



## **FACTUAL HISTORY**

On March 5, 2005 appellant, then a 49-year-old baggage screener, filed a traumatic injury claim alleging that he injured his back while lifting luggage off the belt. OWCP accepted the claim for lumbar muscle spasm, lumbar intervertebral disc without myelopathy, thoracic or thoracolumbar intervertebral disc degeneration, lumbago, and nonunion fracture.

By letter dated June 27, 2005, OWCP placed appellant on the periodic rolls for temporary total disability. Appellant was paid at the three-quarters rate applicable to claimants with dependents.

By letter dated January 14, 2011, appellant informed OWCP of his divorce which was effective that day. In EN1032 forms dated June 6, 2011 and June 5, 2013, he indicated that he was not married and had no dependents.

On June 27, 2013 OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$7,143.37 because he received compensation at the augmented rate from January 14, 2011 to June 1, 2013 when he had no dependents. It calculated the overpayment by subtracting the compensation to which he was entitled for that period, \$53,937.00, from the compensation that he actually received, \$61,080.37, to find an overpayment of \$7,143.37. 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.

On July 3, 2013 appellant requested a prerecoupment hearing, received by OWCP on July 10, 2013. He submitted a completed overpayment recovery questionnaire with his hearing request, but provided no supporting financial documentation. Appellant listed monthly income of \$1,810.80 in the overpayment questionnaire, and monthly expenses of \$2,009.00. The monthly expenses included: \$650.00 for rent or mortgage; \$400.00 for food; \$372.00 for utilities; and \$437.00 for miscellaneous expenses. Under other debts appellant listed a monthly payment of \$100.00 for Justice Finance,<sup>2</sup> \$25.00 for Bealls,<sup>3</sup> and \$25.00 to Montgomery Ward.<sup>4</sup> He reported \$10.00 for cash in a checking account.

By letter dated October 22, 2013, OWCP informed appellant that a telephonic hearing was scheduled before an OWCP hearing representative for November 26, 2013 at 11:30 a.m. Appellant was provided with the toll free number and pass code to use.

In Form CA-110 notes dated December 2, 2013, OWCP indicated that appellant called to advise that he had been unable to join the telephonic hearing as the hearing representative did not answer the telephone at the time and date the hearing was scheduled.

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<sup>2</sup> Appellant noted the amount owed as \$1,094.00.

<sup>3</sup> Appellant noted the amount owed as \$175.00.

<sup>4</sup> Appellant noted the amount owed as \$220.00.

In a January 10, 2014 letter, the hearing representative informed appellant that the appeal would be based on a review of the written record as he was not present for the scheduled hearing on November 26, 2013. Appellant was requested to complete a new questionnaire and provide supporting financial documentation, such as bank statements, household bills, and recurring monthly bills, *etc.*

In response, appellant submitted an updated overpayment questionnaire; a January 11, 2014 water utility bill noting the amount due of \$132.53 and money order receipt; a January 10, 2014 collection receipt for Western Finance noting a balance of \$882.00; a January 10, 2014 loan payment receipt for Justice Finance Company noting a balance of \$1,239.26; a January 10, 2014 Western Union receipt for HEB Grocery noting payment of \$30.00; and a January 24, 2014 statement from Pinacle Bank. On the overpayment questionnaire, he listed monthly income of \$1,810.80 and monthly expenses of \$1,820.00. The monthly expenses included: \$650.00 for rent or mortgage; \$60.00 for food; \$650.00 for utilities; and \$250.00 for miscellaneous expenses. Under other debts, appellant listed monthly payments of \$112.66 for Justice Finance,<sup>5</sup> \$20.00 to Bealls,<sup>6</sup> \$20.00 to Montgomery Ward,<sup>7</sup> \$20.00 to Texas Health,<sup>8</sup> and \$98.00 for Western Finance.<sup>9</sup> He reported \$10.00 for cash in a checking account.

By decision dated February 10, 2014, the hearing representative found that appellant received an overpayment of compensation in the amount of \$7,143.37 because it paid him augmented compensation from January 14, 2011 to June 1, 2013 even though he had no dependents. He found that appellant was without fault in creating the overpayment but denied waiver of recovery of the overpayment as he presented no evidence for consideration of his financial situation. The hearing representative determined that it would recover the overpayment by deducting \$200.00 from appellant's continuing compensation payments.

On appeal, appellant contends that repaying the \$200.00 from continuing compensation would constitute a severe hardship. He also related that he had attempted to call the number listed for the telephonic hearing at the scheduled time and date noted, but was unable to get through.

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

Section 8102 of FECA<sup>10</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>11</sup> When an overpayment has been made to an individual because of an

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<sup>5</sup> Appellant noted the amount owed as \$1,239.26.

<sup>6</sup> Appellant noted the amount owed as \$157.03.

<sup>7</sup> Appellant noted the amount owed as \$130.56.

<sup>8</sup> Appellant noted the amount owed as \$80.00.

<sup>9</sup> Appellant noted the amount owed as \$882.00.

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> *Id.* at 8102(a).

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.<sup>12</sup>

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>13</sup> Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependents. A dependent means a wife if: (a) she is a member of the same household as the employee; (b) she is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to her support.<sup>14</sup>

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

Appellant claimed his wife as a dependent and OWCP accordingly paid him wage-loss compensation at the augmented rate of 75 percent. He informed OWCP of his divorce from his wife in a January 14, 2011 letter. In EN1032 forms dated June 6, 2011 and June 5, 2013, appellant advised that he was not married and had no dependents. The Board finds that, pursuant to FECA, his wife was no longer a dependent as of January 14, 2011, the date of his divorce.

The record confirms that he continued to receive compensation at the augmented rate for dependents for the period January 14, 2011 through June 1, 2013. An overpayment of compensation is therefore established. The amount of compensation actually paid during this period, \$61,080.37, less the compensation appellant should have received at the correct pay rate, \$53,937.00, establishes an overpayment of \$7,143.37. Compensation payment worksheets in the record confirm these figures. The Board will therefore affirm OWCP's February 10, 2014 decision on the issues of fact and amount of overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of FECA and the implementing regulations, 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.<sup>15</sup> Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>16</sup> Section 10.434 provides that, if OWCP finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of FECA or

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<sup>12</sup> *Id.* at 8129(a).

<sup>13</sup> *Id.* at 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>14</sup> *Id.* at 8110(a)(2).

<sup>15</sup> *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>16</sup> 20 C.F.R. § 10.433(a).

(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”<sup>17</sup>

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of FECA if the beneficiary needs substantially all of his or her current income to meet current ordinary and necessary living expenses and the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>18</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>19</sup> An individual’s liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.<sup>20</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>21</sup>

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the 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>22</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>23</sup>

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

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore 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.

The Board finds that the case is not in posture for a decision regarding waiver of recovery of the overpayments.

The hearing representative denied waiver of recovery of the overpayment as appellant presented no evidence for consideration of his finances. A review of the record, however,

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<sup>17</sup> *Id.* at 10.434.

<sup>18</sup> *Id.* at 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).

<sup>19</sup> *Desiderio Martinez*, 55 ECAB 245 (2004); Federal (FECA) Procedure Manual, *id.*

<sup>20</sup> *See supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> 20 C.F.R. § 10.437.

<sup>23</sup> *Id.* at 10.437(b)(1).

reveals that OWCP received on January 29, 2014 a completed overpayment recovery questionnaire. The evidence submitted included: a January 11, 2014 water utility bill noting the amount due of \$132.53 and money order receipt; a January 10, 2014 collection receipt for Western Finance noting a balance of \$882.00; a January 10, 2014 loan payment receipt for Justice Finance Company noting a balance of \$1,239.26; a January 10, 2014 Western Union receipt for HEB Grocery noting payment of \$30.00; and a January 24, 2014 statement from Pinance Bank.

Board precedent holds that OWCP must review all the evidence submitted by a claimant and received by OWCP prior to the issuance of a final decision.<sup>24</sup> As the Board's jurisdiction is final as to the subject matter, it is crucial that OWCP accomplish this.<sup>25</sup>

Because the hearing representative found that appellant failed to submit a completed overpayment questionnaire or supporting financial documentation when a completed form does not appear in the record, it is clear to this Board that OWCP did not consider the factual evidence submitted by appellant in reaching its overpayment decision and denying waiver of the overpayment. Whether OWCP receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.<sup>26</sup> As it failed to address all the relevant evidence of record at the time it issued its February 10, 2014 decision, the Board will set aside the February 10, 2014 decision on the issues of waiver and recovery and remand for consideration and review of all the evidence. After such development as may be necessary, OWCP shall issue a *de novo* 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 \$7,143.37 for the period January 14, 2011 to June 1, 2013. The Board, however, finds that the case is not in posture for a decision regarding his eligibility for waiver of recovery of the overpayment.<sup>27</sup>

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<sup>24</sup> See *M.B.*, Docket No. 09-17 (issued September 23, 2009); *Yvette N. Davis*, 55 ECAB 475 (2004); *Linda Johnson*, 45 ECAB 439 (1994) (evidence received the same day as the issuance of OWCP's decision); *William A. Couch*, 41 ECAB 548 (1990); 20 C.F.R. § 501.6(c).

<sup>25</sup> See *id.*

<sup>26</sup> *Willard McKennon*, 51 ECAB 145 (1999).

<sup>27</sup> In view of the Board's finding on waiver, it is premature to address the amount of recovery of the overpayments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 10, 2014 is affirmed with respect to fact and amount of overpayment and set aside and remanded for further action with respect to the denial of waiver of recovery of the overpayment.

Issued: January 26, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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