

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

R.W., Appellant)	
)	
and)	Docket No. 17-0276
)	Issued: August 8, 2017
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 17, 2016 appellant, through counsel, filed a timely appeal from an October 17, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly denied waiver of recovery of the overpayment; and (2) whether it properly found that the overpayment could be recovered by deducting \$400.00 from continuing compensation.

FACTUAL HISTORY

This case has previously been before the Board on prior appeal.³ The facts of the case as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on September 8, 2003 appellant, then a 46-year-old mail handler, sustained a cervical strain, concussion, and cervical spinal stenosis due to a forklift accident in the performance of duty, OWCP File No. xxxxxx464. Appellant suffered a left shoulder injury on February 25, 2005 when he pulled down a bay door on the dock. For this injury, OWCP accepted bilateral capsulitis of the shoulders, bilateral carpal tunnel syndrome and left medial epicondylitis, OWCP File No. xxxxx258.⁴

On May 29, 2005 and March 30, 2007 appellant filed claims for a schedule award (Form CA-7).

By decision dated October 15, 2007, OWCP granted appellant schedule awards for two percent right upper extremity permanent impairment and two percent left upper extremity permanent impairment for pain and sensory deficit of the C5 and C6 nerve root distribution.

By decision dated June 25, 2009, for right carpal tunnel syndrome, OWCP awarded 5 percent permanent impairment and for right shoulder range of motion deficit he was awarded 8 percent permanent impairment using the Combined Values Chart he was awarded an additional 11 percent impairment, for a total of 13 percent permanent impairment of the right upper extremity.

By that same decision for the left medial epicondylitis, OWCP awarded one percent permanent impairment, for the left carpal tunnel syndrome, it awarded five percent permanent impairment, and for decreased left shoulder range of motion, it awarded eight percent permanent impairment. Using the Combined Values Chart, appellant was awarded a total of 14 percent permanent impairment for the left upper extremity.

On October 18, 2011 appellant filed a claim for an additional schedule award.

By decision dated April 16, 2012, OWCP granted appellant additional impairment of six percent permanent impairment for the combined conditions of right carpal tunnel syndrome and

³ Docket No 14-195 (issued October 10, 2014).

⁴ OWCP combined the claims on March 6, 2008 with File No xxxxxx464 serving as the master file.

right shoulder impingement, and six percent permanent impairment for left carpal tunnel syndrome, left elbow lateral epicondylitis, and left shoulder impingement.

By notice dated February 1, 2013, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$31,473.32 as the additional impairment had already been incorporated in the earlier awards of 13 percent impairment to each upper extremity, but had previously been paid for 13 percent right upper extremity permanent impairment and 14 percent left upper extremity permanent impairment. The compensation received for the additional schedule award constituted an overpayment. OWCP made the preliminary finding that appellant was not at fault in creation of the overpayment. It provided him an overpayment recovery questionnaire (OWCP Form 20) and afforded 30 days to submit financial information about his income, assets, and expenses. OWCP explained that this information was required to consider waiver of recovery of the overpayment.

On February 25, 2013 appellant requested a telephonic prerecoument hearing with an OWCP hearing representative.

Appellant submitted the OWCP Form 20, stating that he had a total monthly income of \$918.72 and monthly expenses of \$3,700.00. He had \$50.00 cash on hand, \$573.57 in a checking account, and a total of \$50.00 under other funds. Under expenses, appellant listed \$500.00 for rent, \$400.00 for food, \$100.00 for clothing, \$400.00 for utilities, \$100.00 for other expenses and \$2,200.00 for bankruptcy. Subsequent to the hearing, he submitted a more detailed accounting of his expenses and income.

By decision dated September 9, 2013, OWCP's hearing representative finalized the overpayment in the amount of \$31,473.32. He found that appellant had been erroneously paid for an additional six percent permanent impairment to each upper extremity. The hearing representative noted that as appellant's income exceeded his expenses by approximately \$473.72, he denied waiver of recovery and found that the overpayment could be recovered by deducting \$400.00 from continuing compensation.

On November 5, 2013 appellant filed an appeal with the Board. In a decision dated October 10, 2014, the Board affirmed in part and set aside in part the September 9, 2013 decision. The Board found that OWCP had properly determined fact and amount of overpayment in the amount of \$31,473.32 based on the receipt of schedule awards for an additional six percent permanent impairment of each upper extremity, to which he was not entitled. The Board determined, however, that OWCP had failed to properly consider whether appellant would be eligible for waiver of recovery of the overpayment and remanded the case to OWCP for such further determination. In view of the Board's finding on waiver, it found that it was premature to consider the method of repayment of the overpayment.⁵

On August 29, 2016 OWCP provided appellant an overpayment recovery questionnaire (Form OWCP-20) and requested supporting documentation so that it could evaluate whether he was eligible for waiver of recovery of the overpayment. It noted that the 2013 OWCP-20 form,

⁵ *Supra* note 2.

which had previously been provided was outdated and requested that he provide updated financial information. OWCP requested that appellant submit the information within 30 days.

By letter dated October 3, 2016, OWCP sent appellant a second request for an updated OWCP-20 form and supporting financial information. It afforded appellant a one-week extension. OWCP noted that the August 29, 2016 letter had been properly addressed to appellant and his counsel and neither letter had been returned as undeliverable.

On October 14, 2016 OWCP received an OWCP Form 20. This questionnaire related that appellant had a total monthly income of \$1,952.00 and monthly expenses of \$1,883.00. It indicated that appellant had \$60.00 cash on hand and a negative \$791.91 in a checking account. Under expenses, appellant listed \$800.00 for rent or mortgage, \$200.00 for food, \$200.00 for clothing, \$428.00 for utilities, \$215.00 for other expenses, and \$40.00 for a credit card. He noted that he owed \$400.00 on the credit card. No corroborating financial information was provided.

By decision dated October 17, 2016, OWCP denied waiver of recovery of the \$31,473.32 overpayment of compensation. It found that appellant failed to respond to its letters dated August 29, 2016 and October 3, 2016. OWCP determined that it would recover the overpayment by deducting \$400.00 every 28 days from his continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

According to section 10.436,⁶ recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁷ For waiver under this standard, the beneficiary must meet the two-pronged test and show that he both needs substantially all of his current income to meet current ordinary and necessary living expenses,⁸ and that his assets do not exceed the resource base.⁹

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.¹⁰ OWCP's regulations provide:

⁶ 20 C.F.R. § 10.436.

⁷ 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) (October 2004).

⁸ 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. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

⁹ See *supra* note 6. *W.F.*, 57 ECAB 705, 708 (2006).

¹⁰ *Id.*

“(a) 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....

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹¹

ANALYSIS -- Issue 1

In the prior decision, the Board affirmed OWCP’s finding that appellant was not at fault in creating the overpayment of compensation, but remanded the case for consideration of whether he was entitled to waiver of recovery of the overpayment. On remand OWCP found appellant was not entitled to waiver of recovery of the overpayment. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² 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.¹³

The decision of whether OWCP shall waive recovery of an overpayment is a matter that rests in its discretion to be exercised pursuant to regulatory guidelines. The Board will not substitute its own discretion to decide the matter.¹⁴

In its October 17, 2016 decision, OWCP found that appellant had failed to respond to its letters of August 29, and October 3, 2016. However, received into the record on October 14, 2016 was the completed overpayment recovery questionnaire.

FECA and its implementing regulations provide that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.¹⁵ Since the Board’s jurisdiction of a case is limited to reviewing that evidence which was before OWCP at the time of its final decision,¹⁶ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board’s decisions are final as to the subject matter

¹¹ 20 C.F.R. § 10.438. *See Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹² 5 U.S.C. § 8129(b). *See D.C.*, Docket No. 09-2042 (issued August 9, 2010); *Tammy Craven*, 57 ECAB 689 (2006).

¹³ *Supra* note 6.

¹⁴ *See John M. Dunn*, Docket No. 92-2096 (issued February 18, 1994).

¹⁵ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125.

¹⁶ 20 C.F.R. § 501.2(c)(1)

appealed,¹⁷ it is crucial that all evidence relevant to that subject matter, which was properly submitted to OWCP prior to the time of issuance of its final decision, be addressed by OWCP.¹⁸

A review of the record clearly shows that OWCP had not considered relevant evidence received into the record prior to the issuance of its October 17, 2016 decision. The Board, therefore, must set aside OWCP's October 17, 2016 decision and remand the case so that OWCP may fully consider the evidence that had been submitted by appellant prior to the issuance of this decision. Following such further consideration and after such further development as it deems necessary, OWCP shall issue a *de novo* decision.

On appeal counsel contends that OWCP was required to issue a new schedule award decision following the October 12, 2012 OWCP hearing representative decision. The Board, however, previously reviewed and ruled upon the schedule award issue in its October 10, 2014 decision. Absent further merit review by OWCP this issue is *res judicata*.¹⁹

CONCLUSION

The Board further finds that the case is not in posture for a decision regarding appellant's entitlement to waiver of recovery of the overpayment.

¹⁷ *Id.* at § 501.6(c).

¹⁸ See *E.Z.*, Docket No. 14-274 (issued March 16, 2015); *Linda Johnson*, 45 ECAB 439 (1994); *William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁹ See *J.V.*, Docket No. 14-0788 (issued October 19, 2015); *Robert G. Burns*, 57 ECAB 657 (2006); see also *D.S.*, Docket No. 14-0012 (issued March 18, 2014)

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2016 is set aside and remanded for further proceedings consistent with the above opinion.

Issued: August 8, 2017
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