

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

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C.S., Appellant )

and )

DEPARTMENT OF JUSTICE, BUREAU OF )  
PRISONS, Atlanta, GA, Employer )

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**Docket No. 13-1423**  
**Issued: October 23, 2013**

*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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 29, 2013 appellant filed a timely appeal from an April 5, 2013 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$2,819.15 from April 30, 2012 to February 9, 2013 because he received compensation at the augmented rate when he had no dependents; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$470.84 from his continuing compensation payments.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated June 21, 1988, the Board affirmed in part and set aside in part an April 7, 1986 overpayment decision.<sup>2</sup> The Board found that OWCP properly determined that appellant received an overpayment of \$188.06 from February 4, 1985 through September 27, 1986 but reversed the finding that he was at fault in the creation of the overpayment. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment. On December 29, 1989 the Board issued an *Order Granting Remand* for OWCP to consider current financial information prior to determining if appellant had established that the overpayment should be waived. The facts and the circumstances as set forth in the prior decision and order are hereby incorporated by reference.

Appellant received compensation following his injury at the three-quarters rate applicable to claimants with dependents. By letter dated January 2, 2013, he related that he had divorced the preceding year. Appellant advised that he did not want his benefits reduced due to his living expenses.

On January 17, 2013 OWCP notified appellant that it was reducing his benefits to the 66 and 2/3 rate for claimants without dependents. It requested a copy of his divorce decree.

In an EN1032 form dated January 22, 2013, appellant related that he had no dependents effective April 30, 2012. OWCP paid him compensation at the standard rate beginning February 10, 2013.

On February 21, 2013 OWCP advised appellant of its preliminary determination that he received an overpayment of \$2,819.15 because he received compensation at the augmented rate from April 30, 2012 to February 9, 2013 when he had no dependents. It calculated the overpayment by subtracting the compensation to which he was entitled for that period, \$22,389.71, from the compensation that he actually received, \$25,208.86, to find an overpayment of \$2,819.15. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

In a decision dated April 5, 2013, OWCP found that appellant received an overpayment of \$2,819.15 from April 30, 2012 to February 9, 2013 because it paid him augmented compensation even though he had no dependents. It found that he was without fault in creating the overpayment but denied waiver of recovery of the overpayment as he did not submit an overpayment recovery questionnaire or financial information. OWCP determined that it would

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<sup>2</sup> Docket No. 87-1469 (issued June 21, 1988). OWCP accepted that on November 6, 1984 appellant, then a 32-year-old correctional officer, sustained a left thigh laceration when he was attacked by a prisoner. It further accepted post-traumatic stress disorder, major depressive disorder, an injury to the left peroneal nerve and insomnia due to a mental disorder.

recover the overpayment by deducting \$470.84 from appellant's continuing compensation payments.

On appeal appellant contends that repaying \$470.84 from continuing compensation payments would constitute a severe hardship. He enclosed information about his monthly expenses.

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

FECA<sup>3</sup> 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 duty.<sup>4</sup> If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his or her monthly pay, which is known as his or her basic compensation for total disability.<sup>5</sup> Where the employee has one or more dependents as defined in FECA, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>6</sup> A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.<sup>7</sup> If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.<sup>8</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$2,819.15 for the period April 30, 2012 to February 9, 2013. On January 22, 2013 appellant advised OWCP that he had no dependents beginning April 30, 2012. OWCP, however, paid him compensation at the augmented rate of 75 percent of his monthly pay until February 9, 2013. Accordingly, appellant received an overpayment of compensation.

OWCP paid appellant \$25,208.86 at the augmented rate from April 30, 2012 to February 9, 2013. It should have paid him \$22,389.71. Appellant consequently received an overpayment of \$2,819.15, the difference between the compensation to which he was entitled at the two-thirds rate and the augmented compensation he received at the three-quarters rate.<sup>9</sup>

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8105(a).

<sup>6</sup> *Id.* at § 8110(b).

<sup>7</sup> *Id.* at § 8110(a).

<sup>8</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

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

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA<sup>10</sup> provides that an overpayment must be recovered 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.” (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>11</sup>

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.<sup>12</sup> An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.<sup>13</sup> Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings and supplies.<sup>14</sup>

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>15</sup> 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.<sup>16</sup>

## ANALYSIS -- ISSUE 2

OWCP, in its preliminary determination of the existence of the overpayment, requested that appellant explain his reasons for seeking a waiver, that he complete the recovery

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<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> 20 C.F.R. §§ 10.436 and 10.437.

<sup>12</sup> 20 C.F.R. § 10.436. 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).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.436.

<sup>16</sup> *Id.* at § 10.437(b)(1).

questionnaire form and submit financial documents to support his claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of FECA. Appellant did not return the overpayment recovery questionnaire provided by OWCP and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of FECA. Nor did he submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment.<sup>17</sup> Section 10.438 of the regulations state that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to OWCP so that it may determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>18</sup> Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from OWCP will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.<sup>19</sup>

As appellant submitted no evidence establishing 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 in refusing to waive recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>20</sup> Section 10.441(a) of the regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [OWCP] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [OWCP] 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.”<sup>21</sup>

### **ANALYSIS -- ISSUE 3**

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<sup>17</sup> See *Madelyn Y. Grant*, 57 ECAB 533 (2006); *James A. Gray*, 54 ECAB 277 (2002).

<sup>18</sup> 20 C.F.R. § 10.438(a).

<sup>19</sup> *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

<sup>20</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>21</sup> 20 C.F.R. § 10.441(a).

OWCP determined that it would recover the overpayment by withholding \$470.84 from appellant's continuing compensation payments. As noted, appellant failed to submit any financial information. OWCP's procedure manual provides that when an individual fails to provide requested financial information, it should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>22</sup> Furthermore, without the appropriate financial documentation or overpayment questionnaire as required by section 10.441, OWCP is unable to consider his financial circumstances. The Board thus finds that it did not abuse its discretion by deducting \$470.84 from appellant's continuing compensation to repay the overpayment.

On appeal appellant argues that deducting \$470.84 from his compensation would cause an undue hardship. He submitted information regarding monthly expenses. The Board, however, has no jurisdiction to review new evidence on appeal.<sup>23</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of \$2,819.15 from April 30, 2012 to February 9, 2013 because he received compensation at the augmented rate when he had no dependents. The Board further finds that OWCP properly denied waiver of the overpayment and properly determined that it would recover the overpayment by deducting \$470.84 from his continuing compensation payments.

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<sup>22</sup> *Frederick Arters*, 53 ECAB 397 (2002). OWCP's procedure manual provides that, if a claimant is being paid compensation or is due accrued benefits from OWCP and does not submit evidence to support a waiver within the allotted time period, the debt should be recovered from such benefits as quickly as possible. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2), 6.22.4d(1)(b) (May 2004). In all cases where an overpayment is due for recovery, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *See id.* at Chapter 6.200.4d(1)(b); *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>23</sup> *See* 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2013  
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