

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

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<b>M.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0902</b>
	)	<b>Issued: October 16, 2018</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Carol Stream, IL,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Frank Pullano, for the appellant<sup>1</sup>  
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 March 27, 2018 appellant, through her representative, filed a timely appeal from a February 16, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issue are: (1) whether appellant received an overpayment of wage-loss compensation in the amount of \$11,249.98 for the period October 31, 2009 through February 1, 2010; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

OWCP properly found that it would recover the overpayment by deducting \$72.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On May 7, 2009 appellant, then a 67-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, while at work on April 27, 2009, she sustained bilateral knee contusions and cervical strain when she tripped and fell. She stopped work on April 27, 2009. OWCP accepted the claim, assigned OWCP File No. xxxxxx739, for neck sprain, bilateral knee contusions, and bilateral knee and leg sprains.<sup>3</sup>

OWCP paid appellant wage-loss compensation for total disability beginning June 13, 2009. On August 3, 2009 it advised her that it would pay her wage-loss compensation on the periodic rolls, effective August 2, 2009. Additionally, OWCP informed appellant that she should report any disability or retirement income and any compensation benefits from a federal agency.

By letter dated May 24, 2010, the employing establishment notified OWCP that appellant had received an initial separation incentive of \$10,000.00 on October 31, 2009 to voluntarily retire early.<sup>4</sup> On June 9, 2010 it questioned whether OWCP had suspended her wage-loss compensation during the period of payment of the separation pay incentive. In a November 29, 2010 letter, the employing establishment advised OWCP that it had issued appellant an additional \$5,000.00 as a second and final payment for her participation in its voluntary early retirement program.

By letter dated July 14, 2017, OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$11,249.98 for the period October 31, 2009 through a fraction of the day on February 1, 2010 because she received a separation pay incentive of \$15,000.00 while also receiving wage-loss compensation.<sup>5</sup> It

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<sup>3</sup> OWCP previously accepted appellant's December 1994 occupational disease claim, assigned File No. xxxxxx062, for bilateral carpal tunnel syndrome, bilateral epicondylitis, bilateral trigger thumbs, and bilateral shoulder impingement syndrome. It granted her a schedule award for 36 percent permanent impairment of each upper extremity under File No. xxxxxx062.

<sup>4</sup> The employing establishment indicated that the date appellant received the separation pay incentive was October 31, 2010 rather than October 31, 2009, but this appears to be a typographical error.

<sup>5</sup> By decision dated June 16, 2017, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$49,073.13 for the period June 13 to October 31, 2009 and February 10, 2010 through November 30, 2015 because it failed to offset the portion of her Social Security Administration (SSA) benefits from her workers' compensation attributable to her federal service. The hearing representative found that she was not entitled to wage-loss compensation from October 31, 2009 through February 1, 2010 due to her receipt of a separation incentive from the employing establishment and instructed OWCP, upon return of the case record, to determine the amount of any overpayment for this period. He further found that appellant was at fault in the creation of the overpayment from June 13 to August 25, 2009, but without fault of the overpayment created from August 6, 2009 to July 20, 2011. The hearing representative denied waiver of the overpayment and set the rate of recovery of the overpayment as \$390.00 per month from continuing compensation benefits. By decision dated June 26, 2018, the Board affirmed in part and set aside in part the June 16, 2017 decision. The Board found that OWCP properly determined that appellant received a \$49,073.13 overpayment of compensation from June 13 to October 31, 2009 and July 1, 2010 through November 30, 2015 and that she was at fault in the creation of the overpayment from June 13 through August 5, 2009 and July 21, 2011 through August 7, 2015. The Board found, however, that she was without fault in the creation of the overpayment from August 17 through November 30, 2015 and remanded the case for OWCP to consider waiver and recovery of the overpayment for the appropriate periods. Docket No. 17-1703 (issued June 26, 2018).

calculated the overpayment by dividing the \$15,000.00 voluntary separation incentive by her weekly pay rate on the date of injury, a rate of \$1,127.37, to find that it equaled 13.31 weeks, or 93.137 days. OWCP found that appellant received \$3,382.11 every 28 days, or \$120.79 per day, which it multiplied by 93.137 days to find an overpayment of \$11,249.98. It determined that she was not entitled to wage-loss compensation from October 21, 2009 to February 1, 2010, and thus the entire gross amount of \$11,249.98 constituted an overpayment of compensation, noting that she was responsible for her health and life insurance benefits during this period. OWCP further informed appellant of its preliminary finding that she was without fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents so that it could determine whether she was entitled to waiver of recovery of the overpayment and set a rate of recovery of the overpayment. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precouplement hearing.

Appellant, on July 28, 2017, requested a precouplement hearing and waiver of the overpayment as it would result in financial hardship. In an accompanying overpayment recovery questionnaire (Form OWCP-20), she listed \$30.00 in assets. Appellant advised that she had monthly income of \$3,886.83 and monthly expenses totaling \$4,991.75. She listed her monthly expenses of \$1,428.13 for her mortgage, \$172.02 for Dish television, \$145.01 for car insurance, \$18.09 for water, \$47.16 for her home telephone, \$116.00 for lawn care, \$559.95 for a car payment, \$54.00 for garbage collection, \$138.00 on a credit card, \$165.76 on a Wells Fargo credit card, \$40.00 for a mobile telephone, \$300.00 for household goods, \$69.42 for gas utility which she indicated was higher in winter, \$253.23 for electricity, \$100.00 for medication, \$700.00 for food including food necessitated by her need for a special diet, \$100.00 for gasoline, \$60.00 for dog food, \$10.00 for canine medication, \$23.33 for a shot, \$40.00 for veterinary treatment, \$70.00 every three months for oil changes, \$12.50 for furnace inspections, \$12.50 for an air conditioner inspection, \$6.66 for air conditioner filters, \$6.66 for air filters for her automobile, and \$390.00 to repay an overpayment of compensation. On December 18, 2017 appellant submitted some supporting financial documentation. By letter dated December 17, 2017, she advised that she now paid \$167.62 for automobile insurance and \$981.94 for home owner's insurance.

Pay stubs received by OWCP on August 8, 2017 indicate that appellant received an initial \$10,000.00 on October 31, 2009 and \$5,000.00 on October 29, 2010 as a total incentive for separation effective October 31, 2009.

During the hearing, held on January 12, 2018, appellant's representative contended that appellant would experience financial hardship attempting to repay the debt. He advised that she required lawn care services in order to avoid a fine, and noted that her utility bills fluctuated seasonally. The representative indicated that the amount for the shot was for her dog.

By decision dated February 16, 2018, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$11,249.98 for the period October 31, 2009 through a fraction of the day on February 1, 2010 because she received wage-loss compensation from OWCP and separation pay incentive from the employing establishment. She found that appellant was without fault in creating the overpayment, but denied waiver of recovery of the overpayment. The hearing representative found reasonable and necessary monthly

expenses of \$3,289.34 per month.<sup>6</sup> She denied the \$559.95 listed for the car payment as there was no evidence that it was a recurring monthly expense, noting that the statement showed a car payment was made in March 2017 on a 2011 Jeep Liberty, but did not indicate the payoff date. The hearing representative further found that appellant had not substantiated monthly lawn care expenses as she submitted bills showing only four occasions of lawn care. She further denied pet expenses. The hearing representative adjusted water, furnace, air conditioning, and car expenses to show monthly premiums and noted that the maximum allowed for household miscellaneous expenses was \$50.00 per month under OWCP's procedures. The hearing representative determined that appellant had monthly income of \$4,035.46, noting that appellant received SSA benefits of \$1,751.00 and OWCP compensation of \$2,108.73 every 28 days after deductions, including for an overpayment of compensation, which yielded a monthly OWCP benefit of \$2,284.46, and a total monthly income of \$4,035.46. As this amount exceeded appellant's monthly expenses by more than \$50.00, the hearing representative denied waiver of recovery of the overpayment. The hearing representative found that the overpayment should be recovered by deducting \$72.00 from appellant's continuing compensation payments every 28 days.

On appeal appellant's representative questions why OWCP's hearing representative disallowed some expenses and asserts that appellant would experience hardship repaying the overpayment. He notes that she was not at fault in creating the overpayment and requests waiver.

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

Section 8102 of FECA<sup>7</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>8</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 may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>9</sup> Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay (which is also known as retirement incentive pay).<sup>10</sup>

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. OWCP's procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay.<sup>11</sup> Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets

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<sup>6</sup> The hearing representative found that appellant substantiated monthly expenses of a \$1,428.13 for her mortgage, \$700.00 for food, \$163.64 for house and car insurance premiums, \$18.09 for water, \$54.00 for garbage, \$138.00 for a Merrick Bank credit card, \$165.76 for a Wells Fargo credit card, \$40.00 for her cell phone, \$47.16 for her home phone, \$49.31 for gas heat, \$180.24 for electricity, \$100.00 for medicine, \$100.00 for gasoline, \$30.00 for oil changes and air filter, \$50.00 for miscellaneous and household expenses, and \$25.00 for furnace and air conditioner expenses, for a total of \$3,289.34.

<sup>7</sup> *Supra* note 2.

<sup>8</sup> 5 U.S.C. § 8102.

<sup>9</sup> *Id.* at § 8116(a).

<sup>10</sup> 20 C.F.R. § 10.421(c).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17c.(1) (June 2009).

for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.<sup>12</sup> Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents, effective the date of the separation or retirement.<sup>13</sup>

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

The Board finds that appellant received an overpayment of compensation. While receiving wage-loss compensation for disability resulting from her employment injury, appellant entered into a voluntary retirement incentive agreement with the employing establishment that resulted in her receiving an initial payment on October 31, 2009 of \$10,000.00 and a subsequent final payment of \$5,000.00 for her October 31, 2009 separation from employment. Under 5 U.S.C. § 8116 and 20 C.F.R. § 10.421(c), she was not entitled to receive both compensation and separation pay concurrently.<sup>14</sup> As such, the record establishes that an overpayment of compensation was created because appellant's compensation should have been suspended for the number of weeks represented by the separation pay, effective the date of her retirement.<sup>15</sup>

The Board further finds that OWCP correctly determined the amount of overpayment. OWCP calculated the overpayment by dividing the \$15,000.00 voluntary separation incentive by her weekly pay rate on the date of injury of \$1,127.37 to find that it equaled 13.31 weeks, or 93.137 days. It found that appellant received \$3,382.11 every 28 days, or \$120.79 per day, which it multiplied by 93.137 days to find an overpayment of \$11,249.98.

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

Section 8129 of FECA provides that an overpayment in 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.<sup>16</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>17</sup>

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

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<sup>12</sup> See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005).

<sup>13</sup> The Board notes that OWCP's Chapter 2.1000.17 (April 1996), cited in *supra* note 11, originally provided that separation pay could be offset by either a dollar-for-dollar amount or based on the period of weeks salary the payment represented. Following the Board's decisions in *Schaack, id.* and *L.J.*, 59 ECAB 264 (issued December 11, 2007), OWCP revised this section of the procedure manual in FECA Transmittal No. 09-05 (issued June 1, 2009). Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of weeks' worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. See *R.H.*, Docket No. 08-2025 (issued July 20, 2009).

<sup>14</sup> See *supra* notes 9 and 10; *P.C.*, Docket No. 14-0860 (issued August 18, 2014).

<sup>15</sup> See *supra* note 13.

<sup>16</sup> 5 U.S.C. § 8129.

<sup>17</sup> *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

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>18</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 position for the worse.<sup>19</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, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>20</sup>

Section 10.438 of OWCP's 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.<sup>21</sup>

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

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that recovery of the overpayment would defeat the purpose of FECA, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base as determined by OWCP's procedures.<sup>22</sup>

OWCP determined that appellant did not require substantially all of her income to meet ordinary and normal living expenses. Appellant asserted that she had a monthly income of \$3,886.83 and monthly expenses of \$4,991.75. The hearing representative determined that appellant received monthly income of \$1,751.00 from SSA and \$2,284.46 from OWCP after deductions, including for an overpayment, for a total monthly income of \$4,035.46. She excluded appellant's expenses for a car and lawn care as unsubstantiated since she did not provide evidence of the duration of the loan or evidence that she paid for lawn care monthly.<sup>23</sup> The hearing representative further found that expenses related to care for her pet were not ordinary and necessary. She determined that appellant's monthly expenses totaled \$3,289.34.

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<sup>18</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or 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).

<sup>19</sup> *Id.* at § 10.437(a), (b).

<sup>20</sup> *Id.* at § 10.437(b)(1).

<sup>21</sup> *Id.* at § 10.438.

<sup>22</sup> *Id.* at § 10.436.

<sup>23</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (June 2009).

OWCP found that appellant's monthly income of \$4,035.46 and her monthly expenses of \$3,289.34 yielded a monthly surplus of more than \$50.00. 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.<sup>24</sup> As appellant's current income exceeds her ordinary and necessary living expenses by more than \$50.00, she does not need substantially all of her income for ordinary and necessary living expenses.<sup>25</sup>

Additionally, the evidence of record does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant submitted no evidence that she relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.<sup>26</sup> Consequently, OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant's representative maintains that recovery of the overpayment would cause financial hardship. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.<sup>27</sup> Further, as found by the Board, the evidence does not demonstrate that appellant would experience financial hardship repaying the overpayment.

Appellant's representative also questioned OWCP's hearing representative's finding that some expenses were not necessary. However, the guidelines for determining ordinary and necessary expenses are set forth in OWCP's procedures and the Board has found that the hearing representative properly calculated such expenses in this case.<sup>28</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>29</sup>

Section 10.441(a) of the regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>30</sup>

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<sup>24</sup> *Id.* at Chapter 6.200.6(a)(1); *see also Desiderio Martinez*, 55 ECAB 336 (2004).

<sup>25</sup> As appellant's income exceeds her ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether her assets exceed the allowable resource base. *See J.W.*, Docket No. 16-1355 (issued January 10, 2017).

<sup>26</sup> 20 C.F.R. § 10.437; *see also D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>27</sup> *Id.* at § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

<sup>28</sup> *See supra* note 25.

<sup>29</sup> *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>30</sup> 20 C.F.R. § 10.441(a).

**ANALYSIS -- ISSUE 3**

The Board finds that OWCP gave due regard to the financial information provided by appellant. Appellant's monthly household income totaled \$4,035.46 and her expenses totaled \$3,289.84, equaling a monthly surplus amount of \$745.62 per month. The Board finds that OWCP properly determined that the rate of recovery should be \$72.00 from her continuing compensation payments every 28 days.<sup>31</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of wage-loss compensation in the amount of \$11,249.98 for the period October 31, 2009 through February 1, 2010. The Board further finds that OWCP properly determined that she was not entitled to waiver of recovery of the overpayment and properly found that it would recover the overpayment by deducting \$72.00 from her continuing compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 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

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<sup>31</sup> See *D.C.*, *supra* note 26.