

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$26,205.32 for the period November 5, 2007 to July 3, 2010 because she received compensation at an inaccurate pay rate; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 19, 2007 appellant, then a 52-year-old sales service associate, filed a traumatic injury claim alleging that she sustained an injury to her elbow, shoulder, hip and neck when she fell on her right side that day. She stopped work on September 20, 2007 and did not return. At the time of her injury, appellant worked six hours a day. OWCP accepted the claim for cervical strain and contusion, right shoulder strain and contusion and a right knee contusion.

OWCP paid appellant compensation beginning November 5, 2007 based on a weekly pay rate of \$948.19. On August 3, 2010 the employing establishment informed OWCP that appellant worked six hours a day five days a week from April 5, 2007 through the date of injury with a yearly salary of \$49,306.00. Appellant took leave without pay for the remaining two hours a day. By letter dated August 5, 2010, OWCP informed her that it had adjusted her compensation based on her six-hour workday on the date of injury.

By decision dated August 12, 2010, OWCP terminated appellant's compensation effective August 12, 2010 after finding that she had no further employment-related condition or disability.

On August 12, 2010 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$26,205.32 for the period November 5, 2007 through July 3, 2010 because it paid her compensation at an inaccurate pay rate. It noted that it had originally calculated her pay rate as \$948.10 by dividing her annual salary, \$49,306.00 by 52. OWCP divided the weekly rate of \$948.10 by 40 to find an hourly rate of \$23.70 based on a 40-hour workweek. It determined that it should have paid appellant using a weekly pay rate of \$711.14 or \$23.70 an hour multiplied by 30 hours a week. OWCP subtracted the amount that it should have paid her from November 5, 2007 to July 3, 2010, \$56,414.01, from the amount she actually received, \$82,619.33 to find an overpayment of \$26,205.32. It further advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment. OWCP requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On September 11, 2010 appellant requested a decision on the written record. She disagreed that the overpayment occurred and requested waiver. Appellant related, "At the time of this injury I was only working 6 hours day due to a previous on the job injury. If not for that injury I would have worked 8 hrs day. This all was discussed at the time of my current injury, and was agreed that I should be paid full time pay." She listed anticipated monthly income when

she began receiving retirement benefits in about a month of \$2,400.00 and monthly expenses of \$2,059.77.

By decision dated September 24, 2010, OWCP denied waiver of recovery of the overpayment of compensation in the amount of \$26,205.32 after finding that appellant's income exceeded her expenses by \$305.00 a month. It determined that she should send \$150.00 a month to repay the overpayment. OWCP incorporated by reference its initial overpayment determination.

On appeal, appellant related that she completed the overpayment questionnaire based on her estimate of her monthly income and expenses. She asserted that her income was less and her expenses greater than anticipated.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ 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.⁴ 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.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$26,205.32 for the period November 5, 2007 to July 3, 2010 because it paid her compensation based on an inaccurate pay rate. 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.⁶ OWCP utilized appellant's pay rate at the time of injury to calculate her pay rate. At the time of her September 19, 2007 employment injury, she worked six hours a day for five days a week or a 30-hour week. OWCP, however, paid appellant compensation based on a 40-hour workweek. In calculating the overpayment, it subtracted the amount of compensation it should have paid her using the correct pay rate, \$56,414.01, from the amount it actually paid her, \$82,519.32, to find an overpayment of \$26,205.32.⁷ Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation.

³ *Supra* note 1.

⁴ *Id.* at § 8102.

⁵ *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

⁶ *Id.* at § 8129(b).

⁷ *See Maria A. McCarthy*, Docket No. 94-219 (issued June 9, 1995).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁵ 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.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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 establish that repayment would defeat the purpose of FECA, appellant must establish that she needs substantially all current income to meet current ordinary and necessary living expenses and that her assets do not

⁸ 20 C.F.R. § 10.436. OWCP 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).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.436.

¹² *Id.* at § 10.437(b)(1).

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.

OWCP found that appellant did not require substantially all of her income to meet ordinary and necessary living expenses. In the September 11, 2010 overpayment recovery questionnaire, appellant related that her anticipated earnings when she began receiving retirement benefits would be \$2,400.00 and her monthly expenses \$2,059.77, yielding a difference of \$340.23. OWCP's procedures provide that an individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ As appellant's reported income exceeded her expenses by more than \$50.00, she is not entitled to waiver as she does not need substantially all her income to meet ordinary and necessary expenses.

Appellant did not allege and the evidence does not establish that she relinquished a valuable right or changed her position for the worse in reliance of the excess compensation or that she would experience severe financial hardship repaying the debt. OWCP thus properly determined that recovery would not be against equity and good conscience.

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 in denying waiver of recovery.¹⁴

On appeal, appellant argues that her income is less and her expenses more than she had anticipated when she completed the overpayment recovery questionnaire. If her financial circumstances have significantly changed, she can again request waiver before OWCP and submit supporting financial information.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$26,205.32 for the period November 5, 2007 to July 3, 2010 because she received compensation at an inaccurate pay rate and that OWCP properly denied waiver of recovery of the overpayment.

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

¹⁴ 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 recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).

¹⁵ *See* 20 C.F.R. § 10.438(b). Appellant submitted financial documentation with her appeal. The Board, however, has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1). The appellant has the option to timely submit this documentation to OWCP.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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