



## **FACTUAL HISTORY**

OWCP accepted that on March 21, 2001 appellant, then a 42-year-old machinist, sustained an aggravation of back pain and cervical spondylosis without myelopathy while handling heavy tools. On March 26, 2001 he underwent authorized anterior cervical discectomies with fusion at C3-4 and C6-7. Following a period of recuperation during which he received compensation, appellant returned to work as a supply technician on October 20, 2002 with permanent lifting restrictions preventing him from working as a machinist.

In a February 12, 2003 letter, OWCP adjusted appellant's compensation effective October 20, 2002 to reflect his actual earnings as a supply technician. It noted that appellant's date-of-injury machinist job paid \$18.91 an hour, whereas the supply technician position paid \$17.12 an hour.<sup>3</sup>

An August 24, 2003 notice of personnel action (Form SF-50) notes appellant's change of position that day from a supply technician, earning \$37,237.00 annually, to a purchasing agent, earning \$41,380.00 annually or \$795.77 weekly. As of August 24, 2003 appellant's date-of-injury position as a machinist paid \$716.10 a week. The record indicates that appellant continued to receive wage-loss compensation.

In a January 15, 2008 letter, appellant advised OWCP that his salary increased due to a promotion and that he should no longer be receiving wage-loss compensation. By January 17, 2008 letter, OWCP advised him that "[b]ased on the regulations you are entitled to the continuing compensation you currently receive. Specifically, you have not been overpaid and this office does not anticipate declaring an overpayment on this issue."

As of November 14, 2015 appellant continued work as a purchasing agent having received periodic increases in salary. OWCP calculated that from August 24, 2003 through November 14, 2015, appellant received \$36,113.59 in wage-loss compensation as he no longer had any loss of wage-earning capacity.

By merit decision dated November 19, 2015, OWCP retroactively adjusted appellant's compensation effective August 24, 2003, finding that his actual earnings of \$795.77 as a purchasing agent exceeded the \$716.10 weekly wages of his date-of-injury machinist job. It terminated appellant's entitlement to continuing wage-loss compensation as his wages as a purchasing agent exceeded his salary of his date-of-injury position as a machinist. As appellant had no loss of wage-earning capacity as of August 24, 2003, he was no longer entitled to wage-loss compensation after that date.

By notice dated November 19, 2015, OWCP informed appellant of its preliminary determination that an overpayment of compensation had been created in his case in the amount of \$36,113.59 for the period August 24, 2003 through November 14, 2015. It made the preliminary finding that appellant was without fault in creating the overpayment. OWCP afforded appellant 30 days to submit information regarding his income, assets, and expenses or

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<sup>3</sup> As the February 12, 2013 letter was an informal modification of benefits, and not a formal loss of wage-earning capacity determination, it did not include appeal rights.

to request a prerecoupment hearing, or request a conference. It enclosed an overpayment recovery questionnaire (Form OWCP-20).

In a November 27, 2015 letter, appellant requested a telephonic prerecoupment hearing, which was held July 11, 2016. During the hearing, he contested the fact of overpayment. Appellant contended that OWCP improperly modified his wage-earning capacity determination, noting that he had not been vocationally rehabilitated, but instead had obtained the purchasing agent job on his own. He noted that he alerted OWCP numerous times that his salary increased due to the promotion. Appellant provided a copy of his November 2003 and January 2008 letters to OWCP advising that he had been promoted and was no longer entitled to compensation.

Appellant submitted a completed Form OWCP-20 overpayment recovery questionnaire, a detailed financial narrative, and supporting documentation. He noted that he lived with his wife and had no other dependents. Appellant provided bills and receipts showing monthly expenses of \$2,200.00 for mortgage, \$800.00 for food, \$150.00 for clothing, \$644.00 for utilities, and \$696.00 in miscellaneous expenses. Bank statements showed \$3,434.00 in a checking account, \$25,119.00 in a savings account, and stocks and bonds valued at \$5,000.00. Appellant also confirmed his ownership of a rental property valued at \$168,000.00. He submitted a federal income tax return showing a monthly household income of \$8,675.00.

By decision dated September 21, 2016, an OWCP hearing representative finalized the preliminary finding of an overpayment in the amount of \$36,113.59 for the period August 24, 2003 through November 14, 2015. He found that appellant received wage-loss compensation for a period in which he had no loss of wage-earning capacity, as his actual earnings exceeded those of his date-of-injury position. The hearing representative found appellant without fault in creating the overpayment as OWCP had advised appellant on January 17, 2008 that he was entitled to continued wage-loss compensation and that there was no overpayment in his case. Based on the financial documentation provided by appellant, the hearing representative accepted \$4,490.00 in allowable monthly expenses: rent or mortgage \$2,200.00; food \$800.00; clothing \$150.00, utilities \$644.00; miscellaneous expenses \$696.00. The documents also established a monthly household income of \$8,675.00. OWCP therefore denied waiver of recovery of the overpayment as he had an excess of \$4,185.00 each month after expenses, significantly more than the \$50.00 allowance under OWCP's procedures. Additionally, appellant had over \$33,000.00 in checking accounts, savings accounts, and bonds, as well as a rental property valued at \$168,000.00. This exceeded the asset base of \$8,000.00 for waiver for an individual with a spouse and no other dependents. The hearing representative directed appellant to repay the overpayment by paying \$200.00 a month until the debt was collected in full.

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

Section 8102(a) of 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.<sup>4</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 or she may not receive salary, pay or remuneration of any type from the United

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<sup>4</sup> 5 U.S.C. § 8102(a).

States, except in limited circumstances.<sup>5</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 from earning the wages earned before the work-related injury.<sup>6</sup> OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work with no loss of wage-earning capacity, but continues to receive wage-loss compensation.<sup>7</sup>

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

Appellant was a machinist when he was injured. As of August 24, 2003, appellant began work at the employing establishment as a purchasing agent, earning \$795.77 a week, which exceeded the current pay rate for his date-of-injury machinist position of \$716.10 a week. At that time, appellant had no loss of wage-earning capacity and would no longer be eligible for wage-loss compensation. OWCP continued to pay \$36,113.59 in wage-loss compensation benefits from August 24, 2003 through November 14, 2015. The \$36,113.59 therefore constitutes an overpayment of compensation.

On appeal appellant asserts that there is no overpayment of compensation in his case as OWCP had not modified his benefits. However, under OWCP procedures, wage-loss compensation may be based on actual earnings, as in this case.<sup>8</sup> As noted, 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 from earning the wages earned before the work-related injury.<sup>9</sup>

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

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 entitled.<sup>10</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 insufficient, in and of itself, for OWCP to waive the

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<sup>5</sup> *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>6</sup> 20 C.F.R. § 10.500(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>8</sup> *Id.* at Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815(3)(c) (June 2013).

<sup>9</sup> See *supra* note 5.

<sup>10</sup> *Id.* at § 8129(a).

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>11</sup> provides that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do 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.<sup>12</sup> 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. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).<sup>13</sup>

Recovery of an overpayment is 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 position for the worse.<sup>14</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.<sup>15</sup> 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. This information will also be used to determine the repayment schedule, if necessary.<sup>16</sup>

### ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation and considered whether he was entitled to waiver of recovery. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience. 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

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<sup>11</sup> 20 C.F.R. § 10.436.

<sup>12</sup> *Supra* note 7 at Chapter 6.200.6.a(1)(b) (June 2009).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.437(b).

<sup>15</sup> *See supra* note 7 at Chapter 6.200.6.b(3) (October 2004). *C.P.*, Docket No. 14-975 (issued September 11, 2014).

<sup>16</sup> 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

necessary living expenses and that his assets do not exceed the established limit as determined by OWCP's procedures.<sup>17</sup>

Appellant submitted a Form OWCP-20 and submitted documents that included bank statements, utility bills, and a federal tax return. The initial question is whether recovery of the overpayment would defeat the purpose of FECA. The Board notes that appellant acknowledged that he had over \$33,000.00 in bank accounts and bonds and owned a rental property valued at \$168,000.00. Therefore, the evidence of record indicates that appellant's assets exceed the resource base of \$8,000.00 for a claimant with a spouse and no other dependents, and recovery would not defeat the purpose of FECA.

In addition OWCP reviewed the financial evidence submitted and provided a list of income and expenses. The expenses included housing, food, clothing, utilities, mortgage, and miscellaneous expenses, totaling \$4,490.00 a month. Appellant documented a household income of \$8,675.00. He therefore had excess income of \$4,185.00 above his ordinary and necessary living expenses, far exceeding the \$50.00 allowance. The Board therefore finds that OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA.<sup>18</sup>

Appellant has not shown that he gave up a valuable right or changed his position for the worse in reliance on compensation payments. The Board finds that the evidence of record does not establish that recovery of the overpayment would defeat the purpose of FECA, or be against equity and good conscience. Therefore, OWCP properly denied waiver of recovery of the overpayment in this case.

On appeal appellant requests waiver of recovery due to financial hardship, emphasizing that he was without fault. The fact that a claimant is without fault in creating an overpayment does not preclude OWCP from recovering all or part of the overpayment.<sup>19</sup> Also, as set forth above, appellant provided extensive financial information demonstrating that recovering the overpayment would not create significant hardship.

With regard to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>20</sup> Appellant is not in receipt of continuing compensation under FECA.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$36,113.59 for the period August 24, 2003 to November 14, 2015. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

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<sup>17</sup> 20 C.F.R. § 10.436.

<sup>18</sup> *Supra* note 14.

<sup>19</sup> See *George A. Rodriguez*, 57 ECAB 224 (2005); *Joyce O. Diaz*, 51 ECAB 124 (1999).

<sup>20</sup> *Judith A. Cariddo*, 55 ECAB 348 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 21, 2016 is affirmed.

Issued: November 6, 2017  
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