

FACTUAL HISTORY

On February 15, 2007 appellant, then a 30-year-old mail handler, filed a traumatic injury claim alleging that, while in the performance of duty that day he experienced pain in his right shoulder while moving mail and sacks. OWCP accepted the claim for right shoulder sprain and rotator cuff impingement/tear and paid all appropriate benefits, including a right shoulder surgery on August 18, 2018.² Appellant eventually returned to full-time limited-duty work with restrictions. He stopped work on November 18, 2009 as the employing establishment could no longer provide work within his restrictions. OWCP accepted a recurrence of disability commencing November 18, 2009, which entitled appellant to a recurrent pay rate effective November 18, 2009. Appellant returned to work on July 1, 2013. By decision dated September 4, 2013, OWCP found his employment as a modified mail processing clerk effective July 1, 2013 fairly and reasonably represented his wage-earning capacity and terminated his entitlement to wage-loss compensation as there was no loss in earning capacity.

By decision dated October 4, 2013, OWCP issued a schedule award for 11 percent impairment to the right upper extremity and 11 percent impairment to the left upper extremity. The award runs from August 29, 2013 to December 22, 2014 for a period of 68.64 weeks of compensation.³ Appellant receives \$3,735.00 every four weeks.⁴

On October 2, 2013 OWCP made a preliminary determination that appellant received a \$43,891.85 overpayment for the period November 18, 2009 to June 30, 2013 because it had paid him effective November 18, 2009 compensation based on an incorrectly calculated recurrent pay rate of \$1,469.42 per week [base \$1,010.12 + Sunday (\$404.00) + night differential (\$55.30)]. It stated that the pay rate was incorrect because the Sunday premium pay was input as \$25.25 additional per hour rather than an additional 25 percent per hour. The correct weekly pay rate for the date of recurrence was \$1,166.43 [base \$1,010.12 + Sunday (\$101.01) + night differential (\$55.30)]. For the period November 18, 2009 through June 30, 2013, OWCP found that appellant received gross compensation \$212,946.04 minus \$12,338.08 health benefit insurance cost minus \$777.86 basic life insurance cost minus \$458.53 optional life insurance cost or a net of \$199,371.57. However, entitlement at the corrected weekly pay rate of \$1,166.43 per week for the period November 18, 2009 through June 30, 2013 would yield a gross compensation of \$169,054.19 minus \$12,338.08 health benefit insurance cost minus \$777.86 basic life insurance cost minus \$458.53 optional life insurance cost or a net of \$155,479.72. OWCP subtracted the amount appellant was entitled to of \$155,479.72 from the amount he received of \$199,371.57 and found \$43,891.85 overpayment. It also found that he was not at fault in the creation of the overpayment and requested that he provide financial information.

On October 24, 2013 appellant requested a telephonic conference and requested waiver as the overpayment occurred through no fault of his. He indicated that he was going to use the schedule award funds to modify his home to accommodate the growing needs of his special

² Appellant has an accepted claim for a left shoulder strain occurring January 17, 2004.

³ The total schedule award amount is \$64,092.60.

⁴ Appellant has not contested either the September 4 or October 4, 2013 decisions on appeal.

needs daughter who was wheelchair bound and has the level of a one-year old. In an overpayment recovery questionnaire, appellant indicated a total monthly income \$4,000.00 and that he supported a wife and three children, one being a special needs child who requires expensive medicines. He listed total monthly expenses as \$4,196.12, which included mortgage \$1,200.00, food \$400.00, clothing \$250.00, utilities \$800.00 and other expenses \$1,300.00. Appellant indicated that he had \$1,780.00 in funds, which included \$75.00 cash, \$205.00 checking account balance, \$1,500.00 savings account balance.

In a November 5, 2013 report of telephone call, OWCP noted that appellant's reported total monthly income of \$4,000.00 was strictly his net take home pay and did not include the schedule award payment. Appellant agreed that his gross pay was approximately \$5,160.18 per month and approximately \$1,000.00 per month was deducted for insurance premiums, taxes etc. OWCP conducted a partial conference and noted that he requested waiver due to his special needs daughter and he was planning to use the schedule award payments to modify their house to suit that daughter's needs. Appellant also stated that a majority of the \$1,300.00 per month expenses were due to the special needs daughter. OWCP requested that he provide financial information on breakdown with supporting documents of \$1,300.00 per month miscellaneous expenses and \$800.00 utilities. It also requested a professional estimate of the cost of the modification appellant's needs for his home.

On November 27, 2013 OWCP received a handwritten breakdown of the miscellaneous expenses per month, which now totaled \$1,418.56, along with a \$16,293.34 estimate, which included cost breakdown and supporting documentation, to modify the home to accommodate the special needs daughter.

On December 3 and 5, 2013 OWCP conducted a preconference call with appellant. The Conference Memorandum for the telephone conference calls conducted on December 3 and 5, 2013 noted that he was in receipt of schedule award benefits, that a waiver or partial waiver could not be applied to the overpayment and that the overpayment must be paid in its entirety by the time the schedule award ended.

By decision dated December 12, 2013, OWCP denied waiver of the \$43,891.85 overpayment which arose during the period November 18, 2009 through June 30, 2013 and found the sum of \$3,400.00 could be withheld from appellant's continuing compensation payments beginning December 15, 2013. The claims examiner noted that appellant received payments of \$3,735.00 every 28 days on the periodic rolls for a schedule award, which will end December 22, 2014, and that he had received a total of \$14,406.43 through December 14, 2013. It found the financial information received had not established a basis for granting waiver and that he had not established that he relinquished a valuable right or changed his position for the worse as he did not make a past expenditure of modifying his home.

On appeal, appellant disputed the denial of waiver as well as the \$3,400.00 deduction from future payments. He explained that he submitted evidence regarding his special needs daughter's disabilities and expenses involved in caring for her needs. Appellant noted that the decision stated that the overpayment could not be waived based on planned future modification to his home to accommodate his special needs daughter's needs and argued, if that was the case, why did the claims examiner request that he provide the estimates? He stated that due to his

work-related injuries, he cannot not provide the care his special needs daughter requires without equipment and modifications that will keep him from having to lift her 104 pound frame. Appellant indicated that in February 2013, his family relocated from a townhouse to a one level home because they could not continue transporting her up and down stairs. He indicated that OWCP compensation has supported all resources needed for ordinary and necessary living expenses for his family and argued that recovery of the overpayment could cause hardship because of the ongoing, ever increasing, needs of his family, especially in relation to his special needs daughter.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of pay,⁶ meaning pay at the time of injury or pay at the time disability begins or pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁷

Section 8129(a) of FECA provides that when an overpayment has been made to an individual 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 the individual is entitled.⁸

ANALYSIS -- ISSUE 1

Fact of overpayment is well established and not contested. The record reflects that OWCP noted that it was paying the incorrect recurrence pay rate when it calculated appellant's schedule award. For the period November 18, 2009 to June 30, 2013, OWCP paid appellant compensation based on an incorrectly calculated recurrent pay rate of \$1,469.42 per week [base \$1,010.12 + Sunday (\$404.00) + night differential (\$55.30)] as the Sunday premium pay was input as \$25.25 additional per hour rather than an additional 25 percent per hour. The correct weekly pay rate for the date of recurrence was \$1,166.33 [Base \$1,010.12 + Sunday (\$101.01) + night differential (\$55.30)]. For the period November 18, 2009 through June 30, 2013, it found that appellant received gross compensation \$212,946.04 minus \$12,338.08 health benefit insurance cost minus \$777.86 basic life insurance cost minus \$458.53 optional life insurance cost or a net of \$199,371.57. However, entitlement at the corrected weekly pay rate of \$1,166.33 per week for the period November 18, 2009 through June 30, 2013 would yield a gross compensation \$169,054.19 minus \$12,338.08 health benefit insurance cost minus \$777.86 basic life insurance cost minus \$458.53 optional life insurance cost or a net of \$155,479.72. As appellant was entitled to \$155,479.72 but received \$199,371.57, an

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at §§ 8105, 8106.

⁷ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁸ *Id.* at § 8129(a).

overpayment of \$43,891.85 exists. The Board finds that OWCP properly determined the fact and the amount of overpayment as no other probative evidence has been presented.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs because of an error of fact of law, adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁹ 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 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 regulations¹⁰ 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 his or 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 \$4,800.00 for an individual.¹¹ 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).¹²

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.¹³ 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.¹⁴

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.436.

¹¹ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹² *Id.*

¹³ *Id.* at § 10.437(b).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

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 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.¹⁵

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation and thus considered whether he was entitled to waiver of recovery of the overpayment. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP's procedures.¹⁶

Appellant furnished OWCP with an overpayment recovery questionnaire and reported monthly income of \$4,000.00 and monthly expenses of \$4,196.12 and \$1,780.00 in savings and checking accounts. The claims examiner determined, after teleconferences with appellant and review of additional documentation, that his stated income did not include schedule award payments, of which he had already received a total of \$14,406.43. In the November 5, 2013 teleconference, OWCP's hearing representative determined that appellant received income of \$2,639.00 every 28 days on his schedule award and had a gross monthly salary of \$3,749.00, totaling \$6,608.00. Appellant agreed that his gross pay was approximately \$5,160.18 per month and approximately \$1,000.00 per month was deducted for insurance premiums, taxes *etc.* He also later claimed his monthly expenses originally listed at \$4,196.12 were increased as due to care for his special needs daughter, which he submitted supporting documentation. Appellant did not submit any further supporting financial information. Based on his reported expenses and income, his income exceeds his expenses by more than \$50.00 per month. As appellant's income exceeds expenses by more than \$50.00, the Board finds that OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA.

The evidence also does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he had relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. While he planned to modify his home to accommodate his special needs daughter's disabilities, there is no evidence that he had made any expenditures. Furthermore, appellant is in receipt of a schedule award which will total over \$64,000.00 when it ends December 22, 2014. He stated that he planned to use the schedule award money to modify his home. An overpayment cannot be waived based on planned future modifications to the home. Appellant argued on appeal that he moved from a townhouse in February 2013 to a one level home to better suit the needs of his special needs daughter. However, he has not met his burden in showing that he changed his position for the worse, since he has not shown that he

¹⁵ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁶ *Id.* at § 10.436.

suffered any loss. Appellant's move from a townhouse to a one level home is simply a conversion of the money into a different form, which he derived some benefit. Conversion of a liquid asset into real or personal property does not constitute a loss. While appellant may have made the expenditure in reliance on the overpayment monies, he must also establish a financial loss before it will be inequitable to recoup the overpayment.¹⁷ Consequently, OWCP properly denied waiver of recovery of the overpayment.

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that he has failed to show that OWCP abused its discretion by refusing to waive the \$43,891.85 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. 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.¹⁸

ANALYSIS -- ISSUE 3

OWCP reduced appellant's future compensation benefits by \$3,400.00 per month. OWCP's procedure manual provides that, if a claimant is being paid compensation or is due accrued benefits, the debt should be recovered as quickly as possible.¹⁹ OWCP's hearing representative noted that appellant was in receipt of compensation benefits of \$3,735.00 every 28 days on the periodic roll for a schedule award, which will end December 22, 2014 and directed recovery of \$3,400.00 from his continuing benefits. The Board finds that OWCP did not abuse its discretion in this matter. The hearing representative considered the evidence of record, as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$43,891.85 for the period November 18, 2009 through

¹⁷ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3)(June 2009).

¹⁸ 20 C.F.R. § 10.441.

¹⁹ See *Frederick Arters*, 53 ECAB 397 (2002), citing Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6. 200.4(c)(2) (September 2009).

June 30, 2013 for which he was not at fault, that he was not entitled to waiver of recovery of the overpayment and that the overpayment should be recovered by withholding \$3,400.00 per month from his continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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