

FACTUAL HISTORY

On January 17, 2002 appellant, then a 44-year-old sales and service representative and distribution clerk, filed an occupational disease claim under File No. xxxxxx082 alleging that on February 20, 2001 she first became aware of her right arm and shoulder injuries and realized that her injuries were due to her repetitive work activities at the employing establishment.² She was diagnosed as having shoulder tenosynovitis by an employing establishment physician. Appellant stopped work on February 21, 2001. On April 19, 2002 OWCP accepted her claim for exacerbation of cervical disc herniation and right shoulder impingement syndrome.

In a September 29, 2010 decision, OWCP granted appellant a schedule award for five percent impairment of the right upper extremity. Appellant was entitled to 15.6 weeks of compensation. The period of the award ran from September 1 through December 19, 2010. OWCP advised that appellant would receive \$2,597.32 for the period September 1 through 25, 2010 and then \$2,909.00 every four weeks until the ending date of the award on December 19, 2010.

On January 21, 2011 OWCP issued a preliminary determination that appellant received an overpayment of \$2,805.11 from December 20, 2010 through January 15, 2011, because it continued to pay her schedule award benefits after the period of the award expired on December 19, 2010. It explained how it calculated the amount of the overpayment for the 27-day period (\$2,909.00 divided by 28 days multiplied by 27 days). OWCP found appellant without fault in creating the overpayment. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment, she was advised to submit, within 30 days, a completed overpayment recovery questionnaire (Form OWCP-20) with supporting financial evidence.

On February 23, 2011 appellant agreed to participate in a telephone conference which was held on February 28, 2011. In a memorandum of the conference, OWCP reported that she had monthly income of \$956.00 from the employing establishment, \$914.00 for kinship benefits she received from the state of New Jersey for her two nephews and \$500.00 in child support, totaling \$2,370.00. Appellant's monthly expenses included \$350.00 for food, \$150.00 for clothing, \$1,316.80 for mortgage, \$290.00 for utilities, \$200.00 for car fuel and \$199.00 for a Chase credit card, totaling \$2,505.80. She had assets which included \$300.00 on hand, \$118.00 in a checking account and \$2,090.61 in a savings account, totaling \$2,508.61.

Following the February 28, 2011 telephone conference, appellant submitted two financial records which indicated that her monthly mortgage was \$1,316.80 and that she received a \$945.41 payment from the Federal Government.

² Prior to the instant claim, appellant filed a traumatic injury claim under File No. xxxxxx140 for a right shoulder and forearm injury on February 20, 2001. She stopped work on February 21, 2001. OWCP accepted appellant's claim for lumbar herniated disc, impingement syndrome of the right shoulder with tendinitis and cervical disc herniation on the right side at C5-6. On October 17, 2002 it combined the case File Nos. xxxxxx140 and xxxxxx082 into a master file assigned number xxxxxx140.

On March 18, 2011 OWCP advised appellant by telephone that it had only received two financial documents regarding her overpayment. Appellant responded that she had sent 12 to 13 pages of financial documents which included a bank statement, bills and a copy of a check for her nephews. She stated that the \$945.41 check she received was a disability retirement payment from the Office of Personnel Management (OPM). Appellant began receiving OPM benefits in June 2010.

On March 22, 2011 OWCP again contacted appellant by telephone and requested that she submit the requested financial documents by facsimile. Appellant responded that she was not at home, but she would call back when she returned home. She did not return OWCP's telephone call.

In a March 22, 2011 decision, OWCP finalized the \$2,805.11 overpayment. It further finalized the preliminary finding that appellant was without fault, but denied waiver of recovery. OWCP stated that she failed to submit the additional requested financial evidence and, thus, it was unclear as to whether she met the criteria for establishing that adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It found that there was insufficient evidence to determine appellant's eligibility for waiver of recovery of the overpayment. OWCP directed recovery of the overpayment at the rate of \$100.00 a month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.⁴ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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.⁵ OWCP's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained exacerbation of cervical disc herniation and right shoulder impingement syndrome while working as a sales and service representative and distribution clerk. On September 29, 2010 it issued a schedule award for five percent impairment of her right upper extremity. Section 8107 of FECA provides 312 weeks of

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

compensation for the total loss of a right arm.⁷ Partial losses or impairments are compensated proportionately.⁸ Accordingly, the September 29, 2010 schedule award provided appellant 15.6 weeks of compensation for the five percent impairment of her right upper extremity (0.05 times 312 equals 15.6 weeks).

The period of the award was thus limited. As the September 29, 2010 award indicated, the period of the award ran from September 1 through December 19, 2010. However, OWCP mistakenly continued to pay appellant for an additional 27 days through January 15, 2011 after the schedule award expired. It determined that the amount of compensation she received for the period December 20, 2010 through January 15, 2011 totaled \$2,805.11 (\$2,909.00 divided by 28 days multiplied by 27 days). As appellant was not entitled to receive schedule award compensation after December 19, 2010, the Board finds that her receipt of such compensation from December 20, 2010 through January 15, 2011 created an overpayment of compensation.

There is no contrary evidence nor does appellant contest the fact and the amount of the overpayment. The Board finds, therefore, that she received an overpayment of \$2,805.11 from December 20, 2010 through January 15, 2011.⁹

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of FECA and the implementing regulations, 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.¹⁰ Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ Section 10.434 provides that, if OWCP finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of [FECA] or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹²

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of FECA if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary’s

⁷ 5 U.S.C. § 8107(c)(1).

⁸ *Id.* at § 8107(c)(19).

⁹ *Alberto Pineiro*, 51 ECAB 310 (2000).

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.434.

assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³ 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 expenses by more than \$50.00.¹⁴ An individual's liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹⁵ 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.¹⁶

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the 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.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation. However, as stated, the 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 she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base as determined by OWCP's procedures.¹⁹

The Board finds that appellant has failed to meet her responsibility for providing the requisite evidence to support waiver of recovery of the \$2,805.11 overpayment.²⁰ OWCP advised her regarding this responsibility, but she failed to adequately comply with its requests to submit information and documentation regarding her financial situation. Appellant submitted financial information which suggested that her monthly expenses exceeded her monthly income, but OWCP properly noted that she had not adequately substantiated such expenses through the

¹³ 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, *supra* note 6, Chapter 6.200.6(a) (June 2009).

¹⁴ *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁵ *See supra* note 13.

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.437.

¹⁸ *Id.* at § 10.437(b)(1).

¹⁹ *Id.* at § 10.436.

²⁰ *Id.* at § 10.438(a).

submission of additional information and documentation. The Board notes that she was given sufficient opportunity to provide the requested information and documentation, but failed in her responsibility to do so. The Board finds, therefore, that OWCP properly exercised its discretion to find that recovery of the overpayment would not defeat the purpose of FECA.

The Board further finds that OWCP properly exercised its discretion to find that recovery of the overpayment would not be against equity and good conscience. The evidence does not show that appellant, in reliance on the \$2,805.11 overpayment, gave up a valuable right or changed her position for the worse. The Board finds, therefore, that OWCP properly denied waiver of recovery of the overpayment of \$2,805.11 for the period December 20, 2010 through January 15, 2011.²¹

Because appellant has failed to establish that recovery of the \$2,805.11 overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive recovery of the overpayment.

On appeal, appellant contended that she timely submitted financial documentation to OWCP supportive of her request for waiver of recovery of the \$2,805.11 overpayment. As stated, she did not submit sufficient financial evidence prior to the issuance of the March 22, 2011 OWCP overpayment decision and thus, it properly found that recovery of the overpayment would not defeat the purpose of FECA.

On appeal, appellant submitted additional financial documentation regarding her monthly expenses, but the Board may not review new evidence for the first time on appeal.²² She may resubmit this evidence and any legal contentions to OWCP accompanied by a request for reconsideration.²³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment from December 20, 2010 through January 15, 2011 in the amount of \$2,805.11. The Board further finds that OWCP properly denied waiver of recovery of the overpayment as the evidence does not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

²¹ With respect to the recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. See *Terry A. Keister*, 56 ECAB 559 (2005); see also *Cheryl Thomas*, 55 ECAB 610 (2004). As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act. *Cheryl Thomas*, *id.*

²² The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. See 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

²³ 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2012
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