

On appeal, appellant alleged that repayment would cause hardship as he had \$63.27 extra income over expenses. He stated that requiring repayment is against equity and good conscience.

FACTUAL HISTORY

On February 9, 1998 appellant, then a 46-year-old rural carrier, filed an occupational disease claim alleging that he developed a right elbow condition due to sorting and handling mail in his delivery vehicle. He returned to full duty on February 16, 1998. OWCP accepted this claim for right lateral epicondylitis on May 13, 1998.

Appellant filed a traumatic injury claim on February 4, 2000 alleging that he slipped and fell on ice injuring his head, neck and shoulders. OWCP accepted his claim for closed head injury, right shoulder strain and contusion and cervical strain on March 15, 2000. Appellant underwent an anterior cervical discectomy and fusion at C5-6 with allograft and syntheses plate on June 5, 2000. He underwent removal of the anterior cervical plate, partial C5 and C6 carpectomies, anterior cervical fusion C5-6 and harvest of right iliac crest graft on May 31, 2001. Appellant returned to work on November 5, 2002.

Appellant underwent right shoulder arthroscopy with subacrominal decompression, distal clavicle excision and biceps tenodesis on July 6, 2009 and stopped work on that date. OWCP began compensation payments to him for total disability on July 6, 2009. By decision dated September 14, 2009, it accepted that appellant sustained the additional conditions of aggravation of a complete rupture of his left rotator cuff. OWCP entered him on the periodic rolls on September 16, 2009.

On November 19, 2009 OWCP was informed that appellant opted for an early retirement from the employing establishment. In a letter dated December 9, 2009, appellant requested information regarding switching his benefits from OWCP, *i.e.*, to the Office of Personnel Management (OPM). He also requested a schedule award on that date. In a letter dated January 14, 2010, OWCP informed appellant of his rate of compensation and the necessity to elect between FECA and OPM benefits. It stated, "Annuity benefits paid by OPM (including any lump sum payment made as a part of an alternative annuity...) and benefits for wage loss paid by OWCP are not payable for the same period of time." In a separate letter of the same date, OWCP informed appellant that he was not entitled to receive both compensation benefits and a schedule award concurrently from OWCP. It requested a medical report regarding his permanent impairment. Appellant elected FECA benefits effective January 25, 2010.

The employing establishment provided a notification of personnel action effective October 31, 2009 indicated that appellant's last day in pay status was July 3, 2009 and that he was to be paid for all accumulated leave to which he was entitled. OWCP completed a memo to file on March 22, 2010 and noted that appellant received a retirement incentive payment on October 31, 2009 in the amount of \$10,000.00. It noted that under FECA such separation incentive payments constituted a dual benefit. OWCP in accordance with its procedure manual calculated the overpayment.³ It noted that appellant received compensation for temporary total

³ Federal (FECA) Procedure Manual Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17(d) (June 2009).

disability and that he received a \$10,000.00 incentive payment with an effective date of October 31, 2009. OWCP stated that he had a weekly salary of \$1,143.61 with an effective pay rate of July 6, 2009. It determined that appellant was not entitled to compensation for 8.74 weeks, the total amount of separation pay received, divided by the weekly salary. OWCP determined that he received dual benefits from October 31 to December 31, 2009 or 8.74 weeks. It provided appellant with a letter dated March 22, 2010 which included these calculations and explanation.

In a preliminary determination dated March 29, 2010, OWCP found that appellant received an overpayment of compensation in the amount of \$7,596.84 because he received dual benefits. By decision dated May 26, 2010, it found that he received an overpayment of compensation in the amount of \$7,596.84 as he received dual payments from OWCP and OPM. OWCP found that appellant was not entitled to waiver of the overpayment as he did not provide information that recovery would defeat the purpose of FECA or be against equity and good conscience.

Appellant participated in a conference call on October 1, 2010. He provided financial information including the names of his debtors. Appellant also provided billing statements.

In an *Order Remanding Case* dated December 14, 2010,⁴ the Board determined that in its May 26, 2010 decision, OWCP did not follow its guidelines and procedures in determining whether waiver of recovery of the overpayment was warranted under FECA and remanded the case in order that OWCP could issue a new preliminary overpayment determination followed by appropriate development and a new decision.

In a letter dated February 4, 2011, OWCP informed appellant of its preliminary determination that he was overpaid in the amount of \$7,596.84 due to a retirement incentive payment which he received on October 31, 2009 in the amount of \$10,000.00.⁵ It stated that this payment constituted dual benefits and provided calculations of the amount of the overpayment. OWCP stated that appellant was without fault in the creation of the overpayment as he was not aware that his compensation benefits were paid incorrectly. It requested that he completed an overpayment recovery questionnaire.

Appellant requested a preresoupment hearing. He requested waiver of recovery of the overpayment and stated that he was not aware that he could not receive his incentive payment and his compensation benefits. Appellant submitted an overpayment recovery questionnaire indicating that he received OPM benefits in the amount of \$2,615.59 a month and that he

⁴ Docket No. 10-1711 (issued December 14, 2010).

⁵ OWCP rescinded the May 26, 2010 decision on June 23, 2010 after appellant filed his appeal to the Board. On September 23, 2010 it issued another preliminary determination of overpayment due to an October 31, 2009 retirement incentive payment. OWCP noted that appellant had not received the overpayment recovery questionnaire needed to determine waiver. It finalized this decision on November 1, 2010 finding that waiver was warranted. The Board and OWCP may not simultaneously have jurisdiction over the same case. Because OWCP must review its prior decision in order to determine whether appellant submitted additional new and relevant evidence, OWCP may not issue a decision regarding the same issue on appeal before the Board. It therefore did not have the authority to issue its June 23 and November 1, 2010 decisions. *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

supported his wife. He listed his expenses which included a mortgage payment of \$1,285.59, food expenses of \$300.00, clothing expenses of \$50.00, utilities of \$310.00 and other expenses of \$340.00. Appellant listed his monthly debts as \$184.40 to American Express, \$155.00 to Progressions CU, \$54.00 to Capital One, \$155.00 to Bank of America, \$314.00 to Chase, \$83.00 to Bank of Omaha and \$368.44 car payment to BB&T. He listed his assets as a checking account balance of \$184.00, savings account balance of \$50.00 and other personal property and funds of \$2,500.00. Appellant provided documentation of his monthly debts.

OWCP granted appellant a schedule award for 12 percent loss of use of his right arm on March 15, 2011. On April 21, 2011 appellant received a schedule award for an additional two percent impairment of his right arm. By decision dated May 5, 2011, OWCP modified the April 21, 2011 decision to reflect two percent impairment for the left upper extremity. Appellant requested an oral hearing of his schedule award decisions on May 18, 2011.

Appellant testified at his precoupment hearing on June 7, 2011. He agreed that he received an incentive that was a double payment. Appellant stated that he was without fault in the creation of the overpayment as he spoke to persons with OWCP and OPM and was not informed that the incentive would result in dual benefits. He stated that he should not have to repay the overpayment. Appellant noted that OWCP had issued decisions stating that waiver was appropriate in his case, which were voided by his appeal to the Board. OWCP's hearing representative requested additional financial information from appellant as he had received schedule awards.

Appellant provided additional financial information on June 16, 2011 and stated that his income from OPM was \$2,615.00 and that his expenses included a mortgage payment of \$1,276.73, utilities of \$425.00, automobile expenses of \$300.00, food expenses of \$300.00, clothing costs of \$75.00, medical expenses of \$225.00 as well as outstanding monthly debts consisting of six credit cards with individual minimum payments of \$100.00, \$144.00, \$328.00, \$75.00, \$77.00 and \$52.00. He calculated his expenses at \$2,501.73.⁶

Appellant stated that he paid for his car and some credit card debt with his schedule award payments. He noted that his wife was scheduled for two surgeries in the next three months. Appellant noted that he had \$200.00 in his checking account and \$50.00 in his savings account.

By decision dated August 16, 2011, OWCP's hearing representative found that appellant received dual benefits in the amount of \$7,596.84 as he received total disability compensation and \$10,000.00 retirement incentive pay. He found that appellant was without fault in the creation of the overpayment. However, the hearing representative found that the overpayment must be recovered. He found that appellant had a resource base of \$250.00, less than \$8,000.00, but that appellant's income exceeded his expenses by \$113.27, more than the \$50.00 allowed by OWCP's procedure manual. The hearing representative noted that appellant had not alleged that he relied on the overpayment to his detriment. As appellant had sufficient resources, he determined that the overpayment was not subject to waiver and that appellant must make repayment. The hearing representative found that, as appellant did not have continuing

⁶ The Board calculates appellant's listed expenses as \$3,377.73.

compensation benefits, the overpayment should be refunded immediately to avoid interest penalties.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁷ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁸ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States.⁹ Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay (which is also known as retirement incentive pay).¹⁰ OWCP discovers concurrent receipt benefits it must declare an overpayment in compensation and give the usual due process rights.¹¹

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.¹² Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$7,596.84 due to a retirement incentive of \$10,000.00 received on October 31, 2009. OWCP provided him with calculations dividing the amount of the separation incentive, \$10,000.00, by his weekly salary, \$1,143.61, finding an overpayment of 8.74 weeks or \$7,596.84. Appellant has not contested the fact or amount of the overpayment. The Board finds that OWCP properly determined the fact and amount of the overpayment received by appellant.

⁷ 5 U.S.C. §§ 8101-8193, 8102.

⁸ *Id.*

⁹ *Id.* at § 8116(a).

¹⁰ 20 C.F.R. § 10.421(c).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

¹² *See L.J.*, Docket No. 10-510 (issued October 1, 2010).

¹³ Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of week's worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17(d) (June 2009); *see R.H.*, Docket No. 08-2025 (issued July 20, 2009).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹⁴ The only exception to this requirement that an overpayment must be recovered as set forth 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 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 is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of [FECA] or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations¹⁵ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of her 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 \$8,000.00 for an individual with one dependant.¹⁶ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹⁷

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.¹⁸ Conversion of the 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.¹⁹

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ 20 C.F.R. § 10.436.

¹⁶ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.437(b).

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$7,596.84 overpayment, repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP's hearing representative accepted all the financial disclosures appellant made and found that his monthly income exceeded monthly expenses by \$113.27. The Board finds that, based on appellant's most recent financial statement, appellant listed income of \$2,615.00 and monthly expenses of \$3,377.73. The Board is unable to determine how he and the hearing representative reached the monthly expenses figure of \$2,501.73. The hearing representative did not discuss or discount any of appellant's monthly expenses and did not explain how he reached the monthly expenses figure of \$2,501.73.

In view of these circumstances further development is needed to determine whether appellant's monthly income exceeds his expenses and whether recovery of the overpayment would cause undue hardship. Because OWCP denied waiver of recovery of the overpayment without giving due consideration to the evidence regarding his current income and expenses, the Board finds that OWCP did not properly exercise its discretion in the matter.²⁰ The Board will set aside the August 16, 2011 decision on the issue of waiver and remand the case for proper exercise of discretion. After such development as may be necessary, OWCP shall issue an appropriate final decision on whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,596.84 for which he was not at fault. The Board also finds that the case is not in posture for decision regarding his eligibility for waiver of denial of the overpayment.

²⁰ See *I.P.*, Docket No. 11-1868 (issued June 5, 2012).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2011 decision are affirmed with respect to fact, amount and fault in the creation of the overpayment and set aside and remanded for further action with respect to the denial of waiver of recovery of the overpayment.

Issued: October 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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