

On appeal, appellant asserts that repayment would be detrimental to his current financial situation.

FACTUAL HISTORY

On January 30, 1979 appellant, then a 38-year-old carpenter, sustained a low back injury at work. The claim was accepted for permanent aggravation of spondylolysis. In 1980, appellant returned to a position as engineering aid and his wage-loss compensation was adjusted accordingly. He was released from work on September 4, 1987 due to a reduction-in-force and was placed on the periodic compensation rolls. Appellant was reemployed on October 9, 1990 as a materials clerk and his compensation was reduced with gross compensation each four weeks of \$770.00.² By decision dated January 15, 1991, OWCP found that his employment effective October 9, 1990, as a materials clerk with wages of \$261.25 per week, fairly and reasonably represented his wage-earning capacity and reduced his compensation.³ It determined appellant's wage-earning capacity, based on a weekly pay rate of \$480.48, with an adjusted wage-earning capacity of \$245.04 for a loss of wage-earning capacity of \$235.44 each week, yielding gross compensation of \$770.00 each week. Appellant received monetary compensation based on the wage-earning capacity rate.

On July 30, 2010 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$11,129.97, because he received incorrect compensation benefits from October 21, 1990 through July 3, 2010. When his compensation payments were reduced on October 21, 1990 to reflect his wage-earning capacity of \$245.04 a week, \$235.44 was entered in error. OWCP found appellant without fault in the creation of the overpayment. Appellant was given 30 days to respond and was provided an overpayment action request form and overpayment questionnaire. Compensation print-outs indicate that beginning on October 21, 1990 he received gross compensation of \$802.00 each four weeks that was periodically raised by cost-of-living increases. The print-outs indicate that appellant received gross compensation totaling \$277,095.97 for the period October 21, 1990 to July 3, 2010. Overpayment worksheets reflect that he should have received compensation of \$265,966.00 for this period, which yielded an overpayment in compensation of \$11,129.97.⁴

On February 7, 2009 appellant requested a telephone conference and submitted an overpayment questionnaire with financial information regarding his expenses. In a telephone conference held on September 13, 2010 he reported assets of \$4,359.79, a monthly income of \$3,299.12 and monthly expenses of \$1,960.85 or a difference of \$1,338.27. Appellant was informed that, as his income exceeded his expenses by more than \$50.00 per month, he did not

² Gross compensation of \$770.00 was reduced by optional life insurance of \$23.50 to yield net compensation of \$746.50.

³ The record indicates that appellant continued to work in this position until April 12, 1991.

⁴ The record also contains a preliminary overpayment determination dated July 23, 2010, in which OWCP found an overpayment in compensation in the amount of \$14,672.89 because compensation payments for the period June 1, 2002 through July 3, 2010 were not reduced based on concurrent social security benefits. The preliminary finding was not finalized because OWCP determined that employing establishment employees did not pay into the federal retirement system and therefore an offset was not necessary.

meet the criteria for waiver and that a reasonable deduction for repayment was 15 percent. He did not agree and requested waiver.

By decision dated September 17, 2010, OWCP found that an overpayment of compensation in the amount of \$11,129.97 was created for the period October 21, 1990 to July 3, 2010. While he was not at fault, appellant was not entitled to waiver as his monthly expenses exceeded his monthly income by \$1,338.27. OWCP determined that \$197.85 would be deducted from future compensation payments to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$11,129.97 because OWCP failed to properly reduce his compensation benefits based on the January 15, 1991 wage-earning capacity determination for the period October 21, 1990 to July 3, 2010.

The January 15, 1991 wage-earning capacity determination found that, after applying the principles set forth in *Albert C. Shadrick*,⁷ as codified in section 10.403 of OWCP's regulations,⁸ appellant had a 51 percent loss of wage-earning capacity, which yielded compensation every four weeks of \$770.00. OWCP print-outs, however, show that, beginning on October 21, 1990, his gross compensation was \$802.00 and OWCP acknowledged that it entered an incorrect amount for his loss of wage-earning capacity. Appellant's compensation benefits were periodically raised by cost-of-living increases, such that, for the period October 21, 1990 to July 3, 2010, he received gross compensation of \$277,095.97 when he should have received \$265,966.00, yielding an overpayment in compensation in the amount of \$11,129.97. The record thus supports that he received compensation based on an incorrect wage-earning capacity rate for the period October 21, 1990 to July 3, 2010, which created an overpayment in the amount of \$11,129.97. The Board will affirm the fact and amount of the overpayment.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at 8129(a).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP 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.”⁹ Section 10.438 of OWCP regulations provides 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁰ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment of compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹²

Appellant furnished OWCP with an overpayment questionnaire on August 27, 2010 and updated his financial information at the prerecoupment hearing held on September 13, 2010. At that time he reported assets of \$4,359.79, monthly income of \$3,299.12 and monthly expenses of \$1,960.85.

OWCP procedures provide an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ In this case, appellant reported household income of \$3,299.12 and monthly expenses of \$1,960.85, yielding a difference between current income and current household expenses of \$1,338.27. While he asserted on appeal that he should be granted waiver because recovery of the overpayment would be detrimental to his financial situation. Appellant’s reported finances do not support this contention. As his monthly

⁹ 5 U.S.C. § 8129.

¹⁰ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) 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. 20 C.F.R. § 10.436. 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. *Id.* at § 10.437.

¹¹ 20 C.F.R. § 10.438.

¹² *Id.* at §§ 10.436, 10.437.

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6 (June 2009).

income exceeds his documented monthly expenses of \$1,338.27, he is not entitled to waiver as he does not need substantially all his income to meet current ordinary and necessary expenses.¹⁴

The Board finds that OWCP properly determined that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of FECA. Moreover, as appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation, OWCP properly determined that recovery would not be against equity and good conscience. OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$197.85 per compensation period. The record indicates that appellant had discretionary income of \$1,338.27 per month. OWCP therefore did not abuse its discretion in finding that he should repay the overpayment at the rate of \$197.85 per compensation period.

¹⁴ *Id.*; see *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

¹⁵ 20 C.F.R. § 10.441(a).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,129.97 and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$197.85 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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