

FACTUAL HISTORY

OWCP accepted that on April 14, 2005 appellant, then a 56-year-old flat sorting machine operator, sustained a cervical strain, lumbar strain and muscle spasm due to tripping over a mat at work. She received OWCP compensation for periods of disability.

The record reflects that appellant's annual salary exclusive of premium pay and overtime on April 14, 2005 was \$46,026.20. Dividing her annual salary by 52 weeks yields a weekly amount of \$885.12. Appellant's total earnings for night differential pay in the year prior to her April 14, 2005 work injury equaled \$3,392.08 (or \$65.23 a week) Her total earnings for holiday pay in the year prior to her work injury equaled \$508.62 (or \$9.78 a week) and for Sunday premium pay equaled \$2,157.24 (or \$41.49 a week). Appellant's total weekly gross pay based on her date-of-injury pay rate was \$1,001.62.

After an audit of the case file, it was determined that OWCP paid appellant at an incorrect pay rate for the period May 30, 2005 to August 28, 2010. During this period, OWCP paid appellant \$1,182.12 a week, rather than \$1,001.62 a week. The error occurred because it paid her night, holiday and Sunday premium pay at double the amount to which she was entitled. For the period May 30, 2005 to August 28, 2010, appellant was paid \$216,001.67 but should have received \$190,252.90.

In an October 21, 2010 notice, OWCP advised appellant of its preliminary determination that she received a \$25,748.77 overpayment of compensation for the period May 30, 2005 to August 28, 2010. Appellant was paid compensation at an incorrect amount during this period. OWCP provided calculations showing that the overpayment was created because she received night, holiday and Sunday premium pay at double the amount to which she was entitled. It also made a preliminary determination that appellant was not at fault in the creation of the overpayment. OWCP advised her that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed appellant that she could submit additional evidence in writing or at precoupment hearing. 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 requested a precoupment hearing before an OWCP hearing representative. Prior to the hearing, she submitted a Form OWCP-20 which she completed on November 12, 2010. Appellant indicated that she had \$4,723.00 in monthly income comprised of \$1,773.00 in social security benefits and \$2,950.00 in FECA wage-loss compensation. She listed \$4,896.65 in monthly expenses, including \$911.00 for mortgage/condominium fees, \$225.00 for food, \$100.00 for clothing, \$255.00 for utilities, \$1,248.00 for miscellaneous expenses and \$2,157.65 for debt payments.²

² Appellant listed assets of \$4,614.72 comprised of cash and amounts in checking and savings accounts. She listed the expenses that made up her miscellaneous expenses, including itemized expenses for housekeeping, cell phone, gasoline, automobile repair, cleaning supplies, unreimbursed medical expenses, personal products, house insurance, travel, entertainment, gifts and church fees. Appellant also provided a list of the entities to which she made monthly debt payments and listed the monthly amounts paid to each entity.

At the April 14, 2011 hearing, appellant discussed the creation of the overpayment and contended that she should not have to repay \$25,748.77 because OWCP erred in creating the overpayment. She discussed her financial situation noting that her social security benefits had dropped significantly since she completed the Form OWCP-20 on November 12, 2010. OWCP's hearing representative provided appellant an opportunity to provide additional documents to support her claimed monthly expenses.

Appellant submitted additional financial documents, including records of monthly payments for expenses such as automobile maintenance, gasoline, cleaning supplies, personal products, medicines, telephone service and automobile insurance. She also submitted documents relating to monthly payments she made to pay off debts to various entities.

In a June 14, 2011 decision, OWCP's hearing representative determined that appellant received a \$25,748.77 overpayment of compensation. She found that appellant was not at fault in the creation of the overpayment but that it was not subject to waiver.³ With respect to the denial of waiver of the overpayment, the hearing representative determined that, even though appellant listed monthly expenses that were greater than her monthly income, she did not adequately document her monthly expenses or establish that recovery of the overpayment would cause hardship. In the absence of such evidence, appellant did not show that she needed substantially all of her income to meet current ordinary and necessary living expenses. The hearing representative discussed appellant's financial documents and stated:

"I find that the claimant has inflated her monthly obligations without further documentation to support her statement. For example she listed other debts as \$2,157.65 and other expenses \$1,248.00.... While the claimant states that she is financially unable to repay the full amount of the overpayment and she listed several monthly expenses for consideration, the listed expenses were not documented, based on those considered ordinary and necessary monthly living expenses."

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 his duty.⁴ 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."⁵

³ It was found that repayment of the overpayment would be made by deducting \$200.00 from appellant's compensation payments every four weeks.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

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 receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶

Section 8105(a) of FECA provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic compensation for total disability.”⁷ Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly 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....”⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$25,748.77 overpayment of compensation. The record contains evidence showing that between May 30, 2005 and August 28, 2010 she received compensation based on an improper pay rate. During this period, OWCP paid appellant \$1,182.12 a week, rather than the correct amount of \$1,001.62 a week. The error occurred because OWCP paid her night, holiday and Sunday premium pay at double the amount to which she was entitled. For the period May 30, 2005 to August 28, 2010, appellant was paid \$216,001.67 but should have received \$190,252.90. Therefore, the record contains evidence which shows that she received \$25,748.77 in duplicate payments. OWCP properly determined that appellant received a \$25,748.77 overpayment of compensation.⁹

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.¹⁰ 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.”¹¹ If OWCP finds a claimant to

⁶ *Id.* at § 8116(a).

⁷ *Id.* at § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents. *Id.* at § 8110(b).

⁸ *Id.* at § 8101(4).

⁹ The record reflects that it was proper to calculate appellant’s pay rate based on her date-of-injury pay as she was not entitled to a recurrent pay rate. *See supra* notes 7 and 8.

¹⁰ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

¹¹ 5 U.S.C. § 8129(b).

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 his 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.¹² 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 his position for the worse.¹³ 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.¹⁴

In determining a claimant's entitlement to compensation benefits, OWCP is required by statute and regulations to make findings of fact.¹⁵ Its procedures further specify that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."¹⁶ These requirements are supported by Board precedent.¹⁷

ANALYSIS -- ISSUE 2

OWCP denied appellant's request for waiver of recovery of the \$25,748.77 overpayment indicating that she did not show that such waiver was warranted under FECA. The Board finds, however, that OWCP did not provide adequate facts and findings in connection with this determination.

¹² 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his 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 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).

¹³ *Id.* at § 10.437(a), (b).

¹⁴ *Id.* at § 10.437(b)(1).

¹⁵ 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹⁷ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

In her June 14, 2011 decision, OWCP's hearing representative determined that, even though appellant listed monthly expenses that were greater than her monthly income, she had not adequately documented her monthly expenses and therefore had not shown that recovery of the overpayment would cause hardship. She generally indicated that appellant inflated her monthly expenses, but she did not provide any specific discussion of which expenses she felt were inflated or why she felt that they were excessive. The hearing representative questioned appellant's miscellaneous monthly expenses and monthly debt payments, but she did not provide adequate findings of which expenses were not supported. Appellant listed the individual expenses that made up her miscellaneous expenses and provided a list of the entities to which she made monthly debt payments and the amounts she paid. She also submitted financial documents which related to a number of these miscellaneous expenses and debt payments. The hearing representative did not discuss which of the itemized expenses or the financial documents submitted by appellant were inadequate. She suggested that some of the listed monthly expenses did not constitute ordinary and necessary living expenses, but she did not identify any specific expenses which she felt were not ordinary and necessary.¹⁸

The case will be remanded to OWCP for further clarification, including the provision of additional detailed findings, regarding the issue of waiver of recovery of the \$25,748.77 overpayment. After such development as it deems necessary, OWCP should issue an appropriate decision regarding this matter.¹⁹

CONCLUSION

The Board finds that appellant received a \$25,748.77 overpayment of compensation. The Board further finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment.

¹⁸ Moreover, OWCP's hearing representative did not make a clear finding about appellant's monthly income. At the April 2011 hearing, appellant noted that the amount of her social security benefits had dropped significantly since she completed the Form OWCP-20 on November 12, 2010. The hearing representative did not address this circumstance in her June 14, 2011 decision.

¹⁹ Given the Board's finding regarding the issue of waiver of recovery of the overpayment, it is premature to consider the issue of the method of repayment of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment. The June 14, 2011 decision is set aside with respect to the issue of waiver of recovery of the overpayment. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 20, 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