

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

N.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Los Angeles, CA, Employer)

**Docket No. 15-1460
Issued: October 27, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 29, 2015 appellant filed a timely appeal from a June 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an \$816.81 overpayment of compensation for the period July 17 to 26, 2014; and (2) whether the overpayment is subject to waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on December 12, 2013 appellant, then a 31-year-old transportation security officer, sustained a complete right rotator cuff tear, right shoulder sprain, and right acromioclavicular sprain while handling a heavy bag. On April 4, 2014 he underwent an arthroscopic rotator cuff repair, bursectomy, and acromioplasty. OWCP authorized the procedure.

Appellant received compensation for temporary total disability from April 3 to June 28, 2014.² He returned to full-time work on July 17, 2014 with no loss of wages.

On July 21, 2014 OWCP noted that the upcoming July 2014 compensation payment would create an overpayment of compensation from July 17 to 26, 2014, as appellant would be paid total disability compensation after he returned to work. It calculated that, based on a daily net compensation rate of 81.681, he would be paid a total of \$816.81 in compensation for the 10-day period.

OWCP issued an electronic compensation payment on July 26, 2014 in the amount of \$2,287.07, covering the period June 29 to July 26, 2014.

By notice dated August 6, 2014, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$816.81 was created in his case for the period July 17 to 26, 2014, as he received compensation for total disability after he returned to work with no loss of wages. It found him without fault in creation of the overpayment, as he was not aware and could not reasonably have been expected “to know that OWCP had paid compensation incorrectly.” OWCP afforded appellant 30 days to request a prerecoupment hearing, provide financial information, and submit additional evidence or argument.

In an August 12, 2014 letter, appellant requested waiver of recovery of the overpayment, contending that OWCP found him without fault, and that repayment would cause financial hardship. He completed an overpayment recovery questionnaire (Form OWCP-20) noting that he resided with his wife and two minor children. Appellant listed \$2,200.00 in monthly household income, \$455.00 in bank accounts, \$200.00 for rent or mortgage, \$600.00 for food, \$400.00 for clothing, \$800.00 for utilities, and \$600.00 for unspecified miscellaneous expenses. He did not indicate whether he wanted to pursue a review of the written record, telephone conference, or a prerecoupment hearing.

In an August 15, 2014 letter, OWCP noted that appellant did not indicate whether he desired a telephone conference, review of the written record, or prerecoupment hearing. By notice dated January 21, 2015, it advised him that it had scheduled a telephonic hearing for March 9, 2015 at 2:00 p.m. Eastern time. OWCP provided a call-in number and passcode to participate in the hearing. As appellant did not telephone at the appointed time, it proceeded with a review of the written record.

² On April 29, 2014 appellant elected to receive FECA benefits by direct deposit effective that day. OWCP placed his case on the periodic rolls effective June 1, 2014.

By decision dated June 2, 2015, OWCP finalized the August 6, 2014 preliminary notice, finding an \$816.81 overpayment of compensation for the period July 17 to 26, 2014. It found that appellant was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver as his income exceeded his monthly expenses by \$200.00.³ OWCP accepted his accounting of \$2,200.00 in monthly household income. It also accepted appellant's stated expenses of \$200.00 for rent or mortgage, \$800.00 for utilities, \$600.00 for food, and \$400.00 for clothing, for a total of \$2,000.00. OWCP disallowed his listing of \$600.00 in "other" expenses as he did not submit any description or documentation of these costs. It calculated that as appellant's monthly discretionary income exceeded \$50.00 limit for disposable income, collection of the overpayment would not defeat the purpose of FECA or be against equity and good conscience. OWCP directed recovery of the overpayment by ordering him to submit payments of \$50.00 a month.

LEGAL PRECEDENT -- ISSUE 1

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 or her duty.⁴

Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵ Compensation for wage loss due to disability is available only for periods during which a work-related medical condition prevents the employee from earning the wages earned before the work-related injury.⁶

ANALYSIS -- ISSUE 1

Appellant received FECA wage-loss compensation from April 3 to June 28, 2014 due to an accepted right rotator cuff tear and surgical repair. He returned to work on July 17, 2014, but continued to receive total disability compensation through July 26, 2014. OWCP calculated that for the 10-day period from July 17 to 26, 2014, appellant received an \$816.81 overpayment of compensation, based on a daily compensation rate of 81.681 multiplied by 10.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$816.81 for the period July 17 to 26, 2014.

³ In the June 2, 2015 decision, OWCP misstated the amount of appellant's monthly disposable income. On page 3 of the decision, it totaled his monthly expenses at \$1,800.00 and not \$2,000.00. OWCP then subtracted \$1,800.00 from appellant's monthly income of \$2,200.00 to equal \$400.00. This is incorrect. OWCP accepted \$2,000.00 in ordinary and necessary living expenses, leaving discretionary income of \$200.00 a month. The Board finds, however, that this is harmless error, as the \$200.00 amount also exceeds the \$50.00 monthly limit for disposable income.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ *Id.* at § 10.500(a). *J.B.*, Docket No. 15-1043 (issued August 6, 2015).

The Board finds that OWCP properly determined the fact and the amount of overpayment. The Board notes that on appeal appellant does not contest the fact or amount of the overpayment.

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.⁷ 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 regulations⁸ 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.⁹ 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).¹⁰

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.¹¹ 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.¹² The individual who received

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 10.436.

⁹ *Id.* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹⁰ *Id.*

¹¹ *Id.* at § 10.437(b).

¹² Federal (FECA) Procedure Manual, *supra* note 9, Chapter 6.200.6.b(3) (October 2004). *C.P.*, Docket No. 14-975 (issued September 11, 2014).

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.¹³

The Board has held that an employee who received payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁴

ANALYSIS -- ISSUE 2

OWCP found that appellant was without fault in creating the overpayment of compensation and considered whether he was entitled to waiver of recovery. 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.¹⁵

OWCP analyzed the financial information appellant submitted. It allowed \$2,000.00 of ordinary and necessary living expenses, including \$200.00 for rent or mortgage, \$800.00 for utilities, \$600.00 for food, and \$400.00 for clothing. OWCP determined that appellant's monthly household income of \$2,200.00 exceeded his expenses by \$200.00 a month. This exceeded the \$50.00 allowance specified in OWCP's implementing regulations, demonstrating that he did not need substantially all of his income for ordinary and necessary living expenses.¹⁶ As appellant's income exceeded his allowable expenses by more than the amount specified, he has not established that recovery would defeat the purpose of FECA.

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no argument that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, OWCP properly denied waiver of recovery of the overpayment.

The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁷ As appellant was not in receipt of continuing compensation benefits at the time the final decision was entered in this matter, the Board lacks jurisdiction to review recovery of the overpayment.

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

¹⁴ *W.P.*, 59 ECAB 514 (2008); *S.C.*, Docket No. 14-1730 (issued April 13, 2015).

¹⁵ 20 C.F.R. § 10.436.

¹⁶ *Id.*

¹⁷ *See Judith A. Carido*, 55 ECAB 348 (2004).

On appeal, appellant argues that OWCP did not contact him regarding a telephonic hearing, and that he was on active military duty on the date of the hearing. The Board notes that the August 15, 2014 informational letter and January 21, 2015 notice of hearing were mailed to him at his address of record. Appellant also contends that he is unable to repay the overpaid compensation due to financial hardship. As found, OWCP properly denied waiver of recovery of the overpayment. The Board lacks jurisdiction to review recovery of the overpayment in this case.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$816.81 overpayment of compensation for the period July 17 to 26, 2014. The Board further finds that he is not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2015 is affirmed.

Issued: October 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board