

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

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**D.D., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Oxford, WI, Employer**

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**Docket No. 12-675  
Issued: October 9, 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  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 6, 2012 appellant filed a timely appeal of an August 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment.<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 to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$6,387.84 for the period August 26, 2010 through February 12, 2011 for which he was not at fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

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<sup>1</sup> Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received; thus the Board has decided the appeal on the record.

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

On appeal, appellant contested the amount of the overpayment, alleging that OWCP should have ended his benefits in a timely manner to avoid an overpayment and that interest should not be collected on the overpayment. He stated that he and his wife maintained separate households and that her income should not have been considered. Appellant argued that his Thrift Savings Plan should not have been considered as available to him when determining waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

This case has previously been before the Board on appeal. On October 31, 2002 appellant, then a 49-year-old correction treatment specialist, filed an occupational disease alleging that he developed work stress due to his federal employment. OWCP denied his claim and he appealed to the Board. By decision dated April 26, 2005, the Board found that appellant had established a compensable factor of employment, error in his termination from work in November 1999. The Board further found that the medical evidence in the record did not establish that this factor caused or contributed to his diagnosed emotional condition.<sup>3</sup> The facts and circumstances in the case as set out in the Board's prior decision are adopted herein by reference.

Following the April 26, 2005 decision, OWCP accepted appellant's claim for anxiety state and major depressive disorder. In a letter dated August 16, 2010, appellant informed OWCP that beginning August 26, 2010 he would be working as an assistant professor. He requested that his retirement annuity begin and his OWCP payments cease on August 26, 2010. OWCP responded on September 24, 2010 and stated that appellant would soon receive an election of benefits form. In a memorandum dated October 21, 2010, the Office of Personnel Management (OPM) informed OWCP of his election of retirement benefits effective August 26, 2010. In a letter dated December 14, 2010, OWCP again stated that appellant would soon receive an election of benefits form.

Appellant completed a Form CA-1032 on December 24, 2010 and listed his employment beginning August 26, 2010 earning \$17,777.78 in 2010 or \$4,444.00 per month. He further indicated that he was married and that his wife lived with him. Appellant stated that he was not receiving retirement or disability retirement benefits from OPM. On December 31, 2010 he informed OWCP that he had not yet received the election of benefits form.

In a letter dated February 16, 2011, OWCP informed appellant that his compensation benefits were terminated effective February 13, 2011 as his actual wages appear to meet or exceed the wages of the job he held when injured. It noted that he had received an overpayment of compensation and requested information regarding his earnings since August 26, 2010.

Appellant responded on March 1, 2011 and stated that his salary was \$40,000.00 per year or \$3,333.33 per month. He provided a paystub supporting his monthly pay rate. Appellant elected to receive his compensation over nine months rather than one year. He stated that his monthly OWCP compensation rate was \$3,897.00.

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<sup>3</sup> Docket No. 04-2190 (issued April 26, 2005).

On March 9, 2011 OWCP informed appellant that he was entitled to compensation every four weeks of \$1,713.00 or \$1,855.75 per month. It provided him with an election form. In a letter dated March 14, 2011, OWCP informed appellant that, at the time of receipt of his August 16, 2011 letter, OWCP should have determined his wage-earning capacity and provided him with an election of benefits. Because it failed to perform these actions, appellant received an overpayment as he received compensation benefits as well as earnings.

Appellant completed the election form on March 20, 2011 and elected retirement benefits effective August 26, 2010. In a letter dated April 8, 2011, OWCP requested \$21,387.84 from OPM as reimbursement for compensation paid from August 26, 2010 through February 12, 2011. OPM responded on May 18, 2011 and noted that \$15,000.00 had been collected from appellant's accrued annuity. It stated that, before the balance of the overpayment could be collected, OWCP must establish that he had received due process.

In a letter dated June 13, 2011, OWCP informed appellant of the preliminary determination that he had received an overpayment of compensation in the amount of \$6,387.84 because he received both OPM and OWCP benefits during the period August 26, 2010 through February 12, 2011. It found that he was without fault in the creation of the overpayment. OWCP calculated the overpayment by determining the gross amount of compensation paid from August 1, 2010 to February 12, 2011, to be \$27,279.00 and the net overpayment to be \$24,465.30. These calculations were based on seven full 28-day periods from August 1, 2010 through February 12, 2011 with gross compensation of \$3,897.00 each. OWCP then reduced this amount by \$3,479.46 the gross amount that appellant was entitled to for the period August 1 through 25, 2010 to reach a gross overpayment of \$23,799.54. It reduced the \$3,479.46 by his health deductions, optional and basic life insurance deductions to reach the net amount of overpayment for August 1 through 25, 2010 of \$3,077.46. OWCP subtracted the net overpayment of \$24,465.30 minus \$3,077.46 to reach \$21,387.84. It then deducted the \$15,000.00 provided by OPM to reach a remaining overpayment of \$6,387.84. OWCP requested financial information from appellant within 30 days and informed him of the penalties of section 10.438 of OWCP's regulations.<sup>4</sup> In a telephone memorandum dated July 12, 2011, the claims examiner noted allowing appellant a two-week extension to provide financial information or to July 27, 2011.

Appellant completed an overpayment recovery questionnaire on July 28, 2011. He indicated that his monthly retirement income was \$2,348.79, that his salary was \$3,553.61 and that his wife received benefits in the amount of \$1,643.00 per month for monthly income of \$7,545.40. Appellant indicated that he owned stocks valued at \$5,267.72. He reported three bank accounts with current balances of \$921.75, \$790.26 and \$10,426.44. Appellant alleged outstanding and projected debts of \$11,500.00 due to contracted household repairs of \$3,500.00 and projected medical expenses due to dental, eye and shoulder surgeries of \$8,000.00. He also listed credit card debts of \$1,300.63 per month. Appellant provided the expenses for two households including rent, food and utilities for a home in Pulaski, Tennessee totaling \$969.65 per month and mortgage, food, utilities and expenses of \$2,126.76 for his permanent residence.

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<sup>4</sup> 20 C.F.R. § 10.438.

He provided estimates of medical costs based on surgeries for both his wife and himself. Appellant noted that the value of his Thrift Savings Plan was \$29,000.00.

Appellant also disagreed with the amount of the overpayment stating that the difference between the gross OPM benefits and FECA benefits was \$463.46 per month and that multiplying this amount by six months, to account for the period from the end of August 2010 to the middle of February 2011 resulted in an overpayment of \$2,780.76 rather than \$6,387.84. He stated that more funds should have been recovered from OPM.

In a decision dated August 10, 2011, OWCP found that appellant received an overpayment in the amount of \$6,387.84 for the period August 26, 2010 through February 12, 2011 as he received dual benefits. It found that he was not at fault in the creation of the overpayment and determined to recover the overpayment by collecting \$250.00 from his OPM benefits per month. OWCP determined that waiver of recovery of the overpayment was not appropriate as appellant had monthly income of \$6,830.39 and household assets of \$46,406.17 including bank accounts, stocks and his Thrift Savings Plan. Appellant's monthly expenses were \$6,591.21. OWCP found that his monthly expenses exceeded income by more than \$50.00 but that as his assets were more than \$8,000.00 he was not entitled to waiver of recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>5</sup> 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.<sup>6</sup>

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, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.<sup>7</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>8</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8102.

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8116(a).

<sup>8</sup> 20 C.F.R. § 10.421(a).

<sup>9</sup> *Id.*

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

Appellant elected to receive OPM benefits effective August 26, 2010, but continued to receive compensation benefits from OWCP through February 12, 2011. As he was not entitled to receive dual benefits under FECA, he received an overpayment.

OWCP calculated the amount of the overpayment by determining the amount of compensation benefits that appellant received from August 26, 2010 through February 12, 2011 and reducing this amount by the \$15,000.00 paid by OPM. It determined that he received an overpayment in the amount of \$6,387.84. OWCP has provided detailed calculations and documentation of the method used to calculate the amount of the overpayment.

On appeal, appellant disagreed with the amount and opined that the overpayment should only be \$2,780.76, as the difference between the gross OPM benefits and his FECA benefits was \$463.46 per month. He has not submitted the necessary documentation in the record to support his claim. Appellant reported that he was currently receiving \$2,348.79 from OPM and the record supports that his net 28-day payment from OWCP was \$3,371.98. Based on this rough method of calculating the overpayment, there is a difference of \$1,023.19 every 28 days rather than \$463.46 as asserted by appellant, resulting in a calculation of an overpayment of approximately \$6,139.14. Thus using appellant's own method of calculating the overpayment results in a figure greater than \$2,780.76.

The Board finds that OWCP has established that appellant received an overpayment of compensation in the amount of \$6,387.84 and that he received dual benefits from OPM and OWCP for the period August 26, 2010 through February 12, 2011.

### **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.<sup>10</sup> The only exception to this requirement that an overpayment must be recovered is 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 recovery of 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.

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<sup>10</sup> 5 U.S.C. § 8129(a).

Section 10.436 of the implementing regulations<sup>11</sup> provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

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>12</sup>

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as 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.<sup>13</sup> This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>14</sup>

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

OWCP found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or be against equity and good conscience. In order to defeat the purpose of FECA it must be established that a claimant needs substantially all current income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit (currently \$8,000.00 for a claimant with a spouse and \$960.00 for each additional dependent).<sup>15</sup> If the nonexempt assets exceed the established limit, then recovery of the overpayment would not defeat the purpose of FECA.

Appellant provided financial information in support of his request for waiver of recovery of the overpayment. He stated that his Thrift Savings Plan contained \$29,000.00. The Board has held that a claimant's contributions to a Thrift Savings Plan and earnings from these

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<sup>11</sup> 20 C.F.R. § 10.436.

<sup>12</sup> *Id.* at § 10.437.

<sup>13</sup> *Id.* at § 10.438(a).

<sup>14</sup> *Id.* at § 10.438(b).

<sup>15</sup> *Id.* at § 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); C.W., Docket No. 11-1338 (issued December 19, 2011).

contributions are assets which OWCP may consider in determining waiver.<sup>16</sup> Appellant has nonexempt assets that exceed the established limit. Therefore, recovery of the overpayment would not defeat the purpose of FECA.<sup>17</sup>

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. The availability of assets indicates that appellant would not experience financial hardship attempting to repay the debt. The factors considered regarding financial hardship are substantially the same as those for defeat the purpose of FECA and, as noted above, he has sufficient available assets.<sup>18</sup> Moreover, appellant has not presented evidence that he gave up a valuable right or changed his position for the worse in reliance on the overpayment. The Board finds that the recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that he relied on the overpayment to relinquish a valuable right or change his position for the worse. As the evidence fails to support that, 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 by denying waiver of recovery.<sup>19</sup>

On appeal, appellant alleged that OWCP improperly considered his Thrift Savings Plan as an available resource and that OWCP improperly calculated his income and living expenses as he and his wife maintained two homes. The Board has directly addressed that the issue of his Thrift Savings Plan and noted that this was appropriate. As appellant exceeds the resource base, the calculations of his income and living expenses are not determinative of waiver of recovery of an overpayment and not relevant. He has failed one prong of the test for waiver of recovery of an overpayment and therefore waiver is not appropriate.

### CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$6,387.84 for the period August 26, 2010 through February 12, 2011, for which he was not at fault and that OWCP properly denied waiver of recovery of the overpayment.

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<sup>16</sup> *Id.*; see also *P.C.*, Docket No. 10-1386 (issued April 26, 2011) *Eloise K. Hahn*, Docket No. 01-1199 (issued June 25, 2002).

<sup>17</sup> As appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test, *i.e.*, whether he needs substantially all his income to meet current ordinary and necessary expenses.

<sup>18</sup> See *Jan K. Fitzgerald*, 51 ECAB 659 (2000); Federal (FECA) Procedure Manual, *supra* note 15, Chapter 6.200.6(b)(1) (June 2009).

<sup>19</sup> As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).

**ORDER**

**IT IS HEREBY ORDERED THAT** August 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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