

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

G.W., Appellant)	
)	
and)	Docket No. 12-1171
)	Issued: October 25, 2012
DEPARTMENT OF THE ARMY,)	
INSTALLATION MANAGEMENT)	
COMMAND, Redstone Arsenal, AL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2011 appellant filed a timely appeal from a December 5, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that found that he received an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (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 appellant received an overpayment of compensation in the amount of \$42,905.92 because he received FECA compensation based on an incorrect pay rate from January 22, 2009 to December 19, 2010; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$333.60 each period from his continuing compensation payments.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserted that repaying the overpayment would be a financial burden and was due to government mistakes, not his.²

FACTUAL HISTORY

This case has previously been before the Board. In a June 3, 1998 decision,³ the Board affirmed a December 12, 1995 OWCP decision granting appellant a schedule award for a six percent loss of use of the left leg and reversed an August 24, 1995 OWCP decision that found that his actual earnings as a firefighter represented his wage-earning capacity.⁴ The Board found that the firefighter position did not fairly and reasonably represent his wage-earning capacity because he was unable to perform the regular-duty requirements due to his employment injury. The facts of the previous Board decision are incorporated herein by reference.

By decision dated February 22, 1999, OWCP denied appellant's claim for an employment-related cervical condition. On March 8, 2000 appellant underwent a second surgical procedure. On November 27, 2000 he had a spinal fusion from L4 to the sacrum. Appellant was referred to vocational rehabilitation in July 2002. In January 2003, an infusion pump for medication was implanted. On October 6, 2003 appellant returned to work as a fire protection inspector.

By decision dated April 16, 2004, OWCP determined that appellant's employment as a fire protection inspector fairly and reasonably represented his wage-earning capacity with zero loss.

Appellant continued to work in the fire inspector position until September 3, 2007. He had additional surgery for removal of a spinal cord stimulator and retained hardware on September 10 and December 17, 2007. Appellant returned to modified duty on February 25, 2008 and to full duty on May 1, 2008.

² On appeal, appellant also asserted that his current compensation is based on an incorrect pay rate. The Board's jurisdiction is limited to reviewing final decisions of OWCP. For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e); *D.G.*, Docket No. 12-770 (issued April 20, 2012). As there is no final OWCP decision issued within 180 days of this appeal regarding the additional issues, the Board lacks jurisdiction to review these issues. *L.G.*, Docket No. 09-1692 (issued August 11, 2010).

³ Docket No. 96-1493 (issued June 3, 1998).

⁴ On July 11, 1990 appellant injured his lower back moving a window-unit air conditioner. OWCP accepted herniated disc at L4-5 and a recurrence of disability on February 15, 1994. On September 15, 1994 appellant underwent discectomy at L4-5 and L5-S1. He returned to regular duty on April 18, 1995. Appellant retired on disability effective August 1, 1997 and elected FECA benefits in February 1999.

Appellant stopped work on January 22, 2009. He was placed on the periodic compensation rolls, based on a weekly pay rate of \$2,016.24, at the 3/4 augmented rate.⁵ On November 19, 2010 the employing establishment offered appellant a modified position as administrative support clerk. Appellant returned to the modified position for four hours daily on December 20, 2010. On February 3, 2011 OWCP reduced his compensation to reflect his earnings. It found that the weekly pay rate when disability recurred on January 22, 2009 was \$1,409.95; the current pay rate for job and step when injured was \$941.42; appellant was capable of earning \$467.54 and had a wage-earning capacity of 50 percent, with an adjusted wage-earning capacity of \$704.98; with a loss of wage-earning capacity of \$704.97; yielding an augmented compensation rate of \$528.76, increased by applicable cost-of-living adjustments to \$546.75 per week, or a four-week gross compensation rate of \$2,187.00.

By letter dated April 11, 2011, appellant contended that his compensation rate was incorrect because, as a firefighter, he received 106 hours of regular pay plus 38 hours of overtime, with a gross annual salary of \$73,317.40. While on total disability his compensation was based on this amount but he was not paid for overtime. Appellant stopped work on June 6, 2011 for an authorized medical procedure.⁶ He was placed on the periodic compensation rolls, based on the January 22, 2009 pay rate or \$1,409.95 weekly and returned to the modified position for four hours daily on July 18, 2011.

On September 19, 2011 OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$42,905.92 from January 22, 2009 to December 19, 2010 as he was paid compensation based on an incorrect pay rate. It paid a weekly pay rate of \$2,016.24 a week when he should have been paid based on a weekly pay rate of \$1,409.95 per week. Appellant was found to be without fault and was advised of his rights if he disagreed with the preliminary finding. He was provided an overpayment questionnaire form and advised to submit the questionnaire in order for waiver of the overpayment to be considered within 30 days. The record contains overpayment worksheets and computer print-outs describing his compensation for the period January 22, 2009 to December 18, 2010. Appellant was paid compensation calculated on a base annual salary of \$72,814.00 but should have received a base annual salary of \$47,672.00.

In correspondence dated October 27, 2011 and postmarked October 28, 2011, appellant requested a prerecoument hearing and requested waiver of the overpayment. Based on the compensation he was receiving beginning in January 2009, he purchased a new vehicle, committed to a wedding for his daughter costing close to \$5,000.00; helped her with rent and

⁵ In December 2009, OWCP referred appellant to Dr. Jay R. SoloRio, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a January 11, 2010 report, Dr. SoloRio diagnosed low back pain status post fusion and advised that appellant was totally disabled and needed further management of his chronic pain. A February 15, 2010 functional capacity evaluation (FCE) indicated that appellant could not return to full-time employment. In supplementary reports, Dr. SoloRio reviewed the FCE, which he considered a valid study. He advised that appellant could not perform his previous employment as a firefighter and provided restrictions to his physical activity. OWCP determined that a conflict had been created regarding appellant's work capabilities and in April 2010 referred him to Dr. Richard A. Bagby, Jr., a Board-certified orthopedist, for a referee examination. In a June 2, 2010 report, Dr. Bagby advised that sitting was restricted to approximately one-half hour at a time and that appellant could work four hours a day if he could stand and move about for 10 minutes each hour. On February 9, 2011 he advised that appellant could perform sedentary duty eight hours a day, five days a week.

⁶ A thoracic epidural neurostimulator and generator were implanted on June 6, 2011.

utilities; gave \$2,000.00 to a nephew, donated to charity; had pet-related medical expenses; purchased a new heat and air-conditioning unit; purchased new appliances for a condominium, new den furniture, a green house, a safe, a sleep number bed, a frozen drink machine, an upright freezer, a kegarator, a new television, a water heater, a new gas grill, camera security system for house, an iPod touch, an espresso machine, a day spa gift certificate for his wife and a new Christmas tree; had a tree removed; updated his security system after a lightning strike; replaced an above-ground pool; increased religious dues; helped his sister financially and had excessive travel expenses due to her terminal illness. Appellant submitted hundreds of pages of financial information and an overpayment questionnaire. He stated that his monthly income was \$6,364.00 and monthly expenses were \$6,927.67. Appellant provided a list of 28 monthly expenses.⁷

By decision dated November 16, 2011, OWCP denied appellant's request for a prerecoupment hearing as untimely.⁸

On December 5, 2011 OWCP finalized the preliminary overpayment decision, finding that appellant received an overpayment in compensation in the amount of \$42,905.92. While appellant was not found at fault, he was not entitled to waiver because his income exceeded his allowable expenses by \$478.32. OWCP disallowed expenses for the security system, Dish network, melaleuca, OnStar, newspaper, pet expenses, cigarettes, Starbucks and "stuff" shopping. It noted that appellant had assets totaling \$61,046.59. Appellant was informed that repayments of \$333.60 would be deducted from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Firefighters Overtime Pay Reform Act of 1998,⁹ in determining the rate of pay for firefighters with regular tours of duty which generally consists of 24-hour shifts, pay rate for compensation purposes is determined as follows:

“(a) Annual salary/-/2756 (53 hours of regular pay per week x 52 weeks) = firefighter hourly rate.

“(b) Firefighter hourly rate x 106 hours = biweekly base pay.

“(c) Firefighter hourly rate x 1.5 = firefighter overtime rate.

⁷ These included mortgage and property taxes, \$2,102.87; food \$450.00; gas for vehicles \$200.00; home telephone/internet \$100.00; cellular telephone \$200.00; utilities \$362.00; vehicle payment \$649.38; Lowe's \$100.00; security system monitoring \$44.99; medical expenses \$60.00; prescription medications \$70.00; melaleuca \$90.00; condominium dues \$155.67; Dish network \$124.62; religious dues \$66.00; OnStar \$18.95; newspaper \$7.25; life insurance \$500.00; pet medication \$84.87; haircuts \$30.00; automobile and condominium insurance \$500.00; cigarettes \$60.00; Starbucks \$16.05; veterinarian \$73.03; home maintenance and repair \$463.80; "stuff" shopping \$664.29; computers \$124.14; unknown miscellaneous expenses, for a total of \$6,927.67.

⁸ Appellant filed an appeal of the November 16, 2011 decision on November 19, 2011. The Board assigned Docket No. 12-297 and the case will be adjudicated separately.

⁹ 5 U.S.C. § 5545(b).

“(d) Firefighter overtime rate x number of hours in regular tour in excess of 106 hours = biweekly firefighter overtime.

“(e) Biweekly base pay + biweekly firefighter overtime/2 = weekly pay rate.

“Most 24-hour shift firefighters have a regular biweekly tour of 144 hours (six 24 hours shifts) consisting of 106 regular hours and 38 firefighter overtime hours; thus 38 hours (144-106) would be used in step (d) above.”

Although overtime pay is normally not included in determining pay rate for compensation purposes under section 8114 of FECA, section 5545(b) was amended to establish that overtime pay for firefighters under that section shall be included in any computation of pay under section 8114.¹⁰ OWCP’s procedures established a formula for determining pay rate for these firefighters, using a base pay of 106 biweekly work hours and an overtime rate of 38 hours above the 106 hours.¹¹

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.¹² Section 8129 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.”¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$42,905.92 overpayment of compensation for the period January 22, 2009 to December 19, 2010. The record supports that when appellant stopped work and began receiving wage-loss compensation on January 22, 2009 OWCP calculated his compensation rate based on a base annual salary of \$72,814.00. OWCP applied the formula identified in the Firefighters Overtime Pay Reform Act of 1998 and described in OWCP procedures,¹⁴ calculating a total weekly pay, including “extra” or overtime pay as identified in the formula, for a weekly pay rate of \$2,016.24. The record, however, includes a Notice of Personnel Action, effective January 4, 2009, indicating that appellant was a GS-7, Step 8 firefighter, with a base annual salary of \$47,672.00. An earnings and leave statement for the pay period ending January 17, 2009 also indicates that his base annual salary was \$47,672.00.

¹⁰ *Id.* at § 5545(b)(d)(4).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (November 2003).

¹² 5 U.S.C. § 8102(a).

¹³ *Id.* at § 8129(a).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.900.8(d) (November 2003).

Using the above-mentioned formula, OWCP recalculated appellant's weekly pay rate using the correct base annual salary, \$47,672.00. As provided in the formula, it divided the correct annual salary by \$2,756.00 (\$47,672.00 divided by \$2,756.00) to find an hourly rate of \$17.30, which it multiplied by 106, to find a biweekly pay rate of \$1,833.80. OWCP multiplied appellant's hourly rate of \$17.30 by 1.5 to find his overtime pay of \$986.10 and divided this sum, \$2,819.90, by 2, which yielded a weekly pay rate for compensation purposes of \$1,409.95.

Computer print-outs and overpayment worksheets found in the record indicate that for the period January 22, 2009 to December 19, 2010 appellant received compensation of \$138,779.12, based on the incorrect base annual salary, when he should have received compensation of \$95,873.20, based on the correct base annual salary, yielding an overpayment of compensation of \$42,950.92.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP 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."¹⁵ Section 10.438 of OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

¹⁵ 5 U.S.C. § 8129.

¹⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436 (2011). 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. *Id.* at § 10.437 (2011). OWCP's procedures provide that the 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) (June 2009); *see W.F.*, 57 ECAB 705 (2006).

¹⁷ 20 C.F.R. § 10.438(b) (2011).

¹⁸ *Supra* note 17.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. OWCP's procedures provide that 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹⁹

In this case, OWCP carefully considered the financial information submitted by appellant. It properly excluded expenses which were not deemed to be ordinary and necessary living expenses such as security system and wellness products payments, pet expenses, the cost of cigarettes and Starbucks and purchases of "stuff." OWCP properly concluded that appellant's documented monthly income exceeded his monthly ordinary and necessary expenses by \$478.32. As appellant's current income exceeds his ordinary expenses by more than \$50.00, he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses. Thus, he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA.²⁰ While it was not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base, the Board notes that his assets of \$61,046.59 well exceed the asset base of \$8,000.00 for an individual with a spouse.²¹

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.²² Appellant contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience. The Board finds this contention without merit. Appellant reported having funds in checking and savings accounts and money market funds totaling \$9,046.59. He also owns a fully-paid condominium, which he valued at \$52,000.00. Taking into consideration appellant's assets and positive monthly cash-flow, the Board finds that recovery of the overpayment of compensation would not cause a financial hardship.²³

Appellant asserted that he relied on the additional funds to help relatives financially, paid for his daughter's wedding and made purchases, such as a new car, a swimming pool, appliances, electronics, *etc.* Recovery of an overpayment is also 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 or her position for the worse.²⁴ OWCP's procedures provide that, to establish that a valuable right has been relinquished, it must

¹⁹ Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 6.200.a(1)(b) (June 2009).

²⁰ *Supra* note 16

²¹ *Id.*

²² 20 C.F.R. § 10.437(a).

²³ *See K.K.*, Docket No. 09-207 (issued October 2, 2009).

²⁴ 20 C.F.R. § 10.437; *see W.P.*, 59 ECAB 514 (2008).

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.²⁵ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁶ An individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²⁷ Conversion of the overpayment into a different form (such as food, consumer goods, real estate, *etc.*) from which the claimant derived some benefit does not constitute loss for this purpose.²⁸

Appellant does not qualify for waiver under the principle of detrimental reliance because the evidence does not establish that he gave up a valuable right or changed his position for the worse in reliance on anticipated payments. As noted above, conversion of the overpayment does not constitute loss for this purpose.²⁹ Appellant gained a benefit by his many purchases. Likewise, donations are not considered a relinquishment of valuable rights.³⁰ Moreover, appellant has not shown that, if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all. OWCP properly found that he was not entitled to waiver on the grounds that recovery would be against equity and good conscience.³¹

As appellant failed to establish that recovery of the overpayment in compensation 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 waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, it 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.³²

ANALYSIS -- ISSUE 3

The Board finds that OWCP gave due regard to the relevant factors noted above in setting a rate of recovery of \$333.60 per compensation period. The record indicates that

²⁵ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.600.b(3) (June 2009).

²⁶ 20 C.F.R. § 10.437(b)(1); *see J.A.*, Docket No. 09-1678 (issued June 9, 2010).

²⁷ *Id.* at § 10.437(b)(2); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁸ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.600.b(3) (June 2009); *K.K.*, *supra* note 23.

²⁹ *Id.*

³⁰ *Supra* note 27.

³¹ Federal (FECA) Procedure Manual, *supra* note 11.

³² 20 C.F.R. § 10.441(a).

appellant's monthly income exceed his allowable monthly expenses by \$478.32 per month. OWCP therefore did not abuse its discretion in finding that he should repay the overpayment at the rate of \$333.60 per compensation period.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$42,905.82 and that OWCP properly denied waiver and required recovery of the overpayment by deducting \$333.60 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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