



## **FACTUAL HISTORY**

OWCP accepted that on or before September 29, 2011 appellant, then a 44-year-old distribution clerk, sustained post-traumatic stress disorder. Appellant stopped work on November 19, 2011 and did not return. She received compensation on the daily rolls beginning on May 18, 2002. OWCP placed appellant on the periodic rolls effective February 23, 2003.

OWCP implemented a vocational rehabilitation effort, including testing and a placement plan with the employment goal of general office clerk. Appellant, however, paid for and completed a training course in massage therapy and began work as a massage therapist and colon hydrotherapist in January 2004. OWCP obtained information regarding entry level wages for massage therapists in her commuting area. By notice dated July 23, 2004 and finalized August 24, 2004, it reduced appellant's compensation based on her projected earnings of \$232.00 a week as a massage therapist. OWCP issued the loss of wage-earning capacity determination by decision dated October 19, 2005. Appellant received wage-loss compensation on the daily rolls in 2007 and 2008 based on the loss of wage-earning capacity determination.

On December 4, 2009 appellant elected to receive FECA benefits effective November 3, 2009.

By notice dated March 3, 2010 and finalized October 26, 2010, OWCP found a \$20,896.43 overpayment of compensation for the period August 10, 2007 to July 5, 2008 as appellant received OPM retirement benefits simultaneously with FECA benefits for that period.

In a June 21, 2011 letter, OWCP advised appellant that she would be paid FECA compensation on the periodic rolls at the rate of \$2,778.00 every four weeks beginning June 5, 2011, based on a weekly pay rate of \$833.02. It determined the \$833.02 weekly pay rate based on the current salary for appellant's date-of-injury position. On July 18, 2011 OWCP authorized \$55,875.43 in retroactive compensation from November 3, 2009 to May 31, 2011 based on the weekly date-of-injury pay rate of \$833.02. It then subtracted the \$20,211.39 overpayment and \$30,211.39 OPM disbursement, leaving a net payment of \$5,472.65.

In an August 17, 2011 worksheet, OWCP noted that it had paid appellant \$61,828.29 in compensation for the period November 3, 2009 to July 30, 2011 based on her date-of-injury pay rate of \$833.02 a week. Appellant was only entitled to \$45,739.82 in compensation for that period under the August 24, 2004 wage-earning capacity determination. Subtracting a \$5,676.06 deduction credit from the gross difference of \$16,088.47, OWCP calculated a \$10,412.41 overpayment of compensation.

By notice dated August 23, 2011, OWCP advised appellant of its preliminary determination that she received an overpayment in the amount of \$10,412.41 for the period November 3, 2009 to July 30, 2011 as it paid compensation based on her date-of-injury pay rate and not under the August 24, 2004 wage-earning capacity determination. It found that she was without fault in creating the overpayment. Appellant was afforded 30 days to request a telephone conference, prerecoumpment hearing or a final decision based on the record. OWCP also requested financial information and any arguments supporting waiver of the overpayment.

Appellant requested a prerecoupment hearing, held January 6, 2012. She submitted information concerning her income and expenses. At the hearing, appellant disputed the fact and amount of the overpayment, contending that OWCP did not explain how it calculated the overpayment. She stated that she had a \$12,500.00 real property interest and held the mortgage on a \$45,000.00 residence in which her daughter lived. The hearing representative held the record open for 30 days with a two-week extension to enable appellant to receive and review her case record from OWCP. In a January 31, 2012 letter, appellant requested a two- to three-month extension to review documents received from OWCP. She did not submit additional evidence or argument prior to March 30, 2012.

By decision dated March 30, 2012, OWCP's hearing representative finalized the fact and amount of the overpayment. Although appellant was found to be without fault in the creation of the overpayment, OWCP denied waiver of recovery as she did not provide documentation of her income and expenses. It found that appellant's asset of a \$12,500.00 property interest exceeded the \$8,000.00 asset base for a married individual.<sup>2</sup> Also, appellant did not argue or demonstrate that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation. Therefore, recovery of the overpayment would not be against equity and good conscience.

### **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.<sup>3</sup> 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."<sup>4</sup>

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in FECA, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, or a total of 75 percent of monthly pay.<sup>5</sup>

If there is a wage-earning capacity determination in place at the time a claimant becomes eligible for compensation, compensation will be paid under that determination unless there are

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<sup>2</sup> OWCP noted that appellant did not submit supporting financial documentation, but accepted his listing of assets, income and expenses as factual.

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> *Id.* at § 8110(b).

demonstrated grounds for modification.<sup>6</sup> Once OWCP determines the employee's wage-earning capacity, a modification of the determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been vocationally rehabilitated or retrained, or the original determination was erroneous. These are the customary criteria for modification. The burden of proof is on the party attempting to demonstrate that a modification of the wage-earning capacity determination is warranted.<sup>7</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$10,412.41. The record reflects that, from November 3, 2009 to July 30, 2011, she was paid compensation benefits based on her date-of-injury pay rate and not based on the August 24, 2004 wage-earning capacity determination. As the August 24, 2004 wage-earning capacity determination remained in place from November 3, 2009 to July 30, 2011, appellant's monetary compensation should have been at the reduced rate based on her constructed earnings as a massage therapist.

OWCP calculated that, under the wage-earning capacity determination, appellant was entitled to \$45,739.82 in compensation based on her ability to earn wages in the constructed position of massage therapist.<sup>8</sup> Appellant was paid \$61,828.29 for that period based on her date-of-injury pay rate. OWCP subtracted a \$5,676.06 deduction credit from the \$16,088.47 difference, resulting in a \$10,412.41 overpayment. The Board will affirm OWCP's determination as to the fact and amount of the overpayment.

On appeal, appellant contests the fact and amount of the overpayment. As stated, OWCP properly found that she should have received monetary compensation under the August 24, 2004 wage-earning capacity determination. It correctly calculated the \$10,412.41 overpayment.

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

Section 8129(a) of FECA provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without

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<sup>6</sup> Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition. *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>7</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>8</sup> *Karen L. Lonon-Jones*, *supra* note 6.

fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>9</sup>

OWCP regulations, at 20 C.F.R. § 10.438(a), state that the overpaid individual “is responsible for providing information about income, expenses and assets as specified by [OWCP]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of [FECA] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.”<sup>10</sup>

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

Although appellant was found without fault in creating the \$10,412.41 overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP noted that she did not provide adequate documentation regarding her income and expenses. It found that appellant’s assets of \$12,500.00 exceeded the resource base of \$ 8,000.00 for an individual with a spouse. The Board finds that OWCP properly determined that she was not entitled to waiver.<sup>11</sup>

Further, as it appears that appellant would not experience severe financial hardship in attempting to repay the debt and she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation. Recovery of the overpayment is not considered to be against equity and good conscience. The Board finds that OWCP properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.<sup>12</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$ \$10,412.41 for the period November 3, 2009 to July 30, 2011. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment.

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<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 20 C.F.R. § 10.438.

<sup>11</sup> *Id.* at § 10.436; *G.B.*, Docket No. 11-1568 (issued February 15, 2012).

<sup>12</sup> *G.B.*, *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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