



## **FACTUAL HISTORY**

On November 23, 2014 appellant, then a 57-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he injured his right shoulder lifting sacks in the performance of his job duties. OWCP accepted his claim on March 11, 2015 for sprain of the right shoulder and upper arm.

Appellant accepted a light-duty position on April 26, 2015 working 10 hours a day, four days a week. He underwent right shoulder arthroscopy with debridement of rotator cuff tear, subacromial decompression, and lateral clavicle excision surgery on August 13, 2015. Appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation due to leave without pay from August 15 through September 26, 2015. On August 28 and 31, 2015 OWCP authorized compensation benefits from August 15 through September 19, 2015. It entered appellant on the periodic rolls on September 1, 2015. On September 11, 2015 OWCP noted that his compensation payments would be direct deposited into his bank account.

Appellant returned to work on October 26, 2015. He signed the limited-duty position offer on October 27, 2015. On December 30, 2015 the employing establishment informed OWCP that appellant had returned to light-duty work on October 26, 2015 for eight hours a day.

In a preliminary determination dated January 6, 2016, OWCP found an overpayment of compensation in the amount of \$5,805.43 because appellant had returned to work for eight hours a day on October 26, 2015, but continued to receive compensation for temporary total disability through December 12, 2015. It informed him that this overpayment constituted prohibited receipt of a dual benefit, but that he was found without fault in the creation of the overpayment. OWCP provided appellant with an overpayment recovery questionnaire (Form OWCP-20) and informed him of his appeal rights. It afforded him 30 days to respond.

OWCP received appellant's completed Form OWCP-20 on February 8, 2016. Appellant listed his monthly income as \$3,800.00 including salary, and other benefits. He noted that he had no dependents. Appellant provided his monthly expenses including: rent \$1,020.00, food \$350.00, utilities \$400.00, and miscellaneous expenses \$266.00. He listed his debts with monthly payments of \$540.00, \$121.00, \$220.00, and \$120.00 for total monthly expenses of \$3,037.00. Appellant indicated that he had a savings account balance of \$6.00 with no savings or other personal property.

OWCP issued a final overpayment determination on February 8, 2016, finding an overpayment of compensation in the amount of \$5,805.43 for the period October 26 through December 12, 2015. It found that appellant was without fault in the creation of the overpayment. OWCP further found that appellant was not entitled to waiver of recovery of the overpayment as he provided no information to support a finding that recovery would defeat the purpose of FECA or be against equity and good conscience.

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

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.<sup>3</sup> OWCP regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>4</sup>

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>5</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$5,805.43 for the period October 26 through December 12, 2015. The record supports, and appellant has not disputed, that he returned to full-time light-duty work on October 26, 2015, but continued to receive compensation from OWCP through December 12, 2015. For this period, he received compensation in the amount of \$5,805.43. As appellant was not entitled to compensation after his return to work, OWCP properly found an overpayment of compensation in the amount of \$5,805.43.

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

The waiver or refusal to waive an overpayment of compensation is a matter that rests within the discretion of OWCP pursuant to statutory guidelines.<sup>6</sup> 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

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<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 8116(a).

<sup>4</sup> *Id.* at § 10.500.

<sup>5</sup> See *M.L.*, Docket No. 16-0295 (issued March 21, 2016); *Danney E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>6</sup> See *E.C.*, Docket No. 14-826 (issued July 3, 2014).

entitled.<sup>7</sup> 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 regulations<sup>8</sup> provides that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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>9</sup>

OWCP procedures provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery would defeat the purpose of FECA if both the individual from whom recovery is sought needed substantially all of his or her current income (including FECA periodic benefits) to meet current ordinary and necessary living expense, and if the individual’s assets did not exceed the resource base 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. 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. 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 of recovery.<sup>10</sup>

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<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 20 C.F.R. § 10.436.

<sup>9</sup> *Id.* at § 10.437.

<sup>10</sup> See *B.R.*, Docket No. 15-1247 (issued October 26, 2015); *L.J.*, 59 ECAB 264 (2007).

## ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in the creation of the overpayment based on receipt of compensation after his return to full-time work. Waiver of recovery of the overpayment 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. The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his income exceeds his monthly expenses by more than \$50.00 a month. He provided an overpayment recovery questionnaire and listed monthly income of \$3,800.00, including his salary and other benefits, and monthly expenses of \$3,037.00. Appellant's income exceeds his unsubstantiated expenses by \$763.00 a month. Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the second prong of the test, *i.e.*, whether he has more than \$4,800.00 in assets.<sup>11</sup>

Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience. As described above, the record does not support this contention.

Recovery of an overpayment is also 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 or her position for the worse. Appellant has not alleged that he gave up a valuable right or changed his position for the worse and, thus, has not established that recovery would be against equity and good conscience.

## CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,805.43, for the period October 26 through December 12, 2015 as he received both his salary and compensation for total disability for which OWCP found he was not at fault. The Board further finds that he is not entitled to waiver of recovery of the overpayment. With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases whether OWCP seeks recovery from continuing compensation benefits under FECA. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to OWCP's recovery of an overpayment under the Debt Collection Act.<sup>12</sup>

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<sup>11</sup> See *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

<sup>12</sup> See *Lewis George*, 45 ECAB 144, 154 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2016 decision of Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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