

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

M.H., Appellant)	
)	
and)	Docket No. 17-0766
)	Issued: July 3, 2017
DEPARTMENT OF THE AIR FORCE,)	
LACKLAND AIR FORCE BASE, TX, Employer)	

Appearances: *Case Submitted on the Record*
*Dr. Anthony Rogers, for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2017 appellant, through his representative, filed a timely appeal from a February 6, 2017 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 over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount \$2,684.39 for the period June 20, 2015 through September 17, 2016 because he was compensated at the wrong pay rate; (2) whether OWCP properly denied waiver of recovery of

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.*

the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$81.82 every 28 days from appellant's continuing compensation.

On appeal appellant generally asserts that he disagrees with the overpayment determination.

FACTUAL HISTORY

On August 4, 2014 appellant, then a 62-year-old security guard, filed a traumatic injury claim (Form CA-1), alleging that he injured his left thigh, back, neck, and right shoulder when he tripped over a curb and fell at work on July 30, 2014. He stopped work that day and began receiving continuation of pay. A Notification of Personnel Action (Form SF-50) indicated that, effective January 12, 2014, appellant's annual pay rate was \$37,957.00. Appellant returned to modified-duty work for four hours daily on December 4, 2014. On January 27, 2015 he began working six hours of modified-duty work daily.

OWCP accepted the conditions of sprain of right shoulder and upper arm, rotator cuff, unspecified sprain of right shoulder and upper arm, sprain of neck, lumbar sprain, and bilateral knee contusions.

A pay rate memorandum dated March 10, 2015 noted that, based on the date-of-injury (July 30, 2014) pay rate, appellant's weekly pay rate for compensation purposes was \$729.94. He received wage-loss compensation at the 2/3 rate from December 1, 2014 to January 23, 2015 for partial days.³

Appellant stopped work on June 10, 2015 when Dr. Francisco Garcia, a Board-certified orthopedic surgeon, performed right shoulder arthroscopic surgery with rotator cuff repair and subacromial decompression.

A Form SF-50, Notification of Personnel Action, indicated that, effective June 19, 2015, appellant's employment was terminated because his appointment term had ended. At that time his annual pay rate was \$39,400.00. Appellant filed claims for compensation (Form CA-7) for wage loss beginning June 20, 2015.

OWCP paid appellant wage-loss compensation beginning June 20, 2015 based on a date of recurrence of June 10, 2015 pay rate.⁴ A pay rate memorandum indicated that appellant's weekly pay rate of \$795.49 included base pay of \$757.69 plus weekly night differential of

³ There is no indication in the record that appellant received compensation from the date his continuation of pay expired until December 1, 2014, and no evidence that he received compensation after January 23, 2015 when he was working six hours daily.

⁴ The record indicates that appellant used leave for the period June 10 through 14, 2015.

\$37.80. Appellant was placed on the periodic compensation rolls, effective September 20, 2015, based on this pay rate.⁵

On November 4, 2016 OWCP issued a preliminary determination that appellant received a \$2,684.39 overpayment of compensation for the period June 20, 2015 through September 17, 2016 for which he was without fault. It explained that the overpayment was created because appellant was paid compensation based on a date-of-recurrence pay rate when he should have been paid compensation based on the date-of-injury rate. OWCP noted that there was insufficient evidence to support that appellant qualified for a recurrent pay rate because there was no evidence to support that he had returned to regular employment and worked more than six months before stopping again on June 10, 2015. Appellant was provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20). He was asked to attach supporting documentation including copies of income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other record which supported the income and expenses listed. OWCP also informed him of the various appeal actions he could take. Appellant was afforded 30 days to respond. An overpayment worksheet and computer print-outs were attached.

Appellant timely requested a telephone hearing. He submitted a completed overpayment questionnaire which listed monthly expenses of \$1,413.59 and monthly income from social security benefits of \$1,870.00, with assets from checking, savings, stocks, and bonds totaling \$120,754.00.

A telephone hearing was held on February 6, 2017. The claims examiner explained that there was no evidence of record that appellant had returned to regular employment and, thus, he was not entitled to a recurrent pay rate. He noted that appellant was not at fault and, while this entitled OWCP to consideration of waiver, it did not automatically qualify appellant for waiver. The claims examiner concluded that, after his review of the completed overpayment recovery questionnaire, appellant did not meet the two-prong test to establish waiver.

By decision dated February 6, 2017, OWCP finalized the preliminary determination that appellant was not at fault in the creation of an overpayment of compensation in the amount of \$2,684.39 for the period June 20, 2015 through September 17, 2016. It noted that in addition to \$1,870.00 per month in social security benefits, appellant also received net FECA compensation of \$1,636.42 every 28 days, and that his monthly expenses totaled \$1,413.59. OWCP further noted that his assets totaled \$120,754.00. It concluded that because appellant's monthly income exceeded his monthly expenses significantly and his resource base exceeded \$4,800.00, there was no evidence that collection of the overpayment would defeat the purpose of FECA and also no evidence to establish that collection would be against equity and good conscience. Appellant, thus, was not entitled to waiver of recovery of the overpayment. The overpayment was to be repaid by deductions of \$81.82 each compensation period.

⁵ On October 19, 2016 Dr. Garcia requested authorization for right shoulder joint reconstruction. In a letter dated October 21, 2016, OWCP informed appellant that it was unable to authorize the requested surgery because there was no medical evidence of record to support the request. Appellant appealed the October 21, 2016 letter to the Board on January 3, 2017. The Board assigned Docket No. 17-0499 to that appeal, which will be adjudicated separately.

LEGAL PRECEDENT -- ISSUE 1

Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁶ In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition.⁷

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation in the amount of \$2,684.39 was created for the period June 20, 2015 through September 17, 2016 because appellant was paid compensation based on an incorrect date-of-recurrence pay rate when he should have been paid compensation based on the date-of-injury rate.

As noted, only if an employee returns to regular full-time employment for a period of six months before the recurrence occurs, is the employee entitled to a recurrent pay rate.⁸

In this case, appellant sustained a traumatic injury on July 30, 2014. He stopped work that day, and did not return until December 4, 2014 when he began four hours daily of modified-duty work. Appellant increased his hours of modified duty to six hours daily on January 27, 2015, stopped work on June 10, 2015 for shoulder surgery, and did not return. While he had worked six months between December 4, 2014 and his work stoppage on June 10, 2015, appellant had not worked the requisite full-time regular duty which would entitle him to a recurrent pay rate.⁹

The record supports that OWCP paid appellant wage-loss compensation beginning June 20, 2015 based on a June 10, 2015 date of recurrence. It continued periodic rolls compensation payments based on this recurrent pay rate through September 17, 2016, based, which totaled \$29,352.50 when he should have been paid at the date-of-injury pay rate of \$729.94 per week, for a total of \$26,668.11. Therefore, OWCP properly found that appellant received an overpayment of compensation in the amount of \$2,684.39.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless the “incorrect payment has been made to an individual who is without fault and

⁶ 5 U.S.C. § 8101(4); *see Dale Mackelprang*, 57 ECAB 168 (2005).

⁷ *C.M.*, Docket No. 08-1119 (issued May 13, 2009).

⁸ *Supra* note 6.

⁹ *Id.*; *see J.R.*, Docket No. 14-1728 (issued June 17, 2015) (appellant is not entitled to a recurrent pay rate as the record demonstrated that all of the positions appellant held following his injury were modified duty, not full-time regular duty).

when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁰ Section 10.438 of OWCP regulations provides 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 denial of waiver.¹¹

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP regulations.¹²

Section 10.436 provides that 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.¹³ For waiver under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁴ OWCP procedures provide that the 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.¹⁵

An individual’s liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits. 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/supplies.¹⁶

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.¹⁷ The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.438.

¹² 5 U.S.C. § 10.434-10.437.

¹³ *Id.* at § 10.436.

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a (June 2009).

¹⁶ *Id.*

¹⁷ *Supra* note 15.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his asset base exceeds the resource base of \$4,800.00, as provided in OWCP procedures.¹⁸ On the completed overpayment recovery questionnaire, appellant noted having checking accounts, savings accounts, stocks, and bonds totaling \$120,764.00. This exceeds the \$4,800.00 asset base for an individual, such as appellant, who has no dependents.¹⁹ 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 to consider the first prong of the test, *i.e.*, whether his monthly income exceeded his monthly ordinary and necessary expenses by more than \$50.00.²⁰

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.²¹ OWCP procedures provide that 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.²² Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²³ The individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²⁴

Appellant submitted no evidence to show that he gave up a valuable right or changed his position for the worse in reliance on anticipated compensation payments. Thus, he has not shown that, if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all. OWCP properly found that he was not entitled to waiver on the grounds that recovery would be against equity and good conscience.²⁵

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, it shall decrease later payments of compensation, taking into account the probable extent of future payments, the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Supra* note 7.

²¹ 20 C.F.R. 10.437; *see W.P.*, 59 ECAB 514 (2008).

²² Federal (FECA) Procedure Manual, *supra* note 15 at Chapter 2.600.b(3) (June 2009).

²³ 20 C.F.R. § 10.437(b)(1) (2011); *see J.A.*, Docket No. 09-1678 (issued June 9, 2010).

²⁴ *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁵ Federal (FECA) Procedure Manual, *supra* note 15.

rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²⁶

ANALYSIS -- ISSUE 3

The record supports that, in requiring recovery of the \$2,684.39 overpayment of compensation by deducting \$81.82 from appellant's compensation payments every four weeks, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441(a) of its regulations and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP properly required recovery of the overpayment by deducting \$81.82 from appellant's compensation payments every four weeks.²⁷

²⁶ 20 C.F.R. § 10.441(a).

²⁷ *Id.*; see *C.P.*, Docket No. 13-1341 (issued January 6, 2014).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,684.39, and that OWCP properly denied waiver of recovery and required recovery of the overpayment by deducting \$81.82 every 28 days from his continuing FECA compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2017
Washington, DC

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

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

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