



## **FACTUAL HISTORY**

OWCP accepted that on December 22, 2009 appellant, then a 42-year-old medical technologist, sustained an aggravation of cervical spondylosis without myelopathy, aggravation of brachial neuritis or radiculitis and right carpal tunnel syndrome due to a fall at work. Appellant received compensation for periods of total disability and underwent right carpal tunnel release surgery on February 22, 2011 which was authorized by OWCP. She returned to full-time work for the employing establishment on April 17, 2011.

In a May 11, 2011 notice, OWCP advised appellant of its preliminary determination that she received a \$2,402.41 overpayment of compensation because she was paid compensation for temporary total disability through May 7, 2011 but returned to full-time work for the employing establishment on April 17, 2011.<sup>2</sup> It made a preliminary determination that she was not at fault in the creation of the overpayment.<sup>3</sup> OWCP advised appellant that she could submit evidence challenging the fact, amount and request waiver of the overpayment. It informed appellant that she could submit additional evidence in writing or at prerecoupment hearing but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant completed a Form OWCP-20 on May 31, 2011 and requested waiver of the overpayment.<sup>4</sup> She advised that she had \$8,259.00 in monthly income comprised of \$6,959.00 in social security benefits and \$1,300.00 in other benefits. Appellant reported \$8,379.34 in monthly expenses comprised of \$1,722.34 for her house mortgage, \$800.00 for food, \$250.00 for clothing, \$2,200.00 for utilities, \$2,200.00 for "other expenses," \$572.00 for a payment to the Central Georgia Regional Credit Union (for a \$5,175.00 debt), and \$635.00 for a payment towards a Discover loan (in the amount of \$9,471.00).<sup>5</sup> She listed \$800.00 in assets comprised of amounts in checking and savings accounts and stocks and bonds. Appellant also submitted numerous financial documents, including statements from her bank accounts between January

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<sup>2</sup> OWCP provided a calculation showing that appellant received \$3,462.00 in compensation for the period April 10 to May 7, 2011 which equaled \$3,184.30 after deductions for medical insurance and dental/vision coverage. This figure was adjusted to account for the fact that April 10 to 16, 2011 was not part of the overpayment period, leaving a total overpayment of \$2,402.41. The record contains payment documents supporting these calculations.

<sup>3</sup> OWCP indicated that the monies creating the overpayment were directly deposited into appellant's bank account and that she did not have an opportunity to return the monies prior to this deposit.

<sup>4</sup> Appellant requested that a decision be made on the written evidence of record.

<sup>5</sup> Appellant indicated that she was supporting two daughters, 20 and 25 years old and two granddaughters under 3 years old.

and May 2011 which included her notations indicating the expenses covered by a number of the checks she wrote.<sup>6</sup>

On July 17, 2011 an OWCP claims examiner made an unsuccessful attempt to contact appellant by telephone to set up a conference to discuss some of the items on her Form OWCP-20. He left a telephone message for appellant on June 21, 2011, stating that a decision would be made on the existing record if she did not call back. The record does not indicate that appellant responded to the message.

In a June 24, 2011 decision, OWCP determined that appellant received a \$2,402.41 overpayment of compensation. It found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver.<sup>7</sup> OWCP discussed the submitted financial information and documentation and found that it did not support a finding that appellant needed substantially all of her current monthly income to meet current monthly ordinary and necessary living expenses (*i.e.*, she did not show that monthly expenses exceeded monthly income by \$50.00 or more).<sup>8</sup>

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

Section 8102(a) of FECA 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.<sup>9</sup> Section 8129(a) of FECA provides, in pertinent part:

“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.”<sup>10</sup>

Section 8116(a) of FECA provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not

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<sup>6</sup> These documents reveal that, on the average for the several months prior to June 2011, appellant had monthly expenses of about \$50.00 for water, \$50.00 for heating gas, \$300.00 for electricity, \$200.00 for cell telephone service, and \$150.00 for combined home telephone, cable and internet services. Appellant also had monthly automobile expenses of about \$300.00 for an automobile purchase loan, \$400.00 for gasoline and \$100.00 for insurance.

<sup>7</sup> OWCP directed that appellant repay the overpayment by forwarding a \$150.00 payment every month to OWCP. As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

<sup>8</sup> OWCP discussed its unsuccessful attempts to have appellant provide additional clarification of her expenses.

<sup>9</sup> 5 U.S.C. § 8102(a).

<sup>10</sup> *Id.* at § 8129(a).

receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>11</sup>

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

The Board finds that appellant received a \$2,402.41 overpayment of compensation. In the present case, appellant received disability compensation through May 7, 2011 despite the fact that she returned to full-time work for the employing establishment on April 17, 2011 and was not entitled to disability compensation after that date. The record contains evidence which shows that appellant received \$2,402.41 in compensation for the period April 18 to May 7, 2011 to which she was not entitled. Therefore, OWCP properly determined that appellant received a \$2,402.41 overpayment.

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

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>12</sup> These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>13</sup> If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor 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 her 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>14</sup> According to 20 C.F.R. § 10.437, 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 her position for the

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<sup>11</sup> *Id.* at § 8116(a).

<sup>12</sup> *See Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedure provides 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).

worse.<sup>15</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 that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>16</sup>

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

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. She reported that she had had \$8,259.00 in monthly income and \$8,379.34 in monthly expenses. The Board finds, however, that OWCP properly determined that appellant did not submit sufficient evidence to support the claimed monthly expenses. For example, appellant reported \$2,200.00 in monthly expenses for utilities, but she submitted documentation showing that each month she paid about \$50.00 for water, \$50.00 for heating gas, \$300.00 for electricity, \$200.00 for cell telephone service, and \$150.00 for combined home telephone, cable and internet services. Even if the expenses for multiple telephones, cable and internet were allowed, these expenses would total below the claimed \$2,200.00 figure. Appellant listed “other expenses” of \$2,200.00 and provided documentation for monthly expenses of about \$800.00 in this category that were related to automobile expenses. Although she documented other monthly expenses which would fall under the “other expenses” category, she did not provide sufficient documentation to establish that the total amount for these expenses as \$2,200.00.<sup>17</sup> Given appellant’s failure to document her claimed monthly expenses, the record reflects that her monthly income well exceeds her monthly expenses.<sup>18</sup>

As appellant’s current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.<sup>19</sup> Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant’s assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she

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<sup>15</sup> 20 C.F.R. § 10.437(a), (b).

<sup>16</sup> *Id.* at § 10.437(b)(1).

<sup>17</sup> Appellant reported monthly expenses of \$572.00 for a payment to the Central Georgia Regional Credit Union (for a \$5,175.00 debt) and \$635.00 for a payment towards a Discover loan (in the amount of \$9,471.00). She did not submit documentation showing that she was required to pay these amounts each month.

<sup>18</sup> The Board notes that OWCP attempted to gain additional information about appellant’s financial situation, but that appellant did not respond to OWCP.

<sup>19</sup> *See supra* note 14 and accompanying text.

relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>20</sup>

On appeal, appellant alleged that she submitted sufficient financial information and documentation to show that she would suffer financial hardship if required to repay the overpayment. However, for the reasons explained above, she did not fully document her claimed monthly expenses.

Because appellant has failed to establish that recovery of the 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 the overpayment.

### **CONCLUSION**

The Board finds that appellant received a \$2,402.41 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>20</sup> See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).