

FACTUAL HISTORY

On prior appeal,² the Board found that prior to April 14, 2008 appellant worked four hours a day and received compensation for four hours of injury-related disability.³ OWCP made no deduction for health benefits, life insurance or alimony. Then, effective April 14, 2008, the employing establishment withdrew the limited duty and OWCP paid compensation for total disability. Because appellant was no longer receiving wages from which deductions could be made, OWCP began deductions from compensation for his health benefits, life insurance and alimony.

The Merit Systems Protection Board (MSPB) ultimately reversed the employing establishment's action and retroactively restored appellant to duty with back pay and benefits with appropriate credits and deductions.

As the Board explained, the MSPB decision restored matters to the status *quo ante*, to when OWCP paid gross compensation for only four hours of injury-related disability with no deduction for health benefits, life insurance or alimony and the deductions were made retroacting from his wages. When it calculated the amount of the overpayment, OWCP credited the \$487.81 it had deducted for health benefits and life insurance during the period, but did not credit the \$4,954.89 it had deducted for alimony. As it did not adequately explain why it treated the deductions differently, the Board set aside OWCP's November 23, 2009 decision on the issue of amount of the overpayment and remanded the case for further development. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On January 6, 2011 OWCP issued a final decision. It found that appellant received an \$8,384.72 overpayment from April 14 to September 27, 2008. OWCP explained that it credited health benefit and basic life insurance premiums to lower the amount of the overpayment because the employing establishment retroactively deducted the premiums when it reinstated wages. With respect to the alimony, OWCP explained as follows: "As the amount of alimony paid [to the ex-wife] came out of the compensation paid to [appellant] and [he] would have received the money if the court ordered alimony deduction did not exist, it will not be credited to lower the amount of the overpayment of compensation for the period in question."

OWCP found appellant not at fault for the overpayment. Considering the issue of waiver, it accepted the figures provided on appellant's overpayment recovery form, which showed \$2,302.00 in net monthly income and \$2,143.00 in estimated monthly expenses. OWCP noted: "[Appellant] does pay alimony to his ex-wife, however, the alimony is taken out of his pay and the amount of the alimony is not reported as income above." Because appellant did not need substantially all of his current income to meet current ordinary and necessary living expenses, OWCP denied waiver. OWCP found that the overpayment should be recouped by deducting \$150.00 from continuing compensation payments.

² Docket No. 10-1027 (issued December 20, 2010).

³ On January 13, 1997 an unknown assailant attacked appellant in the course of his employment as a letter carrier. OWCP accepted his workers' compensation claim for contusions to the neck, back and lower ribs and for herniated discs at L4-5 and L5-S1.

On appeal, appellant argued that his back pay was reduced by the amount of compensation he received from OWCP. He argues that the overpayment of alimony payments has not been addressed. Appellant also argues that he has once again been denied work as a result of the National Reassessment Process, which has reduced his current net income to \$1,637.81 with expenses as previously listed at \$2,143.00. His requests waiver and reimbursement for all monies deducted from his compensation payments.

LEGAL PRECEDENT -- ISSUE 1

FECA places limitations on the right to receive compensation: While an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.⁴ It is, therefore, well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁵

ANALYSIS -- ISSUE 1

As the Board found, on the prior appeal, appellant received an overpayment. Appellant's reinstatement meant that he would receive wages and compensation for wage loss for the same hours. The question was, specifically whether deductions for alimony payments should be credited against the overpayment.

The Board finds that OWCP should credit deductions for alimony, just as it did for health benefits and life insurance. The explanation OWCP provided on remand does not sufficiently distinguish these deductions or justify their different treatment. Prior to April 14, 2008, all three were deducted from payroll. Beginning April 14, 2008, all three were deducted from compensation. When MSPB retroactively reinstated appellant's pay and benefits with appropriate credits and deductions, the employing establishment became responsible for making all three deductions from reinstated pay. MSPB made no distinction between the deduction for health benefits and basic life insurance and the deduction for alimony. All were the employing establishment's responsibility. Ultimately, appellant's pay and all the deductions from that pay were to come from the employing establishment's budget, just as they did prior to April 14, 2008.

If anyone is responsible for making the compensation fund whole for the alimony OWCP paid during the period, it is the employing establishment. OWCP must recover from appellant, if he is not entitled to waiver, the net compensation he received for the period. It must recover from the employing establishment or from the Office of Personnel Management, the premiums and alimony it paid from the compensation fund. OWCP may not attempt to recover from appellant the alimony that the employing establishment was to deduct from reinstated wages. Appellant owes no alimony to OWCP. Such a recovery would effectively double his alimony

⁴ 5 U.S.C. § 8116(a).

⁵ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

payments for the period, leaving him to seek redress from the employing establishment. The only thing appellant owes OWCP, assuming no waiver, is the net compensation he actually received for the additional four hours of wage loss.

The Board finds, therefore, that appellant received an overpayment of \$3,429.83 from April 14 to September 27, 2008. This equals the \$16,528.53 in total compensation he received, minus the \$7,656.00 in gross compensation he properly received for the first four hours of injury-related disability, minus the \$487.81 OWCP paid for health benefits and basic life insurance, minus the \$4,954.89 OWCP paid for alimony. The Board will affirm OWCP's January 6, 2011 decision on the issue of fact of overpayment and will modify the decision accordingly on the issue of amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that 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 overpayment.⁷ If it 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 his 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 his 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

⁶ 5 U.S.C. § 8129(a).

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.434.

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

¹⁰ *Supra* note 9, Chapter 6.200.6.a(1)(b) (October 2004).

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

ANALYSIS -- ISSUE 2

Appellant was not at fault in the overpayment, so he is eligible for consideration of waiver. His monthly income, however, as reflected in his overpayment recovery questionnaire, exceeds his monthly expenses by more than \$50.00. Appellant is, therefore, deemed not to need substantially all of his current income to meet current ordinary and necessary living expenses. Thus, recovery of the overpayment will not defeat the purpose of FECA. Because the record raises no issue of detrimental reliance, recovery is not considered to be against equity and good conscience. The Board finds that OWCP properly denied waiver. The Board will affirm OWCP's January 6, 2011 decision on that issue.

LEGAL PRECEDENT -- ISSUE 3

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 his 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.¹³

ANALYSIS -- ISSUE 3

OWCP found that it should recoup the overpayment by deducting \$150.00 from appellant's continuing compensation payments, but it did not give due regard to the relevant factors noted above in its January 6, 2011 decision. Whether it considered these factors or how it determined that recovering all but \$9.00 of appellant's excess monthly income would minimize any resulting hardship, remains unclear. The Board finds, therefore, that OWCP abused its discretion in setting the rate of recovery from continuing payments of compensation. The Board will set aside OWCP's January 6, 2011 decision on the issue of recovery.

Any issues that appellant has with the employing establishment's reinstatement of pay are not before this Board. The Board's jurisdiction is limited to reviewing OWCP's final decision on the overpayment and the issues of fact, amount, waiver and recovery.¹⁴

¹¹ 20 C.F.R. §10.437(b).

¹² *Supra* note 9, Chapter 6.200.6.b(3) (October 2004).

¹³ 20 C.F.R. § 10.441(a).

¹⁴ *Id.* at § 10.438(b).

CONCLUSION

The Board finds that appellant received an overpayment of \$3,429.83 from April 14 to September 27, 2008. The Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board further finds that OWCP abused its discretion in setting the rate of recovery.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment, is modified on the issue of amount, is affirmed on the issue of waiver and is set aside and remanded on the issue of recovery.

Issued: February 6, 2012
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