

FACTUAL HISTORY

On December 5, 1984 appellant, then a 35-year-old file clerk, sustained an injury in the performance of duty when she tried to move a broken file shelf. OWCP accepted her claim for lumbosacral strain and a ruptured L4-5 disc, left. Appellant suffered several recurrences of disability and received compensation for temporary total disability at the augmented rate for dependents.

On May 3, 2010 OWCP made a preliminary determination that appellant received a \$14,343.21 overpayment from October 11, 2002 to November 21, 2009. It explained that her husband died on October 11, 2002, but she continued to receive compensation at the augmented rate for dependents. OWCP found that appellant was at fault in creating the overpayment.

In a decision dated November 9, 2010, OWCP's hearing representative found that appellant did receive a \$14,343.21 overpayment from October 11, 2002 to November 21, 2009 because she continued to receive compensation at the augmented rate for dependents after her husband's death. He found, however, that appellant was not at fault in the matter. OWCP's hearing representative denied waiver on the grounds that appellant's monthly expenses exceeded her monthly income by \$224.27, accepting the reasonable figures she provided in her testimony during a September 1, 2010 telephonic hearing. He found that appellant could repay the debt through deductions of \$125.00 each four weeks from her periodic rolls payment. OWCP's hearing representative noted that this still left appellant with more than \$50.00 a month in discretionary income.

On appeal, appellant argues that she did nothing wrong. She explains that OWCP did not follow up on the information she provided about her husband's death. Appellant adds that it pays her \$1,258.00 a month, not \$1,362.28.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Compensation for total disability is paid at the rate of 66⅔ percent of monthly pay.⁴ A disabled employee with one or more dependents is entitled to have basic compensation for disability augmented to 75 percent.⁵

When an overpayment of compensation has been made 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.⁶ OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the

³ 5 U.S.C. § 8102(a).

⁴ *Id.* § 8105.

⁵ *Id.* § 8110(b).

⁶ *Id.* § 8129(a).

overpayment.⁷ If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁸

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 her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual.⁹

An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹⁰

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.¹¹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹²

Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or her attention is called to same. If no refund is made, OWCP shall decreased 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.¹³

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* § 10.434.

⁹ *Id.* § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹¹ 20 C.F.R. § 10.437(b).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

¹³ 20 C.F.R. § 10.441(a).

ANALYSIS

Appellant does not dispute the fact or amount of the overpayment. Though she was not entitled to compensation at the augmented rate for dependents after her husband died, OWCP continued to pay compensation at the augmented rate from October 11, 2002 to November 21, 2009. Payment records and worksheets document that this error caused an overpayment of \$14,343.21 during the period. The Board will therefore affirm OWCP's November 9, 2010 decision on the issues of fact and amount of overpayment.

The primary issue, at least the one appellant seems most concerned about on appeal, is whether she was at fault in the matter. OWCP found so in its preliminary determination, but upon further consideration OWCP's hearing representative concluded that appellant was not at fault in the matter. To use her words on appeal, she "did nothing wrong." It was OWCP that made the mistake. That does not mean, however, that appellant may keep money that does not belong to her. The law still requires repayment unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.

Appellant completed an overpayment recovery questionnaire listing her monthly income and expenses, and she testified as to her income and expenses during the telephonic hearing. OWCP's hearing representative accepted her testimony as reasonable, but because she failed to document her expenses, he accepted the lower end of any range she provided. As the difference between her monthly income and monthly expenses was (roughly) \$224.27, appellant is deemed not to need substantially all of her current income to meet current ordinary and necessary living expenses. Recovery of the overpayment will therefore not defeat the purpose of FECA. Because there is no evidence that appellant gave up a valuable right or changed her position for the worse in reliance on the overpaid amount, recovery of the overpayment is not against equity and good conscience. As appellant is thus not eligible for waiver, the Board will affirm OWCP's November 9, 2010 decision on that issue.

In the absence of waiver, FECA requires OWCP to recover the debt by decreasing later payments, to which appellant is entitled. OWCP's hearing representative was aware of the extent of her future payments, her rate of compensation and her financial circumstances. He explained that if appellant repaid the debt at a rate of \$125.00 a month, she would still have over \$50.00 a month in discretionary income.¹⁴ The Board therefore finds that OWCP has properly taken into account relevant factors so as to minimize any hardship while still recovering the debt in a reasonably timely manner. The Board will affirm its November 9, 2010 decision on the issue of rate of recovery.

Appellant argues on appeal that she "did nothing wrong." OWCP agrees. It was OWCP that created the overpayment by not following through on the paperwork she submitted. As the Board has explained, this does not entitle appellant to money mistakenly paid to her. The law requires OWCP to recover the debt. As for the compensation she receives, the record shows that when OWCP issued its November 9, 2010 decision, it was paying appellant \$1,258.00 in

¹⁴ This would leave something of a buffer for expenses that tend to fluctuate or arise unexpectedly.

compensation every 28 days. For example, with a check dated November 20, 2010, OWCP paid appellant \$1,258.00 for the period October 24 to November 20, 2010, which was 28 days. This is the equivalent of \$1,362.83 a month ($\$1,258.00 \times 13/12$).

CONCLUSION

The Board finds that OWCP properly denied waiver of the recovery of a \$14,343.21 overpayment from October 11, 2002 to November 21, 2009 and properly determined the rate of recovery from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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