



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 31, 2012 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2012 he sprained his lower back while transferring and pulling mail from a dolly in the performance of duty. He stopped work on October 18, 2012. On November 29, 2012 OWCP accepted appellant's claim for sprain of the lumbar region of the back. It later expanded acceptance of the claim to include the conditions of aggravation of lumbar stenosis and displacement of lumbar intervertebral disc without myelopathy. Appellant received wage-loss compensation and medical benefits on the supplemental rolls as of December 2, 2012 and on the periodic rolls as of April 7, 2013.

On September 6, 2013 appellant underwent an anterior lumbar discectomy at L3-4 and L4-5, anterior interbody fusion at L3-4 and L4-5, and a lateral fusion from L3 to L5. On September 13, 2013 he underwent a reexploration of the laminectomy at the fusion site and a debridement and primary closure. Appellant returned to work in a full-duty capacity on April 11, 2014.

On June 4, 2015 OWCP issued a schedule award for four percent permanent impairment of appellant's left lower extremity. On May 5, 2016 it issued a schedule award for an additional two percent permanent impairment of the left lower extremity and found zero percent permanent impairment of the right lower extremity. On October 23, 2016 appellant filed a timely appeal with the Board from the May 5, 2016 decision. On July 18, 2017 the Board affirmed OWCP's May 5, 2016 schedule award decision.<sup>3</sup>

On March 16, 2017 OWCP issued a preliminary determination of overpayment, finding that appellant was overpaid compensation benefits in the amount of \$4,233.16 due to an overpayment of his schedule award. It noted that appellant was entitled to an additional two percent left lower extremity schedule award decision as determined by OWCP on May 5, 2016. Pursuant to that decision, OWCP erroneously paid him this two percent impairment twice, for an erroneous total of four percent impairment of the left lower extremity. OWCP noted that appellant received a payment in the amount of \$8,611.27 for the period March 25 to June 13, 2016, a period of 80.64 days, when he should have received only \$4,378.11, a period of 40.32 days. Accordingly, OWCP found an overpayment was made in the amount of \$4,233.16. It further made a preliminary determination that appellant was without fault in creation of the overpayment, and provided appellant instructions with regard to how to dispute the amount of the overpayment and instructions for requesting a waiver. OWCP further requested that appellant complete an overpayment recovery questionnaire (OWCP-20), and submit supporting financial documents. It afforded appellant 30 days to respond. Appellant did not respond.

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<sup>2</sup> Docket No. 17-0144 (issued July 18, 2017).

<sup>3</sup> *Id.*

On July 10, 2017 OWCP finalized the preliminary overpayment determination finding that appellant was overpaid in the amount of \$4,233.16 for the extra two percent. It noted that appellant was without fault in the creation of the overpayment because he could not have reasonably been aware that he was not entitled to the payments received. However, as appellant submitted no response to the preliminary determination, OWCP determined that he did not contest the finding. It further noted that, since appellant had not shown that recovery would defeat the purpose of FECA or be against equity and good conscience, the entire payment should be paid within 30 days of the date of the decision.

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

The schedule award provision of FECA<sup>4</sup> and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members of functions of the body. Section 20 C.F.R. § 10.404 provides that compensation is provided for specific periods of time for the permanent loss or loss of use of certain members.<sup>5</sup>

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor.<sup>6</sup> OWCP procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.<sup>7</sup>

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

The Board finds that OWCP determined that appellant received an improper overpayment of his schedule award. OWCP erroneously issued a schedule award for four percent permanent impairment of appellant's left lower extremity on June 4, 2015. On May 5, 2015 it issued a schedule award for an additional two percent permanent impairment of his left lower extremity. Pursuant to the Percentage Table for Schedule Awards, a two percent schedule award of appellant's leg affords 40.32 days of compensation.<sup>8</sup> Appellant received three checks for this May 5, 2015 award: one for \$3,951.07 for the period from March 25 through April 30, 2016; one for \$2,990.00 for the period from May 1, 2016 through 28, 2016; and one for \$1,670.20 for the period May 29 through June 13, 2016. These checks totaled \$8,611.27. The difference between the amount that appellant should have been paid for 40.32 days (\$4,378.23) and the amount he was paid (\$8,611.27) equals the amount of the overpayment of \$4,233.04.

The Board affirms OWCP's finding of fact and amount of overpayment.

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *J.M.*, Docket No. 17-1285 (issued October 12, 2017).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004); *see also D.L.*, Docket No. 17-1432 (issued November 20, 2017).

<sup>8</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 2, Percentage Table of Schedule Awards, Form CA-699 (January 2010).

## LEGAL PRECEDENT -- ISSUE 2

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.<sup>9</sup> These statutory guidelines are found in section 8129(b) of FECA which provides: "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."<sup>10</sup> 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.

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.<sup>11</sup> 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 or her position to the worse.<sup>12</sup> 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, that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>13</sup>

Section 10.438 of OWCP regulations provide that an 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 the requested information within 30 days of the request shall result in denial of waiver,

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<sup>9</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> 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. *Desederio Martinez*, 55 CAB 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 Action*, Chapter 6.200.6(a) (June 2009).

<sup>12</sup> *Id.* at 10.437(a), (b).

<sup>13</sup> *Id.* at § 10.437(b)(1).

and no further requirement for waiver shall be considered until the requested information is furnished.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.<sup>15</sup>

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore be considered. Repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>16</sup>

In its preliminary determination of overpayment dated March 16, 2017, OWCP requested that appellant provide a completed OWCP-20 form overpayment recovery questionnaire and supporting financial information. Appellant failed to submit this information. Accordingly, as required by section 10.438 of its regulations, appellant was not entitled to waiver.<sup>17</sup> The evidence before OWCP was insufficient to determine whether recovery of the overpayment would defeat the purpose FECA or would be against equity or good conscience.<sup>18</sup>

Therefore, the Board finds that OWCP properly denied waiver of recovery of the \$4,233.16 overpayment of compensation.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$4,233.16 due to an improper payment by OWCP of his schedule award. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment.

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<sup>14</sup> *Id.* at § 10.438.

<sup>15</sup> *R.H.*, Docket No. 15-0392 (issued February 3, 2016).

<sup>16</sup> *L.J.*, Docket No. 17-1591 (issued November 17, 2017).

<sup>17</sup> *J.V.*, Docket No. 15-0140 (issued November 25, 2015).

<sup>18</sup> 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 10, 2017 is affirmed.

Issued: March 6, 2018  
Washington, DC

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

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

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