

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

_____)	
R.E., Appellant)	
)	
and)	Docket No. 17-1625
)	Issued: July 18, 2018
DEPARTMENT OF THE ARMY, SCHOFIELD)	
BARRACKS COMMISSARY, Wahiawa, HI,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 24, 2017 appellant filed a timely appeal from a June 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,770.00 because FECA compensation she

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant filed a timely request for oral argument in this case. By order dated December 4, 2017, the Board, after exercising its discretion, denied her request for oral argument as the issues could adequately be addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1625 (issued December 4, 2017).

received for the period December 4, 1988 to November 19, 2011 was based on an incorrect pay rate; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

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

On November 19, 1985 appellant, then a 31-year-old part-time store worker at a commissary in Hawaii, filed a traumatic injury claim (Form CA-1) alleging that she injured her back when lifting a heavy box on November 9, 1985. OWCP accepted the claim for low back strain and paid wage-loss compensation benefits.⁴ Appellant returned to part-time work as a cashier at the employing establishment on July 17, 1988.

In October 1988, appellant relocated from Hawaii to Georgia. On December 4, 1988 she began part-time work as a sales store checker (cashier) at the Fort Benning, Georgia commissary.

By decision dated January 4, 1989, OWCP reduced appellant's compensation benefits, based on her actual part-time earnings as a sales store checker (cashier). It found that her compensation rate every four weeks was \$739.00.

On May 14, 2006 appellant began working 40 hours a week as a sales store checker.

Appellant stopped work on May 13, 2011 and filed a claim for compensation (Form CA-7), beginning that day. On May 21, 2011 she filed a claim for compensation (Form CA-7) for total disability commencing May 13, 2011. OWCP paid appellant FECA compensation benefits through November 28, 2011 based on the rate of compensation as set forth in the January 4, 1989 loss of wage-earning capacity (LWEC) determination.

On November 29, 2011 OWCP modified the January 4, 1989 LWEC determination to reflect that appellant had no wage loss and terminated her FECA monetary compensation.

Appellant subsequently requested a hearing, held on April 12, 2012. By decision dated July 11, 2012, an OWCP hearing representative affirmed the November 29, 2011 OWCP decision which modified appellant's LWEC to find zero wage loss. Appellant appealed to the Board. By decision dated April 16, 2013, the Board found that she had not met her burden of proof to modify the January 4, 1989 LWEC determination for the period May 13 to November 29, 2011 and that OWCP properly modified the original LWEC determination on November 29, 2011.⁵

³ Docket No. 14-1217 (issued October 6, 2014); Docket No. 13-0115 (issued April 16, 2013).

⁴ OWCP assigned the present claim File No. xxxxxx105. On September 10, 1986 appellant sustained a second employment-related low back strain. OWCP adjudicated the 1986 claim under OWCP File No. xxxxxx322. It combined the claims, with File No. xxxxxx105 becoming the master file.

⁵ Docket No. 13-0115 (issued April 16, 2013).

On October 24, 2013 appellant requested reconsideration. By decision dated November 21, 2013, OWCP denied modification of the Board's April 16, 2013 decision.⁶ It found that appellant had not established a material worsening of the accepted lumbar strain. OWCP noted that the pay rate issue had previously been addressed and that she had not stopped work in May 2011 due to the accepted condition.

Appellant appealed to the Board. By decision dated October 6, 2014, the Board found that she had not established a material change in the injury-related condition, but also found that the record required further development to determine whether she had been compensated at the correct pay rate following the July 11, 2012 hearing representative decision.⁷

On remand from the Board's October 6, 2014 decision, OWCP undertook development of the pay rate issue. Following its receipt of information from the employing establishment, by decision dated March 16, 2015, OWCP vacated its January 4, 1989 LWEC decision. It noted that the January 4, 1989 decision, was calculated using incorrect pay rates. In determining appellant's LWEC, it had incorrectly used the locality pay rate in Hawaii when it should have used the Georgia locality pay rate. OWCP concluded that a new LWEC determination should be issued.

By separate decision dated March 16, 2015, OWCP reduced appellant's compensation benefits, based on her actual part-time earnings as a sales store checker (cashier) at the Fort Benning commissary. It found a new compensation rate of \$767.00 every four weeks, as of the date she was last paid on November 29, 2011.

On May 6, 2015 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$142,629.24 had been created. It explained that the overpayment occurred because appellant was compensated at an incorrect pay rate from December 4, 1989 to November 19, 2011 and found her at fault in the creation of the overpayment.

On June 4, 2015 appellant requested a prerecoupment hearing before an OWCP hearing representative. She submitted additional information including an overpayment recovery questionnaire (Form OWCP-20), pay rate information, a 2014 tax return, and financial information.

By decision dated October 27, 2015, an OWCP hearing representative vacated the March 16, 2015 LWEC determination and set aside the May 6, 2015 preliminary finding of an overpayment. The hearing representative instructed OWCP to obtain additional information from the employing establishment regarding appellant's employment status.

After obtaining further information from the employing establishment, by decision dated June 6, 2016, OWCP determined appellant's LWEC for the period December 4, 1988 to November 19, 2011. It computed her pay rate based on earnings at Fort Benning, in accordance

⁶ Decisions of the Board are final upon expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). While an appellant may file a petition for reconsideration with the Board within 30 days of the date of issuance of a Board decision 20 C.F.R. § 501.7(a), she did not file a petition for reconsideration with the Board of its April 16, 2013 decision. As such, this decision is *res judicata* as to the issues decided.

⁷ Docket No. 14-1217 (issued October 6, 2014).

with OWCP procedures, finding a weekly pay rate of \$253.97. OWCP determined that this fairly and reasonably represented appellant's LWEC. It applied the *Shadrick* formula and determined that she had 31 percent LWEC. OWCP set appellant's net compensation for the period December 4, 1988 to November 19, 2011 at \$609.00 every four weeks.⁸ Appellant timely requested a review of the written record before OWCP's Branch of Hearings and Review.

On June 29, 2016 OWCP issued a preliminary determination that an overpayment of compensation occurred in the amount of \$181,983.75 had been created because appellant was paid compensation at an incorrect rate from December 4, 1988 to November 19, 2011. It found her without fault in the creation of the overpayment and forwarded an overpayment action request and overpayment recovery questionnaire (Form OWCP-20) for her completion.

In correspondence dated July 27, 2016, received by OWCP on August 4, 2016, appellant maintained that an overpayment did not occur and requested a review of the written record.⁹ She submitted evidence previously of record with OWCP's Branch of Hearings and Review.

By decision dated January 26, 2017, OWCP's hearing representative denied modification of the June 6, 2016 LWEC determination. The hearing representative found that the record supported that OWCP properly calculated appellant's pay rate for compensation purposes and concluded that she had not met her burden of proof to modify the June 6, 2016 LWEC decision.¹⁰

A hearing was held on March 16, 2017 regarding the June 29, 2016 preliminary overpayment determination. Appellant testified regarding her employment history and injuries. She maintained that an overpayment had not been created. OWCP's hearing representative advised appellant to submit a completed overpayment recovery questionnaire and accompanying financial information.

Appellant submitted a completed overpayment recovery questionnaire. She indicated that the household monthly income was \$5,309.61 and that monthly expenses were \$4,778.00. Appellant listed assets totaling \$128,330.00 and attached a copy of her 2016 tax return, information regarding her husband's retirement income, their Social Security Administration retirement income, and evidence previously of record.

By decision dated June 23, 2017, an OWCP hearing representative finalized the preliminary finding of an overpayment. She found that an overpayment of compensation had been created for the period December 4, 1988 to November 19, 2011. The hearing representative

⁸ In attached worksheets OWCP noted that the effective date on which the pay rate for compensation was based was November 13, 1985, which they prorated to a 32-hour work week and, after applying the 2087 method, concluded that appellant's weekly pay rate was \$330.07. It then noted that, in October 1988, she moved from Hawaii to Georgia, and the current pay rate for the job and step when injured at the new location (Fort Benning), effective December 4, 1988, was \$7.91 per hour. OWCP then applied the 2087 method and concluded that appellant's weekly pay rate for the date-of-injury job and step was \$253.97, based on a 24-hour workweek, with actual earnings of \$175.91 per week.

⁹ The record indicates that a hearing was scheduled.

¹⁰ By decision dated May 16, 2018, the Board affirmed the January 26, 2017 LWEC decision. It found that, as the record supported that OWCP followed proper procedures, the June 6, 2016 LWEC was proper, and there was, therefore, no basis to support that it should be modified. Docket No. 17-1288 (issued May 16, 2018).

explained that the overpayment occurred because, based on the figures of the June 6, 2016 LWEC decision, appellant received FECA compensation totaling \$322,284.00 during that period when she was entitled to compensation of \$140,300.25, which yielded an overpayment of compensation of \$181,983.75. She found appellant without fault in the creation of the overpayment. The hearing representative noted that appellant's reported monthly income of \$5,309.61 less reported monthly expenses of \$4,778.00, yielded an excess of \$531.61, and also noted that appellant listed assets of \$128,300.00. She found that the financial information submitted did not establish a basis for granting waiver of recovery and set repayment at \$500.00 per month. The hearing representative compromised appellant's overpayment debt so that it would be repaid within appellant's lifetime and reduced the debt by \$77,213.75, leaving a balance of \$104,770.00.

LEGAL PRECEDENT -- ISSUE 1

OWCP is directed by statute to compute compensation based on an employee's monthly pay, which is defined under section 8101(4) of FECA as the greater of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time federal employment.¹¹

OWCP procedures provide that when an injured employee is reemployed in a new locale with a lower percent of locality than the job held on the date of injury, or without the cost-of-living allowance, the employee may be paid less than previously even if reemployed at the same grade and step. The current pay rate for the job and step when injured should reflect the pay in the new locale, not the original one.¹² The procedures further explain that the employee is not losing net pay if reemployed at a lower locality pay rate since the cost of living is less in the new location, as represented by the difference in locality pay.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,770.00.

OWCP found that an overpayment was created in the amount of \$104,770.00 for the period December 4, 1988 to November 19, 2011, because appellant's FECA compensation had been based on an incorrect pay rate. It explained that, in determining her LWEC in 1989, it had incorrectly used the locality pay rate in Hawaii when it should have used the locality pay rate in effect in Georgia.

In its May 16, 2018 decision, the Board found that it was proper for OWCP to calculate appellant's pay rate for compensation purposes beginning on December 4, 1988 based on her

¹¹ 5 U.S.C. § 8101(4).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4.e(1) (June 2013).

¹³ *Id.*

earnings at the Fort Benning, Georgia location, where she worked at that time.¹⁴ Computer print-outs and an overpayment worksheet of record indicate that, for this period, appellant received FECA compensation totaling \$322,284.00, based on her pay rate in Hawaii, when she was entitled to compensation of \$140,300.25, based on her pay rate in Georgia. This yielded an overpayment of compensation of \$181,983.75. The hearing representative compromised the overpayment to \$104,770.00.

An overpayment of compensation in the amount of \$104,770.00 was, therefore, created.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless “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.”¹⁶ 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 on 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.¹⁷

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.¹⁸

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.¹⁹ 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.²⁰ An individual is deemed to need substantially all or his

¹⁴ *Supra* note 10.

¹⁵ *Supra* note 12.

¹⁶ 5 U.S.C. § 8129.

¹⁷ 20 C.F.R. § 10.438.

¹⁸ *Id.* at §§ 10.434-10.437.

¹⁹ *Id.* at § 10.436.

²⁰ *Id.*

or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²¹

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.²² 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.²³

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.²⁴ 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.²⁵ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁶ An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²⁷

ANALYSIS -- ISSUE 2

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

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.²⁸

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because her assets exceed the resource base of \$8,000.00 for an individual with a spouse, as provided in OWCP procedures.²⁹ Financial information of record submitted by her documents

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

²² *Id.*

²³ *Id.*

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

²⁵ *Supra* note 21 at Chapter 6.200.6.b(3) (June 2009).

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

²⁷ *Id.* at § 10.437(b)(2) (2011); *see Wayne G. Rogers*, 54 ECAB 482 (2003).

²⁸ *Id.* at § 10.436.

²⁹ *Id.*

assets in excess of \$128,000.00. 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 unnecessary to consider the first prong of the test, *i.e.*, whether her monthly income exceeded her monthly ordinary, and necessary expenses by more than \$50.00.³⁰ She did not establish that she was entitled to waiver on the basis of defeating the purpose of FECA.³¹

Appellant submitted no evidence to show that she gave up a valuable right or changed her position for the worse in reliance on anticipated compensation payments. Thus, she has not shown that, if required to repay the overpayment, she would be in a worse position after repayment than if she had never received the overpayment at all. OWCP properly found that appellant was not entitled to waiver on the grounds that recovery would be against equity and good conscience.³²

As appellant failed to establish that recovery of the overpayment in compensation would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.

With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.³³ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.³⁴

On appeal appellant generally contends that OWCP was incorrect in finding that an overpayment of compensation existed. As explained above the Board found that OWCP properly determined the fact and amount of overpayment and properly denied waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,770.00 because FECA compensation she received for the period December 4, 1988 to November 19, 2011 was based on an incorrect pay rate. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

³⁰ *Id.*

³¹ *See K.K.*, Docket No. 09-0207 (issued October 2, 2009).

³² *Supra* note 21.

³³ *Cheryl Thomas*, 55 ECAB 610 (2004).

³⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board