

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**S.W., Appellant**

**and  
DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Gallup, NM, Employer**

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**Docket No. 11-1687  
Issued: July 23, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 15, 2011 appellant filed a timely appeal from May 16, 2011 decisions by the Office of Workers' Compensation Programs (OWCP) denying waiver of an overpayment, compromising the principal and setting the rate of recovery.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly denied waiver of recovery of the overpayment in the compromised amount of \$29,300.00; and (2) whether OWCP gave due regard to relevant factors in setting the rate of recovery from continuing compensation.

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<sup>1</sup> Although Gordon Reiselt, Esquire filed the appeal on appellant's behalf, he subsequently withdrew as appellant's counsel.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 19, 1997 appellant, then a 66-year-old respiratory therapist, filed a traumatic injury claim alleging that, on that date, an elevator she was riding came to an abrupt stop and she suffered an injury to her neck and low back strain. On July 15, 1997 OWCP accepted her claim for lumbar strain and cervical strain. It paid appropriate compensation and medical benefits.

OWCP made a preliminary determination on February 24, 2011 that appellant had been overpaid compensation benefits in the amount of \$8,816.79 for the period November 1, 2008 through January 15, 2011. On March 15, 2011 it made a second preliminary determination that she had been overpaid compensation benefits in the amount of \$61,355.08 from September 28, 1997 through October 31, 2008. The total amount of the overpayment was \$70,171.87. The reasons provided by OWCP for both preliminary determinations were that appellant received FECA payments that were not reduced by the Federal Employment Retirement System (FERS) offset amount. It noted that the FERS offset is required due to receipt of social security benefits that were part of her annuity for federal service under FERS. OWCP found that appellant was without fault in creating this overpayment. Appellant was provided 30 days within which to note her disagreement, to request a hearing and submit evidence, including financial documentation.

On March 31, 2011 appellant requested that OWCP make a decision based on the written evidence. She noted that she was not aware of the overpayment.

By letter dated April 11, 2011, appellant, through her attorney, requested waiver of recovery of the overpayment and submitted financial documentation. She listed her income as \$1,314.00 for social security benefits and \$1,389.83 from FECA for a total monthly income of \$2,703.83. Appellant listed expenses of \$359.83 for rent/mortgage; \$229.60 for food; \$152.38 for clothing; \$399.46 for utilities; \$682.30 for insurance; \$549.51 for health expenses; and \$308.99 for miscellaneous. She listed her debts as \$471.00 per month, which included: \$230.00 to Global Client Solution, LLC; \$41.00 to Chase Card Services, \$25.00 to Catherine's Clothing Card; and \$175.00 per month for attorney fees. Appellant noted a checking account balance of \$74.58 and savings of \$138.11. She submitted supporting documentation.

In a May 16, 2011 decision, OWCP finalized the preliminary determinations, finding overpayments in the total amount of \$70,171.87. It found that, even though appellant was without fault in the creation of the overpayment, it determined that circumstances did not warrant waiver of recovery of the overpayment. OWCP determined in a separate decision, also dated May 16, 2011 that the principal had been compromised to the amount of \$29,300.00, which would be recovered by taking \$300.00 from each of appellant's continuing compensation payments. Compromise was made because OWCP determined that she did not have the present or prospective ability to pay the full amount of the overpayments within a reasonable period of time due to her advanced age of 81 years old.

## LEGAL PRECEDENT -- ISSUE 1

Section 8129 of FECA<sup>3</sup> 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. 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 or 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>4</sup> An individual's liquid assets include but are not limited to the value of stocks, bonds, savings accounts, mutual funds and certificates of deposit.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</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>8</sup>

## ANALYSIS -- ISSUE 1

Appellant did not contest the amount of the overpayment. OWCP determined that she was without fault in creating the overpayment. Because appellant is without fault, it may recover the overpayment only if recovery would not defeat the purpose of FECA or be against equity and good conscience.

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<sup>3</sup> 20 C.F.R. §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

<sup>4</sup> *Id.* at § 8129(b).

<sup>5</sup> *See Maria A. McCarthy*, Docket No. 94-219 (issued June 9, 1995).

<sup>6</sup> 20 C.F.R. § 10.436. OWCP's 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).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Appellant requested waiver of recovery of the overpayment and provided information on an overpayment recovery questionnaire. OWCP correctly determined that her monthly income did exceed her monthly expenses by more than \$50.00. The Board finds, therefore, that OWCP properly determined that recovery of the compromised overpayment would not defeat the purpose of FECA. Although appellant's counsel made arguments that it was against equity and good conscience to collect the debt due to appellant's advanced age of 81 years old and the fact that she was not at fault in the creation of the overpayment, the Board finds that OWCP properly took these matters into consideration when it compromised the amount of the overpayment, reducing it from \$70,171.87 to \$29,300.00. Further, there is no evidence in this case and she did not allege that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received. Pursuant to its regulations, OWCP properly found that recovery of the overpayment would not be against equity or good conscience.

As the evidence in this case fails to support that the 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 a waiver of recovery of the compromised overpayment.

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

Section 8129 provides that when an overpayment has been made to an individual because of an error of factor law, adjustment shall be made by decreasing later payments to which the individual is entitled.<sup>9</sup>

Section 10.441 of OWCP's regulations provide that, when 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 or her attention is called to the 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.<sup>10</sup>

Under OWCP's procedure manual, the compromise of all or part of the overpayment and any charges may be made depending upon the individual claimant's financial circumstances in order to set a repayment schedule. Compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established.<sup>11</sup> Compromise is a matter which rests in the discretion of OWCP.<sup>12</sup>

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<sup>9</sup> 20 C.F.R. § 10.436.

<sup>10</sup> *Id.* at § 10.441(a).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5 (May 2004). See *Jorge E. Diaz*, 53 ECAB 403 (2002).

<sup>12</sup> *D.C.*, Docket No. 10-1046 (issued January 19, 2011); *Jorge E. Diaz, id.*; *Linda D. Lane*, 46 ECAB 727 (1995).

## ANALYSIS -- ISSUE 2

OWCP took several factors into consideration in setting there rate of recovery from appellant's continuing compensation, including her financial circumstances, the extent of the overpayment and the amount of time it would take to recover the debt. It determined that the debt would be collected by deducting \$300.00 from each of appellant's continuing compensation payments.

The Board finds that OWCP did not act reasonably in determining the amount to be taken out of appellant's continuing compensation. First, the Board notes that she listed her income as \$1,314.00 for social security benefits and \$1,389.83 from FECA for a total monthly income of \$2,703.83. In the May 16, 2011 decision, OWCP found that appellant had income of \$1,421.83 from FECA benefits and \$1,316.80 income from social security. Then, it added to her income her assets of \$1,200.00, which represented the average monthly balance at Regions Bank and \$345.87 for average monthly balance at Arrest Bank. The monthly income from FECA and social security were added to the bank averages to arrive at total assets of \$4,329.50.<sup>13</sup> Although it is not absolutely clear, OWCP appears to have used the figure of \$4,329.50 as appellant's monthly income. This was not accurate as monthly bank averages should not be counted as income. Appellant's social security check was deposited into her account at Regions Bank and including it as monthly income would result in counting her social security compensation twice. With regard to appellant's usual monthly expenses, OWCP disallowed appellant's credit card bills at Catherine's and Chase, finding that the Catherine's Credit Card charges may be duplicates for clothing expenses and the Chase Credit Card may also be duplicates of other expenses. OWCP already reduced her clothing allowance from the requested \$150.00 to \$100.00 per month. The credit card bills were for past expenses and are appellant's responsibility to pay. The allowances for clothing and other expenses are for continuing expenses, not for past expenses. Other items reduced or not allowed by OWCP include expenses for gifts, second and third telephone, cable television and Internet. These reductions and disallowances were within the discretion of OWCP. Appellant's attorney contended that the second and third telephones were extensions not separate lines. In its decision, OWCP simply mentioned a second and third telephone and found the expense not as ordinary and necessary living expenses. With regard to the telephone bill as well as cable and Internet expenses, it was well within the discretion of OWCP to find that these expenses were not ordinary or necessary.

Due to the questions with regard to how OWCP counted appellant's income and disallowance of credit card payments in determining her monthly income, the case will be remanded for OWCP to reconsider the amount to be taken out of her continuing compensation payments.

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<sup>13</sup> In discussing waiver of recovery when recovery would defeat the purpose of FECA, OWCP's procedures provide that income includes but is not limited to government benefits, wages, self-employment income, regular payments such as rent or pension, investment income, alimony and child support. Federal (FECA) Procedure Manual, *supra* note 11, *Debt Management, Initial Overpayment Actions*, Chapter 6.200.6(a)(2). In determining the amount of an employee's income, the Board has held that total income includes "any funds which may be reasonably considered available for his or her use, regardless of source." *See generally Otto A. Fernandez*, 55 ECAB 558 (2004); *see also F.B.*, Docket No. 09-1945 (issued September 10, 2010).

**CONCLUSION**

The Board finds that OWCP properly denied waiver of recovery of the overpayment in the compromised amount of \$29,300.00. The case will be remanded for OWCP to reconsider the amount to be recorded from appellant's continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 16, 2011 is affirmed in part and remanded in part for further consideration consistent with this opinion.

Issued: July 23, 2012  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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