

March 4, 2010 and subsequently rescinded; and (2) whether OWCP properly denied waiver of recovery of the \$11,587.25 overpayment of compensation.

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to this appeal will be summarized. Appellant, then a 46-year-old pipefitter helper, injured his back on January 21, 2004. He filed a traumatic injury claim (Form CA-1) on January 26, 2004, which OWCP accepted for lumbar strain and thoracic strain.

On June 25, 2008 appellant requested a schedule award (Form CA-7) based on a partial loss of use of his left lower extremity.

By decision dated June 24, 2010, OWCP granted appellant a schedule award for a nine percent permanent impairment of the left lower extremity, for the period September 4, 2009 to March 4, 2010, for a total of 25.92 weeks of compensation; based on a weekly compensation rate of \$390.13, this amounted to a total award of \$11,587.25.

Appellant filed a request for reconsideration on August 30, 2010.

In a September 20, 2010 decision, based on a new medical report from Dr. Craig Uejo, Board-certified in occupational medicine serving as an OWCP medical adviser, OWCP modified the June 24, 2010 decision, finding that appellant had zero percent permanent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides*.

Also on September 20, 2010 OWCP issued a preliminary notice that an overpayment in the amount of \$11,587.25 had occurred, representing the schedule award paid from September 4, 2009 to March 4, 2010. It found that appellant was without fault in creating the overpayment and allowed him 30 days to challenge the overpayment or request a prerecoumpment hearing.

On September 25, 2010 appellant completed an overpayment recovery questionnaire (Form OWCP-20) and checked a box indicating that, if an overpayment did occur, appellant would be entitled to waiver of recovery of the overpayment as it would be against equity and good conscience.

By decision dated April 22, 2011, OWCP affirmed the June 24, 2010 schedule award decision for the left lower extremity. It concluded that appellant had zero percent permanent impairment. An appeal was filed with the Board.³ In a decision dated August 21, 2012,⁴ the Board affirmed OWCP's April 22, 2011 decision rescinding appellant's schedule award.⁵

³ The overpayment decision was held in abeyance pending the Board's decision on permanent impairment.

⁴ Docket No. 11-1915 (issued August 21, 2012).

⁵ On August 25, 2012 appellant again requested a schedule award for permanent impairment of the left lower extremity. By decision dated April 2, 2013, OWCP denied appellant's request for a schedule award. On April 13, 2013 appellant requested a hearing before an OWCP hearing representative. By decision dated September 24, 2013, an OWCP hearing representative affirmed the April 2, 2013 decision denying appellant's schedule award claim. On November 4, 2013 appellant filed an appeal with the Board from the September 24, 2013. By decision dated September 16, 2015, the Board affirmed the denial of the schedule award. Docket No. 14-0199.

By decision dated May 15, 2013, OWCP finalized the preliminary overpayment determination. It noted that an overpayment had been created because appellant received a schedule award in the amount of \$11,587.25, which had been rescinded. OWCP found that while appellant was not at fault in the creation of the overpayment, he was not entitled to waiver of the overpayment.

Appellant filed an appeal with the Board and, in an order dated May 23, 2014,⁶ the Board set aside OWCP's May 15, 2013 decision on the issue of waiver, finding that it had failed to consider appellant's evidence, to make detailed findings, and to state the reasons supporting its finding that appellant was not entitled to waiver of the overpayment, pursuant to 20 C.F.R. § 10.126. The Board therefore remanded for consideration of the issue as to whether appellant was entitled to waiver of the overpayment in the amount of \$11,587.25.

On July 1, 2014 OWCP requested that appellant complete a new overpayment recovery questionnaire (OWCP-20).

In a Form OWCP-20 received by OWCP on July 18, 2014, appellant indicated that he had a monthly income of \$55.21 and total monthly expenses of \$3,347.00. He also listed a checking account balance of \$10,000.00; a savings account balance of \$85,000.00; and personal property in the amount of \$1,000.00, for a total amount of \$96,000.00 in available funds. Appellant further stated that his savings account balance was earmarked for retirement, that he had \$20,000.00 in legal fees, and a mortgage balance of \$112,000.00. He provided a July 7, 2014 letter from a health club indicating that he had been a member since June 2012 and had paid \$59.00 in dues for June 2014.

By decision dated October 7, 2014, OWCP found that appellant was not entitled to waiver of recovery of the overpayment in the amount of \$11,587.25. It considered the financial information appellant had provided but found that it failed to provide sufficient justification for OWCP to waive recovery of the overpayment and rather demonstrated that he had available funds well in excess of the amount owed to OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁷ 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.⁸ 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.⁹

⁶ Docket No. 13-1429 (issued May 23, 2014).

⁷ *Supra* note 1.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant had received an overpayment of compensation in the amount of \$11,587.25 representing the schedule award paid from September 4, 2009 to March 4, 2010 and subsequently rescinded. The record supports that he received a schedule award in the amount of \$11,587.25 for the period September 4, 2009 to March 4, 2010. As noted above OWCP found in its April 22, 2011 decision that the June 24, 2010 schedule award had been rescinded. The Board affirmed OWCP's rescission in its August 21, 2012 decision.¹⁰

OWCP properly found fact and amount of overpayment, as the overpayment was the entire amount of schedule award that appellant had received before the schedule award had been rescinded. OWCP thus properly found that an overpayment in compensation in the amount of \$11,587.25 had been created.

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.¹¹ 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.¹² 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

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹³

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 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.¹⁴ An individual is deemed to need substantially all of his or her

¹⁰ Although appellant subsequently filed a new claim for schedule award, this claim was also denied by OWCP, and the denial was affirmed by the Board in a September 16, 2015 decision. *Supra* note 3.

¹¹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹² 20 C.F.R. § 10.433.

¹³ *Id.* at § 10.434.

¹⁴ 20 C.F.R. § 10.436. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁵

An individual's liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹⁶ 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. 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.¹⁷

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.¹⁸ 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.¹⁹

ANALYSIS

The Board remanded the case for OWCP to properly determine appellant's request for waiver of recovery of the overpayment. Although appellant was not at fault in creating the overpayment, this does not mean that he gets to keep the overpaid amount if he does not meet eligibility requirements for waiver, as noted above.²⁰ In its October 7, 2014 decision, OWCP determined that appellant was not entitled to waiver of the overpayment.

The Board finds that OWCP properly exercised its discretion to find that recovery of the overpayment would not be against equity and good conscience. OWCP reviewed the claimed income, expenses and assets provided in his July 18, 2014 Form OWCP-20 and found that appellant had ample available funds with which to repay the overpayment he owed to OWCP. As noted above, he reported assets of \$96,000.00 and the Board notes that these assets greatly exceed the allowable resource base of \$4,800.00 for a single claimant without dependents.²¹ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the

¹⁵ *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁶ *See supra* note 14.

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.437.

¹⁹ *Id.* at § 10.437(b)(1).

²⁰ *See George A. Rodriguez*, 57 ECAB 224 (2005).

²¹ The record does not substantiate that appellant is married or has claimed dependents.

first prong of the test, *i.e.*, whether his monthly income exceeds his monthly ordinary and necessary living expenses by more than \$50.00.²²

The Board has held that OWCP must rely on a claimant's current financial situation at the time of the waiver determination.²³ Past circumstances or assumed future conditions are not a proper basis on which to decide a claimant's eligibility for waiver.²⁴ While appellant alleged that he would require his assets for his retirement, this is not sufficient to refute the fact that his assets far outweigh the resource base.

Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period September 4, 2009 to March 9, 2010. Therefore OWCP acted properly in refusing appellant's request for waiver, as he did not meet the qualifications for waiver of the recovery of the overpayment.²⁵ Pursuant to its regulations, OWCP did not abuse its discretion in issuing its October 7, 2014 final decision denying waiver of recovery of the overpayment in the amount of \$11,587.25.

CONCLUSION

The Board finds that OWCP properly found fact of overpayment and an overpayment in the amount of \$11,587.25 representing the schedule award paid from September 4, 2009 to March 4, 2010 which was subsequently rescinded. The Board finds that OWCP properly denied waiver of the overpayment as the evidence does not establish that recovery would defeat the purpose of FECA or be against equity and good conscience.

²² See *C.H.*, Docket No. 15-799 (issued June 19, 2015).

²³ *L.S.*, 59 ECAB 350 (2008).

²⁴ 20 C.F.R. § 10.433.

²⁵ See *E.M.*, Docket No. 07-785 (issued August 17, 2007); 20 C.F.R. § 10.436.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board