

would defeat the purpose of FECA as appellant's entire income is necessary to meet her ordinary and necessary living expenses.

FACTUAL HISTORY

On May 19, 2005 appellant, then a 49-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back when picking up mail that fell on the floor. OWCP accepted her claim for aggravation of lumbar spondylolisthesis, sprain/strain of the lumbar region, major depression, and panic disorder without agoraphobia.

On July 6, 2005 appellant filed a claim for compensation (Form CA-7) for the period beginning July 7, 2005. In a memorandum to the file dated July 20, 2005, the claims examiner noted that the employing establishment reported her base salary as \$45,269.00, which equaled \$870.56 per week. OWCP added to this figure \$52.28 for night differential and \$43.33 for Sunday premium, for a total weekly pay rate of \$971.17. Appellant received compensation based on this pay rate for wage loss for the period July 4, 2005 through January, 31, 2015. However, on June 13, 2006, for some unknown reason, she began receiving compensation based on an incorrect pay rate of \$1,071.78 per week, and was compensated at this rate for all compensation periods from June 11, 2006 to January 31, 2015.

Effective February 1, 2015, appellant elected to receive OPM benefits in lieu of FECA benefits. On February 11, 2015 OWCP awarded a schedule award for 21 percent impairment to her left leg, which ran from February 1 to 7, 2015.

On February 5, 2015 OWCP advised appellant of a preliminary determination of an overpayment in the amount of \$33,491.34. In an accompanying memorandum, it noted that for the period June 11, 2006 through January 31, 2015, she should have received a gross amount of \$322,641.35 based on a weekly pay rate of \$971.17.² However, appellant received

² For the period June 11, 2006 through February 28, 2007, appellant's compensation pay rate should have been \$647.45 (or approximately \$92.49 a day), for a total compensation for 263 days in the amount of \$24,325.49. For the period March 1, 2007 through February 29, 2008, her compensation rate should have been \$663.00 (or approximately \$94.71 a day), for a total of 366 days in the amount of \$34,665.43. For the period March 1, 2008 through February 28, 2010, appellant's compensation rate should have been \$691.50 (or approximately \$98.785 a day), for a total of 730 days in the total amount of \$72,113.58. For the period March 1, 2010 through February 28, 2011, her compensation rate should have been \$715.00 (or approximately \$102.14 a day), for a total of 365 days, or a total compensation amount of \$37,282.14. For the period March 1, 2011 through February 29, 2012, appellant's compensation rate should have been \$727.25 (or approximately \$103.89 a day), for a total of 366 days for a compensation amount of \$38,024.79. For the period March 1, 2012 through February 28, 2013, her compensation rate should have been \$750.50 (or approximately \$107.215 a day), for a total of 365 days, for a compensation amount of \$39,133.21. For the period March 1, 2013 through February 28, 2014, appellant should have been compensated at a rate of \$763.25 (or approximately \$109.035 a day), for a total of 365 days, for a compensation amount of \$39,798.03. For the period March 1, 2014 through January 31, 2015, she should have been compensated at a rate of \$774.75 (or approximately \$110.68 a day), for a total of 337 days, for a compensation amount of \$37,298.68. The total compensation should have been \$322,641.

compensation in the amount of \$356,132.69 based on a weekly pay rate of \$1,071.78.³ OWCP made a preliminary determination that she was overpaid \$33,491.34, the net difference between the \$356,132.69 she received and the \$322,641.35 that she should have received. It also determined that appellant was without fault in creating the overpayment and sent her forms to complete to determine eligibility for a waiver of recovery of the overpayment and financial forms.

Appellant responded on February 25, 2015, and listed her monthly income from her compensation benefits as \$3,116.72, added \$130.17 from veterans benefits, for a total monthly income of \$3,246.89. She listed her rent or mortgage as \$1,400.00, food as \$500.00, clothing as \$100.00, utilities as \$239.00, and other expenses of \$1,535.64. Appellant noted monthly payments on her Avant Credit E Loan as \$110.00 (total amount owed of \$1,100.00) and Great Plains E Loan of \$235.00 (total amount owed of \$1,200.00) for total monthly installments of \$345.00. She listed other expenses as \$16,362.84 for a 2013 Nissan Rogue with Wells Fargo as lien holder, \$1,851.12 for car insurance, \$65.00 for gas, \$45.00 for oil change service, \$78.00 for tag renewal. Appellant noted that she has three cats and spends \$5.00 for monthly food and litter box and \$580.00 for veterinarian. She noted credit card debts of \$840.00, \$430.00, \$530.00, \$200.00, and \$35.00. Appellant also listed \$850.00 for attorney fees and \$6,000.00 for hospital bills and \$7,000.00 for a personal care attendant, for a total of \$51,789.84. She listed her funds on hand as negative \$171.00 0 cash on hand, and \$171.00 overdraft in her checking (\$136.00) and savings (\$35.00) accounts. Appellant denied that she had an overpayment. She also noted that as she was getting older, insurance costs were going up and she also had periodontal bills, and the last estimate to correct her dental condition was \$7,000.00 which she could not afford.

On March 4, 2015 appellant, through counsel, requested a telephone conference.

By letter to appellant dated March 6, 2015, OWCP requested supporting documentation on various expenses and assets. On March 23, 2015 it received from her copies of bills from Capitol One, Great Plains Lending, Geico, Target, Avanti Credit, Wells Fargo, and Holy Cross Hospital. Appellant also submitted copies of her Bank of America checking account monthly statements. These statements note cash withdrawals of over \$1,000.00 on the following dates: December 16, 2014 (\$1,000.00); December 30, 2014 (\$1,070.00); January 9, 2015 (\$1,600.00);

³ Appellant received incorrect compensation for the period June 11, 2006 through February 28, 2007 as follows. For the period June 11, 2006 through February 28, 2007, she had a compensation pay rate \$714.52 (or approximately \$102.07 a day) for 263 days lost or a compensation amount of \$26,845.54. For the period March 1, 2007 through February 29, 2008, appellant received compensation at a rate of \$731.75 (or approximately \$104.535 a day) for a total of 366 days lost, or a compensation amount of \$38,260.07. For the period March 1, 2008 through February 28, 2010, she received compensation in the amount of \$763.25 (or approximately \$109.035 a day) for 730 days lost, or a total of \$79,596.08. For the period from March 1, 2010 through February 28, 2011, appellant was paid at a rate of \$789.25 (or approximately \$112.75 a day), for a total of 365 days lost, or a total compensation amount of \$41,153.75. For the period March 1, 2011 through February 29, 2012, appellant had a compensation rate of 802.75 (or approximately \$114.68 a day) for 366 days or a total of \$41,972.36. For the period from March 1, 2012 through February 28, 2013, appellant had a compensation rate of \$828.50 (or approximately \$120.357 a day), for a total of 365 days lost or a total of \$43,200.36. For the period from March 1, 2013 through February 28, 2014, she had a compensation rate of \$842.50 (or \$120.357 a day) (or approximately, for a total of 365 days lost, for a total compensation amount of \$43,930.35. For a period from March 1, 2014 through January 31, 2015, appellant had a compensation rate of \$855.25 (or approximately \$122.18 a day), for a total of 337 days lost or a compensation amount of \$41,174.18. The total compensation she received for this period was \$356,132.69.

and March 6, 2015 (\$1,390.00). Appellant also submitted a revised household budget noting a monthly income of \$3,487.00. She listed her monthly expenses of \$3,801.00, noting rent \$1,400.00, electricity \$408.00, telephone \$43.00, groceries \$300.00, clothing \$50.00, vehicle payments \$365.00, fuel \$65.00, health expenses of \$21.00, automobile insurance \$463.00, \$200.00 pet food and monthly payment of loans of \$420.00. Appellant listed total amounts owed to creditors as \$16,362.00 for Wells Fargo Car Loan, \$840.00 for Capital One charge card, \$430.00 for 1st Premier Gold charge card; \$530.00 for 1st premier Platinum charge card, \$200.00 for Target card, \$1,365.00 for attorney fees, \$9,273.00 for Holy Cross Hospital for a total of \$29,000.00. She alleged that, when her expenses were subtracted from her income, she has a loss of \$313.83. On March 25, 2015 OWCP received a note dated March 20, 2015 wherein Robert Nogavero indicated that appellant had been living with him since December 2013, and that she pays him \$1,400.00 in rent and also pays electric. Mr. Nogavero provided a telephone number in the event that OWCP had any questions.

In a memorandum of conference dated March 25, 2015, the hearing representative discussed appellant's financial records, and determined that appellant had a monthly net income of \$3,234.42 and monthly expenses of \$1,875.37. He utilized appellant's financial records and receipts and adjusted numerous allowances for expenses. The hearing representative listed her expenses as food \$198.88, clothing \$82.18, utilities (water) \$110.99, electricity \$230.42, cellphone \$43.00, automobile \$364.86, gas \$66.78, car insurance \$457.80, medical expenses \$61.64, and internet \$24.95. He listed monthly liabilities as Avant \$110.48, Great Plains \$233.87, Capital One \$25.00, Target Red \$25.00, First Premium Gold \$34.94, and First Premium Platinum \$35.00. In addition to other smaller changes the hearing representative made in appellant's expenses, he did not allow her \$1,400.00 in rent, as he found that her support of that amount was not adequate. He noted that she advised that she has a deal with her landlord and pays sporadically, and noted that her bank account supports occasional withdrawals of \$1,390.00, \$1,600.00, and \$1,070.00. However, the hearing representative stated that the evidence he received to support the amount of appellant's rent was only a written letter from an unknown person advising that she pays rent in the amount of \$1,400.00. He noted that the evidence of record failed to support at least a contract for the amount in question. The hearing representative found that appellant had a monthly surplus of \$1,359.05, and determined that \$50.00 would be deducted from each of her continuing compensation benefits.

By decision dated March 25, 2015, OWCP finalized its determination that appellant had received an overpayment of \$33,491.34 and that she was not at fault in the creation of the overpayment, however, OWCP determined that she had not provided sufficient justification for OWCP to waive recovery of the overpayment, and that OWCP would deduct \$50.00 from future compensation payments.

LEGAL PRECEDENT -- ISSUE 1

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 duty.⁴ When an overpayment has been made to an individual because of an error of fact or law,

⁴ 5 U.S.C. § 8102(a).

adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.

ANALYSIS -- ISSUE 1

For the period June 11, 2006 through January 31, 2015, appellant should have received a gross amount of \$322,641.35 based on a weekly pay rate of \$971.17. However, she received compensation based on a weekly pay rate of \$1,071.78 for a total of \$356,132.69. Accordingly, appellant received an overpayment in the amount of \$33,491.34, the difference between the two amounts. The Board affirms this determination as it is supported by financial records from OWCP.

LEGAL PRECEDENT -- ISSUE 2

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁵

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.⁶ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁷

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.⁸ Recovery of an overpayment is also considered to be against

⁵ 20 C.F.R. § 10.434. See 5 U.S.C. § 8129(b).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

⁷ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁸ 20 C.F.R. § 10.437(a).

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 her position for the worse.⁹

Section 10.438 of the 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁰

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.¹¹

The hearing representative determined that, as appellant's income greatly exceeded his expenses, he was not entitled to waiver of the overpayment. He noted some discrepancies in her financial information. Most significantly, the hearing representative noted that appellant had not submitted sufficient evidence to support that she paid \$1,400.00 in rent. He noted that, although she submitted a note from an individual supporting the \$1,400.00 monthly amount, her checking account did not show regular payments of rent and there was no rental contract. Accordingly, the hearing representative determined that appellant's income exceeded her expenses by \$1,359.05, and she thus did not need substantially all her income to meet her current ordinary and necessary expenses.¹²

The Board finds that OWCP properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of FECA. The hearing representative carefully reviewed her monthly budget, bank statement, and bills and determined that her income greatly exceeded her expenses. Moreover, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance of the overpaid compensation, OWCP properly determined that recovery would not be against equity and good conscience. OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provide that, 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

⁹ *Id.* at § 10.437(b).

¹⁰ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

¹¹ *Id.*

¹² *See R.M.*, Docket No. 07-1066 (issued February 6, 2009).

to the 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 hardship.¹³

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive compensation from OWCP. The hearing representative determined that her expenses exceeded her income by \$1,359.05. He found that appellant was capable of repaying the debt with deductions of \$50.00 every 28 days from her continuing compensation benefits. The Board finds that OWCP reasonably required deductions in this amount from her continuing compensation payments.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of \$33,491.34; properly denied waiver of the recovery of the overpayment; and properly determined that the overpayment would be collected by deducting \$50.00 from each of appellant's continuing compensation payments.

¹³ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004); *see also J.M.*, Docket No. 10-1913 (issued July 11, 2011).

¹⁴ *B.P.*, Docket No. 14-2017 (issued March 19, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2015 is affirmed.

Issued: April 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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