

On appeal appellant contends that repayment of the overpayment would cause undue financial hardship for him and his family as his income is needed for food expenses related to his family's food allergies.

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On May 22, 2013 appellant, then a 31-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that, on March 15, 2013, he sustained a right ear injury when he was exposed to a loud tone on the line at work. He stopped work on the date of injury. Appellant briefly returned to work from May 23 to June 9, 2013 and then claimed wage-loss compensation for total disability from June 10, 2013.

OWCP accepted the claim for right ear tinnitus and began paying compensation for wage loss on the supplemental rolls as of July 18, 2013 and on the periodic rolls as of January 12, 2014.

In an August 2, 2013 memorandum, the employing establishment reported that appellant's base salary on May 15, 2013 was \$105,736.00. It also reported premium pay for the year prior to March 15, 2013 as: \$4,080.00 in holiday pay; \$3,468.00 in overtime; \$2,970.75 in Sunday premium pay; and \$2,932.50 in night differential pay.

Based on the information provided by the employing establishment OWCP determined that appellant's pay rate on May 15, 2013 was \$119,187.25, or \$2,292.06 per week. The wage-loss compensation appellant received was based on a pay rate of \$2,292.06 per week.

In a June 5, 2015 letter, appellant requested that OWCP adjust his pay rate. He contended that, under employing establishment guidelines, he was considered a certified professional controller in training when he transferred to the Charlotte worksite. Appellant had completed one half of his required training at the time of injury, and would have completed training if not for the work injury. He indicated that his pay would have increased upon completion of training. Appellant asserted that he should be considered as in a "learner's capacity" under 5 U.S.C. § 8113, and should therefore be entitled to a pay rate corresponding to an increased wage-earning capacity.

The record contains a February 8, 2012 memorandum from the employing establishment indicating that appellant's transfer to the Charlotte facility would be effective April 8, 2012. The memorandum indicated that the transfer was to a "higher level facility" and, if appellant failed to fully certify at the new facility, he could be subject to adverse action. In a memorandum dated July 6, 2015, an employing establishment manager reported that at the time of injury appellant would have been designated as a Certified Professional Controller-In Training and would have to complete training and become fully certified before he would be eligible for a pay increase.

² Docket No. 17-0257 (issued July 27, 2017); *Order Remanding Case*, Docket No. 16-1437 (issued November 2, 2016); and Docket No. 16-0881 (issued July 27, 2016).

By letter dated October 8, 2015, OWCP requested that the employing establishment complete a questionnaire with respect to appellant's employment at the time of injury. The employing establishment was asked whether he was in a formal training program with a specific date of completion and, if he would automatically receive a pay raise on completion of any training, to provide the pay rate. In a response dated November 2, 2015, an employing establishment manager responded "no" to the question of whether there was a formal training program with a specific date of completion. The manager reported that completion of training was dependent on performance and there was no specified date of completion. He indicated each controller's performance determined certification. No pay information was provided.

By decision dated November 17, 2015, OWCP denied appellant's request for an increased pay rate for compensation purposes. It noted the November 2, 2015 response from the employing establishment and found that he was not in a learner's capacity.

On December 15, 2015 appellant requested reconsideration. He submitted a December 10, 2015 letter from an employing establishment air traffic manager. The manager asserted that appellant was in a formal training program. He indicated that there was no set time, "just hours allocated for the position [appellant] was training on." The manager related that "[a]lthough when I arrived at Charlotte Airport there was no reason to think [appellant] would not be successful in training. [Appellant] was allocated 120 hours on each of the [two] departure positions and 100 hours for [three] satellite positions." He reported that this was not an indefinite program and upon completion appellant would have been promoted. The manager contended that previous experience had nothing to do with advancement, as it was based on completion of training. He reported that appellant's base pay in 2013 would have been \$118,349.00. In addition, the manager indicated that he had discussed the prior answer given by another air traffic manager as to formal training, and the manager had misunderstood what was being interpreted as formal.

By letter dated January 8, 2016, OWCP requested that the employing establishment provide comments. On March 9, 2016 it received updated pay rate information with respect to appellant's earnings in the year prior to May 15, 2013. The employing establishment manager now indicated that he had earned \$1,963.08 in holiday pay, \$1,834.88 in night differential, and \$1,216.32 in Sunday premium pay. No overtime pay was reported for the period. A memorandum of telephone call dated March 9, 2016 indicated that the prior figures reported were based on another employee.

In a March 10, 2016 decision, OWCP found that appellant's pay rate was \$110,750.28, or \$2,129.81 per week, based on the information provided by the employing establishment. It found that he was not in a learner's capacity. OWCP determined that the employing establishment "has clearly stated that an air traffic controller in training must merit the training completion. The change in designation as a Certified Professional Controller, upon completion of training, would not be automatic." In addition, OWCP found that the evidence indicated that appellant's status was not any different from any employee who had an opportunity for advancement depending on ability and merit.

In a notice dated March 16, 2016, OWCP advised appellant of its preliminary determination that he had received a \$16,740.25 overpayment of compensation for the period July 18, 2013 to March 5, 2016 as he had received compensation based on a pay rate for

compensation purposes of \$2,292.06 per week. It noted that the proper pay rate was \$2,129.81 per week. In addition, OWCP made a preliminary determination that appellant was without fault in the creation of the overpayment as he was not aware, nor could he have reasonably been aware, that his compensation payments had been paid incorrectly. It requested that he complete a Form OWCP-20 and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. An overpayment worksheet dated March 15, 2016 determined that appellant was overpaid during the period July 18, 2013 to March 5, 2016 for a total of \$16,740.25.

On March 23, 2016 appellant appealed the March 10, 2016 pay rate decision to the Board.

On March 24, 2016 appellant requested that OWCP make a decision based on the written record. He submitted a completed Form OWCP-20 overpayment recovery questionnaire dated March 20, 2016 and supportive financial information which included copies of credit card statements, other monthly bill, and a 2015 federal tax return. Appellant contended that he was not at fault in creation of the overpayment. He reported total monthly income of \$5,885.95 in FECA compensation benefits. Appellant also reported total monthly expenses of \$1,530.36, which included \$1,496.00 for rent or mortgage, \$1,700.00 for food, \$50.00 for clothing, \$340.00 for utilities, \$1,389.00 for other expenses, \$363.98 for a USAA personal loan, \$542.00 and \$546.00 for AES loans, and \$78.30 for Navient. He noted a \$45,505.41 federal student loan owed to Mohela that was in nonpayment status for financial hardship. Appellant indicated that he had \$4,285.17 in a checking account, \$1,418.33 in a savings account, totaling \$5,703.50, and no cash on hand, stocks, bonds, or other personal property.

In a letter dated June 1, 2016, OWCP reported that in a telephone conference held on that date, appellant had been advised to provide sufficient proof of his monthly expenses. It afforded him 15 days to submit the additional evidence.

By letter dated June 6, 2016, appellant listed additional expenses which included \$140.00 for a storage unit, \$110.00 for a cellphone, \$45.00 for internet, \$200.00 for gas, \$104.00 for car and renters insurance, \$50.00 for repairs and tires, \$150.00 for physician's, \$75.00 for food and miscellaneous for a dog, \$50.00 for household management, \$150.00 for daughters' classes, \$300.00 for a USAA American Express card (used for miscellaneous expenses clothes and such), totaling \$1,374.00 for other expenses. He submitted his family's monthly budget and bank statements.

By decision dated June 29, 2016, OWCP finalized its preliminary determination of an overpayment in the amount of \$16,740.25. It denied waiver of recovery of the overpayment, finding that appellant had submitted insufficient evidence to justify waiver. OWCP required recovery of the overpayment by deducting \$200.00 from his continuing compensation payments.

By decision dated July 27, 2016, the Board set aside the March 10, 2016 pay rate decision and remanded the case to OWCP.³ The Board found that OWCP had failed to properly make findings as to whether appellant was in a learner's capacity under 5 U.S.C. § 8113(a). The Board

³ Docket No. 16-0881 (issued July 27, 2016).

noted that, as to the likelihood of completing training and receiving additional pay, the employing establishment should provide additional clarification.

OWCP, by letter dated August 31, 2016, requested additional information from the employing establishment regarding appellant's training program. In a September 26, 2016 memorandum, an employing establishment acting air traffic manager responded that appellant was in a formal qualification training program to become a certified Professional Controller. He related that this required certification on two departure radar positions with an allotment of 120 training hours each, and certification on 3 satellite radar positions with allotments of 100 training hours each. Appellant's qualification training would not continue indefinitely, but according to demonstrated abilities in the hours allocated. The acting air traffic manager concluded, "Positive progress generally leads to position certification; however, negative progress could lead to suspension or termination of training."

On July 2, 2016 appellant filed a timely appeal from the June 29, 2016 OWCP overpayment decision. By order dated November 2, 2016, the Board set aside the June 29, 2016 decision and remanded the case to OWCP.⁴ The Board found that the overpayment issues were not in posture for decision as OWCP had not yet determined the correct pay rate. The case was remanded to OWCP to properly resolve the pay rate issue and possible overpayment of compensation.

By decision dated November 3, 2016, OWCP found that appellant was not entitled to an increase in pay as a certified professional controller. It found that the evidence from the employing establishment established that he was not in a learner's capacity at the time of injury.

On November 7, 2016 appellant appealed the November 3, 2016 decision to the Board.

By decision dated July 27, 2017, the Board affirmed OWCP's November 3, 2016 decision, finding that appellant failed to meet his burden of proof to establish a greater pay rate for compensation purposes based on 5 U.S.C. § 8113(a).⁵ The Board found that the evidence of record was insufficient to establish that his pay rate should be based on completion of a training program and certification as a controller. The Board also found that the overpayment issues were not in posture for decision until the learner's permit compensation issue was resolved, therefore on remand OWCP should issue a merit decision on the overpayment issues to preserve appellant's appeal rights.

By decision dated August 22, 2017, OWCP denied waiver of recovery of the \$16,740.25 overpayment of compensation, noting that, although appellant had minimal assets, he had not shown that he required substantially all of his income to meet ordinary and necessary living expenses. It set recovery of the overpayment at \$200.00, to be deducted from his continuing FECA compensation payments.

⁴ *Order Remanding Case*, Docket No. 16-1437 (issued November 2, 2016).

⁵ Docket No. 17-0257 (issued July 27, 2017).

LEGAL PRECEDENT -- ISSUE 1

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery of an overpayment 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 this subchapter or would be against equity and good conscience."⁷ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.⁸

According to 20 C.F.R. § 10.436, 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 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.⁹ According to 20 C.F.R. § 10.437, 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 position for the worse.¹⁰ 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.¹¹

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. This information will also be used to determine the repayment schedule, if necessary. Failure to submit

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ 5 U.S.C. § 8129(b).

⁸ *M.G.*, Docket No. 14-1917 (issued January 22, 2015).

⁹ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). 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) (June 2009).

¹⁰ *Id.* at § 10.437(a), (b).

¹¹ *Id.* at § 10.437(b)(1).

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.¹²

The Board has held that OWCP must rely on current financial information when determining eligibility for waiver of recovery of an overpayment.¹³

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

On July 27, 2017 the Board affirmed OWCP's November 3, 2016 decision finding that appellant failed to meet his burden of proof to establish a greater pay rate for compensation purposes. With respect to the findings made in the Board's July 27, 2017 decision, those matters are *res judicata* absent any further review by OWCP.¹⁴

The Board also found, however, that the overpayment issues were not in posture for decision until the pay rate issue was resolved. The Board, therefore, remanded the case for OWCP to issue a merit decision on the overpayment issues to preserve appellant's appeal rights.

OWCP thereafter issued an August 22, 2017 decision denying waiver of the recovery of the overpayment, finding that appellant had not shown that he required substantially all of his income to meet ordinary and necessary living expenses. It set repayment at \$200.00 to be deducted each period from his continuing FECA compensation. OWCP based the denial of waiver and the repayment schedule on the financial information appellant had submitted prior to OWCP's June 29, 2016 decision.

The Board finds that OWCP did not follow the Board's instructions from the July 27, 2017 decision. OWCP did not issue a merit decision regarding all of the overpayment issues, to preserve appellant's appeal rights.

The Board also finds that OWCP improperly denied waiver of recovery of the overpayment in the August 22, 2017 decision. As noted above, the Board has held that OWCP must rely on current financial information when determining eligibility for waiver of an overpayment.¹⁵ In *Thomas E. Ray*¹⁶ the Board remanded the case for further development on the issue of waiver where OWCP relied on three-year-old financial information in its waiver determination. In *Carol R. Graham*¹⁷ the Board remanded the case for further development on the issue of waiver as OWCP relied on financial information that was 16 months old in determining the claimant's

¹² *Id.* at § 10.438.

¹³ C.S., Docket No. 12-0313 (issued October 23, 2012).

¹⁴ *See W.F.*, Docket No. 15-1208 (issued October 23, 2015); *see also Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Id.*

¹⁶ 51 ECAB 344 (2000).

¹⁷ Docket No. 02-2198 (issued February 4, 2003).

eligibility for waiver of the overpayment. Similarly, in *R.O.*,¹⁸ the Board remanded the case for further development of the issue of waiver as OWCP relied on financial documents that were 11 months old in denying waiver.

In its August 22, 2017 decision, OWCP relied upon financial information appellant submitted in March and June 2016 prior to OWCP's June 29, 2016 decision. This financial information was not reasonably current. OWCP should have requested that appellant submit new financial information after the Board's July 27, 2017 decision. As appellant's financial information was not reasonably current as of August 22, 2017, OWCP has not properly determined whether he is entitled to waiver of recovery of the overpayment.¹⁹

Therefore, the case shall be remanded to OWCP. OWCP shall issue a merit decision regarding fact and amount of the overpayment. It shall also request that appellant provide current financial information regarding his monthly income, monthly expenses, and assets for the purpose of evaluating whether he qualifies for waiver of recovery of the overpayment. After such development as it deems necessary, OWCP shall issue a *de novo* decision on this matter.²⁰

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁸ Docket No. 16-1836 (issued May 23, 2017).

¹⁹ *Id.*

²⁰ In light of the Board's disposition, the issue regarding recovery of the overpayment is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2017 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: April 11, 2018
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