spend about \$14,865.00 on the trips. Appellant asserted, "I was unaware that I was over compensated and suffered a financial loss on these trips.

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<sup>2</sup> Appellant returned to work on November 16, 2009.

<sup>3</sup> In an April 30, 2010 report of telephone call, OWCP indicated that it had provided appellant with a worksheet showing his correct compensation and the CPI adjustments. It noted that he "understands all the figures now...."

I would not have taken them had I known I was getting money that was not due to me.” He requested a credit on the overpayment of \$14,865.00.

At the telephone hearing, held on August 10, 2010, appellant described his living expenses. He further related that he took vacations when he was off work on the advice of his physician. Appellant related that he would have taken less expensive vacations if he had known that he was receiving incorrect compensation. He asked for waiver of the amount that he spent on the vacations.

By decision dated November 16, 2010, the hearing representative finalized the finding that appellant received an overpayment of \$24,017.94 because he received compensation based on an inaccurate pay rate date. She determined that he was without fault but denied waiver after finding that he did not need his current income to meet his living expenses and as his assets exceeded the resource base. The hearing representative further found that appellant did not relinquish a valuable right or change position for the worse. She found that he should repay the overpayment in full.

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

Section 8102 of FECA<sup>4</sup> 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.<sup>5</sup> Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at 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.<sup>6</sup> Section 8146(a) of FECA provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a cost-of-living increase shall be increased by the percentage of the increase.<sup>7</sup>

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

The Board finds that appellant received an overpayment of \$24,017.94 for the period February 16, 2008 to November 15, 2009 because OWCP paid him compensation that included inaccurate cost-of-living increases. 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.<sup>8</sup> Appellant stopped work on April 12, 2007. OWCP, however, mistakenly entered the effective pay rate date as May 15, 2000 instead of April 12, 2007, the date disability began and the date that he was last exposed to the conditions that caused his injury. It thus incorrectly adjusted his compensation to include cost-of-living increases beginning May 15, 2000. The Board has held that a claimant is entitled to a cost-of-living increase only where entitlement to compensation occurs more than one year

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Id.* at § 8102.

<sup>6</sup> *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

<sup>7</sup> *Id.* at § 8146(a); *see also* *Franklin L. Armfield*, 29 ECAB 500 (1978).

<sup>8</sup> *See supra* note 6.

prior to the effective date of the increase.<sup>9</sup> OWCP subtracted the amount of compensation it should have paid appellant using the correct pay rate date of April 13, 2007, \$111,853.76, from the amount that he actually received using incorrect cost-of-living adjustments, \$135,871.70, to find an overpayment of \$24,017.94. As appellant was only entitled to cost-of-living increases that, became effective after April 13, 2007, he received an overpayment of \$24,017.94.

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

Section 8129 of FECA<sup>10</sup> 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.” (Emphasis added.) 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.

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 his 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>11</sup> An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.<sup>12</sup> 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.<sup>13</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 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>14</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>15</sup>

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<sup>9</sup> See *Franklin L. Armfield*, *supra* note 7.

<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> 20 C.F.R. § 10.436. Office 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>12</sup> *Id.*

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

<sup>14</sup> 20 C.F.R. § 10.436.

<sup>15</sup> *Id.* at § 10.437(b)(1).

## ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or be against equity and good conscience. In order to defeat the purpose of FECA it must be established that a claimant needs substantially all current income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit (currently \$8,000.00 for a claimant with a spouse and \$960.00 for each additional dependent). If nonexempt assets exceed the established limit, then recovery of the overpayment would not defeat the purpose of FECA.

Appellant provided evidence accompanying his overpayment recovery questionnaire indicating that he had over \$ 100,000 in his TSP account. The Board has held that a claimant's contributions to the TSP and earnings from those contributions are considered assets which OWCP may consider in determining waiver.<sup>16</sup> Appellant has nonexempt assets that exceed the established limit. Therefore, recovery of the overpayment would not defeat the purpose of FECA.<sup>17</sup>

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. The availability of assets indicates that appellant would not experience financial hardship attempting to repay the debt. The factors considered regarding financial hardship are substantially the same as those for defeat the purpose of FECA and, as noted above, appellant has sufficient available assets.<sup>18</sup> Moreover, appellant has not presented evidence that he gave up a valuable right or changed his position for the worse in reliance on the overpayment. He argued that he relied to his detriment on the overpayment by spending part of the money he received on trips to visit acreage that he owned and for family vacations. Appellant related that his physician told him to do things that he enjoyed to help his recovery. He did not submit evidence, however, substantiating that he relinquished a valuable right that he was unable to get back or that his action in taking vacations was based chiefly or solely on reliance on his compensation payments.<sup>19</sup> The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse.

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<sup>16</sup> *Eloise K. Hahn*, Docket No. 01-1199 (issued June 25, 2002); *see also P.C.*, Docket No. 10-01386 (issued April 26, 2011).

<sup>17</sup> As appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test, *i.e.*, whether he needs substantially all his income to meet current ordinary and necessary expenses.

<sup>18</sup> *See Jan K. Fitzgerald*, 51 ECAB 659 (2000); Federal (FECA) Procedure Manual, Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(1) (June 2009).

<sup>19</sup> *See Wayne G. Rogers*, 54 ECAB 482 (2003).

As the evidence fails to support that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion by denying waiver of recovery.<sup>20</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of \$24,017.94 because he was paid at an inaccurate rate and that OWCP properly denied waiver of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2011  
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

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<sup>20</sup> As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).