

FACTUAL HISTORY

In 1995, appellant, a 49-year-old health services administrator, developed an emotional condition in the performance of duty. OWCP accepted his claim for anxiety and depression and paid benefits. Appellant later filed an occupational disease claim alleging additional exposure through April 15, 1998, when he stopped work. OWCP accepted that claim for anxiety and depression and paid compensation based on a weekly pay rate of \$1,309.60.

In 2010, the employing establishment informed OWCP that appellant was a GS-13, Step 5 employee on April 15, 1998 with a \$59,132.00 annual base pay and \$4,648.00 locality adjustment, for an adjusted base pay of \$63,780.00 and a weekly pay rate of \$1,226.54. The employing establishment provided a January 4, 1998 Form SF-50 to document its figures.

On April 30, 2010 OWCP made a preliminary determination that appellant received a \$43,728.81 overpayment from April 15, 1998 through April 10, 2010 because it had paid him at the incorrect pay rate. It documented how it calculated the amount by comparing the gross compensation he received during the period to the gross compensation he should have received. OWCP found that appellant was not at fault in the matter.

Appellant stated that from 1998 to 2003 he had two daughters in college. With his wife's salary the only income, he was forced to take out extensive loans, for which he still owed \$67,000.00. Appellant considered taking his youngest daughter out of college, which was costing \$30,000.00 a year: "After I started receiving compensation then it made possible for my daughter to complete her education." He requested waiver, as the overpayment was not his fault.

Appellant completed an overpayment recovery questionnaire showing \$11,088.60 in monthly income, \$11,058.56 in monthly expenses, liquid assets of \$4,522.87 and nonliquid assets of \$200,000.00 (current market value) in the form of a second, nonincome producing property.

During a telephone conference, appellant argued that OWCP should consider waiver based on how long it took to correct the pay rate and the manner in which it handled his claim. He informed OWCP that the value of his boat in 2002 was \$20,000.00 and was currently \$10,000.00 most likely. Appellant clarified that one daughter went to college from 1998 to 2004 and the other from 2000 to 2006. He stated that he made a decision to send them to college based on his income during the period he was overpaid. "I took out the loans counting on expected compensation by OWCP.... In addition I used approximately 80% of my savings (lifetime savings) to pay for additional college expenses not reflected in the parent's direct student loans. That left me with my workers' compensation payments to rely on for their education."

In a decision dated October 7, 2010, OWCP finalized its preliminary determination. It found appellant without fault in the creation of a \$43,728.81 overpayment of compensation because he was not and could not have been aware that he was not entitled to the payments he received.

OWCP denied waiver on the grounds that appellant's assets exceeded the specified resource base and because the evidence did not establish detrimental reliance. It explained that he took out the educational loans before he began receiving the incorrect payments in 2003 and there was no evidence that he based his decision to continue paying tuition on his receipt of the overpaid portion of the compensation.

On the issue of recovery, OWCP stated as follows: "OWCP will deduct the amount of \$350.00 from future compensation payments."

On appeal, appellant disputed the calculation of the overpayment, the denial of waiver, the deduction of \$350.00 from future payments and the reduction of his pay rate. He explained that on February 18, 2003 OWCP informed him of the amount of compensation he would receive weekly: "Acting on this information we immediately decided that we could let our daughters continue their studies in their respective Universities." Appellant added that he had the opportunity to transfer one or both to a local college to reduce expenditures: "That again I did made the decision not to bring them home based in the total amount of our combined income at that time including the compensation payment." He argued that the pay rate in the record at the time should remain unchanged because the employing establishment relinquished its right by refusing to provide information.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of pay,³ meaning pay at the time of injury or pay at the time disability begins or pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁴

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.⁵

ANALYSIS -- ISSUE 1

Fact of overpayment is well established. Appellant's January 4, 1998 Form SF-50 supports that he was a GS-13, Step 5 employee on April 15, 1998 (the date of injury/last exposure) with a weekly pay rate of \$1,226.54. He received compensation, however, based on a weekly pay rate of \$1,309.60. This caused an overpayment of compensation from April 15,

² *Id.* at § 8102(a).

³ *Id.* at §§ 8105, 8106.

⁴ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁵ *Id.* at § 8129(a).

1998 through April 10, 2010. The Board will affirm OWCP's October 7, 2010 decision on the issue of fact of overpayment.

OWCP calculated the overpayment by comparing the gross compensation appellant received with the gross compensation he should have received. The difference was \$43,728.81. OWCP did not explain, however, the reason it compared gross compensation. One of the deductions from gross compensation, appellant's basic life premiums, was dependent on his annual base pay. Because OWCP originally used an inflated annual base pay, it deducted more for basic life premiums than it should have, suggesting that the overpayment might be smaller with a comparison of net compensation. The Board will set aside OWCP's October 7, 2010 decision on the amount of overpayment and will remand the case for a clear explanation of why a comparison of gross compensation is appropriate under these circumstances.

LEGAL PRECEDENT -- ISSUE 2

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.⁶ 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.⁷

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 or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment.⁸ Assets may include liquid assets such as cash, the value of stocks, bonds, savings account, mutual funds and certificates of deposit and nonliquid assets such as the fair market value of an owner's equity in property, such as a second home and furnishings/supplies, a boat, a camper, vehicles above the two allowed per immediate family, jewelry and artwork.⁹

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 made, gives up a valuable right or changes his position for the worse.¹⁰ Conversion of the

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

⁹ Procedure Manual, Chapter 6.200.6.a(4). Assets do not include the value of household furnishings (primary residence), wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home that the person maintains as the principal family domicile or income-producing property, if the income from such property has been included in comparing income and expenses.

¹⁰ 20 C.F.R. § 10.437(b).

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.¹¹

ANALYSIS -- ISSUE 2

Appellant was not at fault in creating the overpayment. OWCP found that he was not and could not have been aware that the payments he received were incorrect. This does not mean, however, that appellant may keep money that does not belong to him. 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.

Appellant disclosed that he had assets exceeding \$200,000.00, including a second, nonincome-producing property and a boat. This amount exceeds the specified resource base. The evidence establishes that appellant has financial resources sufficient for more than ordinary needs, that he is not largely or solely dependent upon current benefit payments for the necessities of life. Recovery will, therefore, not defeat the purpose of FECA.¹²

Appellant argued that he made a decision to send his daughters to college based on his income during the period he was overpaid. That would support his reliance on the receipt of compensation benefits in general, but it does not support his reliance on the overpaid amount, which is the relevant inquiry. To establish detrimental reliance, appellant must show that the amount he was overpaid caused him to make a decision, to his detriment, that he would not have otherwise made.¹³ He did not show, therefore, that the \$83.06 error in his weekly pay rate made all the difference, that, if he had instead received compensation benefits at the correct and slightly reduced pay rate, it would not have been possible for his daughters to remain at their respective universities. Recovery, therefore, will not be against equity and good conscience.

As neither condition of waiver is met, the Board finds that OWCP properly denied waiver. The Board will affirm OWCP's October 7, 2010 decision on the issue of waiver.

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the

¹¹ *Supra* note 8, Chapter 6.200.6.b(3) (June 2009).

¹² *Id.*, Chapter 6.200.6(a).

¹³ *See id.*, Chapter 6.200.6.b(3), Example 3: A widow entered her daughter in college because the difference in monthly benefits between her entitlement to a Civil Service death annuity and her entitlement to a FECA death annuity made this possible. Subsequently, it was discovered that all FECA benefits were paid in error. (She remained entitled to OPM benefits). The widow had no other funds from which to pay her daughter's tuition. Because she entered her daughter in college and incurred a financial obligation in spending the benefits, she was in a worse position financially than if she and her daughter had never been entitled to FECA benefits.

financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹⁴

ANALYSIS -- ISSUE 3

Appellant is not entitled to waiver. OWCP must, therefore, recover the overpayment from future compensation payments. It set the rate of recovery at \$350.00, but it did not give due regard to the relevant factors in its October 7, 2010 decision. The decision simply stated: "OWCP will deduct the amount of \$350.00 from future compensation payments." The Board will also set aside OWCP's October 7, 2010 decision on the issue of rate of recovery and will remand the case for a proper consideration of the rate of recovery with due regard to relevant factors.

On appeal, appellant disputes the calculation of the overpayment and the deduction of \$350.00 from future payments. As the Board has found, further action is required on these two issues. But the evidence does not establish appellant's entitlement to waiver. Appellant's financial resources are well in excess of the minimum resource base and the evidence does not establish detrimental reliance. It may be, as he explains, that once OWCP informed him how much compensation he would receive weekly, he immediately decided that he could let his daughters continue their studies at their respective universities. Appellant did not show, however, that he would not have made that decision if OWCP had informed him of the compensation to which he was correctly entitled. He makes an argument that the employing establishment's actions prevent OWCP from correcting his pay rate, but when an overpayment of compensation has been made because of an error of fact or law, the law mandates that OWCP make an adjustment under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹⁵ The law also provides that OWCP may review an award for or against the payment of compensation at any time on its own motion and in accordance with the facts found on review may decrease the compensation previously awarded.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation from April 15, 1998 through April 10, 2010. The Board finds that further action is warranted on the issue of amount. The Board finds that OWCP properly denied waiver of the recovery of the overpayment. The Board also finds that further action is warranted on the issue of rate of recovery from future compensation payments.

¹⁴ 20 C.F.R. § 10.321(a).

¹⁵ 5 U.S.C. § 8129(a).

¹⁶ *Id.* at § 8128(a)(1).

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: January 20, 2012
Washington, DC

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

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

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