



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated November 25, 2011, the Board affirmed an October 4, 2010 decision denying appellant's request for a prerecoupment hearing as untimely.<sup>3</sup> The Board further affirmed OWCP's determination that he received an overpayment of \$7,541.21 from August 17, 2009 to January 1, 2010 because it paid him compensation at an inaccurate pay rate. The Board found, however, that appellant was not at fault in the creation of the overpayment and remanded the case for OWCP to consider whether he was entitled to wavier. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

By letter dated December 5, 2011, OWCP requested that appellant complete and submit an overpayment recovery questionnaire within 30 days. It further advised him that he could request a telephone conference or a decision based on the written evidence.

In an overpayment questionnaire dated December 21, 2011, received by OWCP on January 4, 2012, appellant listed his monthly income as \$6,701.00. He provided expenses of \$1,450.00 for housing, \$1,200.00 for food, \$100.00 for clothing, \$600.00 for utilities and other expenses of \$1,900.00. Appellant indicated that he made installment payments of \$359.13 for an education loan, \$491.85 to the Department of Education, \$240.00 to Union Plus, \$100.00 to Health One Visa, \$130.00 to Pentagon Federal Credit Union Visa, \$150.00 to Hickam Federal Credit Union Visa, \$203.00 to Discover and \$150.00 to OWCP, for a total of \$1,823.98. He had savings of \$2,167.13. Appellant related that he gave cash to his children in 2010 and 2011 of \$2,000.00 and a loan of \$1,500.00 to a daughter for a car. He requested a decision based on the written evidence and provided supporting financial information.

In an internal memorandum dated January 4, 2012, OWCP noted that appellant had submitted \$1,500.00 as payment of the overpayment, and that a balance remained of \$6,041.21.

In a decision dated January 5, 2012, OWCP denied waiver of recovery of the overpayment. It determined that appellant had not provided a completed overpayment recovery questionnaire.

In an amended overpayment decision dated January 12, 2012, OWCP denied waiver of recovery of the overpayment of compensation after considering appellant's overpayment recovery questionnaire. It determined that the overpayment recovery questionnaire established that he had monthly income of \$6,701.00 and expenses of \$5,250.00, for a difference of \$1,451.00. OWCP denied waiver based on its finding that his income exceeded his expenses such that he did not require substantially all his income to meet ordinary and necessary living expenses. It determined that it would recover the remaining overpayment from his schedule award.<sup>4</sup>

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<sup>3</sup> Docket No. 11-543 (issued November 25, 2011). OWCP accepted that appellant sustained a left knee sprain and left medial meniscal tear on June 14, 2009. It paid him compensation for disability from August 17, 2009 to January 1, 2010 based on a 40-hour workweek rather than a 72-hour workweek.

<sup>4</sup> See *supra* note 1.

By decision dated January 12, 2012, OWCP granted appellant a schedule award for a two percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from September 8 to October 18, 2012, for a total amount of \$6,554.69. OWCP indicated that it was deducting the remaining balance of the overpayment, \$6,041.12, from the schedule award.

On appeal, appellant's representative appeals the overpayment decision, arguing that he submitted the requested financial information.

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

Section 8129 of FECA 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.<sup>5</sup>

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>6</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>7</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>8</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>9</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

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<sup>5</sup> *Supra* note 2 at 8129(b).

<sup>6</sup> 20 C.F.R. § 10.436. OWCP's 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>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.436.

that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>10</sup>

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

On prior appeal the Board remanded the case for OWCP to consider waiver of recovery of the \$7,541.21 overpayment of compensation. An overpayment cannot be waived unless recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by OWCP's procedures.<sup>11</sup>

Appellant completed an overpayment recovery questionnaire on December 21, 2011. He indicated that he had \$2,167.13 in savings. Consequently, appellant's assets do not exceed the resource base of \$8,000.00 for an individual with a spouse or dependent.<sup>12</sup>

The next issue is whether appellant requires substantially all of his income to meet ordinary and necessary living expenses. He indicated that his monthly income was \$6,701.00. Appellant listed expenses of \$1,450.00 for housing, \$1,200.00 for food, \$100.00 for clothing, \$600.00 for utilities and miscellaneous expenses of \$1,900.00, which totaled \$5,250.00.<sup>13</sup> OWCP subtracted \$5,250.00 from \$6,701.00 to find that he had a monthly surplus of \$1,451.00. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>14</sup> Consequently, as appellant's income exceeded his expenses by more than \$50.00, he did not need substantially all of his income for ordinary and necessary living expenses.

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, OWCP properly denied waiver of recovery of the overpayment.

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<sup>10</sup> *Id.* at § 10.437(b)(1).

<sup>11</sup> *Id.* at § 10.436.

<sup>12</sup> *See supra* note 6.

<sup>13</sup> Appellant indicated that he made installment payments on loans of \$359.13 for an education loan, \$491.85 to the Department of Education, \$240.00 to Union Plus, \$100.00 to Health One Visa, \$130.00 to Pentagon Federal Credit Union Visa, \$150.00 to Hickam Federal Credit Union VISA, \$203.00 to Discover and \$150.00 to OWCP, for a total of \$1,823.98. While he also indicated \$1,900.00 in miscellaneous expenses, he provided no financial documentation supporting such expenses or explaining whether these expenses were separate from the installment payments on his loans. It is appellant's burden to provide the financial information necessary to support his request to waive recovery of the overpayment. *See W.P.*, 59 ECAB 514 (2008).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004); *Desiderio Martinez*, 55 ECAB 336 (2004).

On appeal, appellant notes that he timely submitted the overpayment recovery questionnaire. As discussed, however, the information contained on the questionnaire is insufficient to establish that he is entitled to waiver of recovery of the overpayment.

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

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>15</sup> Section 10.441(a) of the regulations provide:

“When 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 his or her attention is called to same. If 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.”<sup>16</sup>

If a sufficiently large lump-sum payment of compensation is due the debtor for a single period of past entitlement or for a schedule award, the debt should be recovered in full by a single deduction from compensation owed.<sup>17</sup>

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

Appellant forwarded OWCP \$1,500.00 in payment of the overpayment. The Board does not have jurisdiction over the recovery of this amount as its jurisdiction with respect to the recovery of an overpayment is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA.<sup>18</sup> OWCP, however, also recovered a portion of the overpayment, \$6,041.21, from a schedule award decision. As this constitutes compensation benefits under FECA, the Board has jurisdiction over the recovery of this amount.<sup>19</sup> OWCP's procedures provide that, if a sufficiently large lump-sum payment of compensation is due the debtor for a single period of past entitlement or for a schedule award, the debt should be recovered in full by a single deduction from compensation owed.<sup>20</sup> Consequently, it properly recovered the \$6,041.21 from appellant's schedule award as repayment of the remainder of the overpayment.<sup>21</sup> Further, the record reflects that appellant's monthly income was \$6,701.00 and

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<sup>15</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>16</sup> 20 C.F.R. § 10.441(a).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8.b (May 2004).

<sup>18</sup> *See D.R.*, 59 ECAB 148 (2007).

<sup>19</sup> *See generally A.P.*, Docket No. 07-326 (issued June 5, 2007).

<sup>20</sup> *See supra* note 16.

<sup>21</sup> *See Levon H. Knight*, 40 ECAB 658 (1989).

his expenses were \$5,250.00, which resulted in an excess of \$1,451.00 per month, and thus there is no evidence that recovery from the schedule award would result in hardship.

**CONCLUSION**

The Board finds that OWCP properly denied waiver of recovery of a \$7,541.21 overpayment of compensation. It further finds OWCP properly recovered \$6,041.21 of the overpayment from the amount owed on a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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