

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$19,081.57 for the period March 4 through October 30, 2016; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On May 14, 2015 appellant, then a 46-year-old medical instrument technician, filed an occupational disease claim (Form CA-2) alleging that she sustained right thoracic outlet syndrome while in the performance of duty. She noted that she first became aware of her condition and related it to her federal employment on April 30, 2012. OWCP assigned File No. xxxxxx244 and, following development of the claim, accepted right thoracic outlet syndrome. It paid appellant wage-loss compensation for total disability commencing January 18, 2016.

Previously, under OWCP File No. xxxxxx517, OWCP had accepted a November 9, 2009 occupational disease claim (Form CA-2) for right bicipital tendinitis and other affectations of the right shoulder. Appellant was off work beginning December 18, 2009 due to OWCP authorized right shoulder arthroscopy. She was released to restricted duty on February 11, 2010 and returned to regular-duty work on April 30, 2010. By decision dated March 15, 2017, OWCP granted appellant a schedule award for 11 percent permanent impairment of her right upper extremity. The award ran for 34.32 weeks from March 4 to October 30, 2016 (fraction of day) for a total of \$26,245.28. OWCP noted that payment of the award ended when appellant had been paid for the last day shown in the period of award, October 30, 2016.⁴

The record reflects that on June 30, 2017 in OWCP File No. xxxxxx244, it paid appellant wage-loss compensation for the period April 4, 2016 through June 9, 2017. On September 12,

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 25, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Appellant also has an October 14, 2011 occupational disease claim under OWCP File No. xxxxxx451, which OWCP accepted for right carpal tunnel syndrome and right lesion of ulnar nerve/cubital tunnel syndrome. Appellant underwent OWCP-authorized right carpal tunnel syndrome surgery on February 3, 2012 and returned to full-time full duty on October 20, 2012. She stopped work on January 6, 2016 and has not returned. By decision dated July 12, 2016, OWCP denied appellant's claim for wage-loss compensation for the period January 18, 2016 and continuing, as the evidence did not establish that she was disabled as a result of her accepted October 14, 2011 work-related medical conditions. By decision dated June 5, 2017, an OWCP hearing representative affirmed the July 12, 2016 decision. On April 8, 2016 appellant filed a Form CA-7 schedule award claim. On July 14, 2017 OWCP administratively combined OWCP File Nos. xxxxxx451, xxxxxx517, and xxxxxx244, with File No. xxxxxx244 designated as the master file.

2017 it issued a compensation check for the period January 18 to March 29, 2016. A separate worksheet noted the amount of compensation paid for each period commencing April 4, 2016.

On September 22, 2017 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$19,081.57 for the period March 4 through October 30, 2016, because she received compensation benefits based on temporary total disability for her right arm condition under OWCP File No. xxxxxx244 after she was paid schedule award compensation for that same period under OWCP File No. xxxxxx517. It also made a preliminary determination that she was without fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact and amount of the overpayment, and request waiver of recovery. It informed her that she could submit additional evidence in writing or at prerecoumment hearing, but that a prerecoumment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.

An OWCP worksheet, which detailed the amount of compensation paid due to concurrent payment of temporary total disability and the schedule award for the right arm, noted a total overpayment of \$19,083.08 for the period March 4 through October 30, 2016. A recovery reporting form indicated that appellant had oversubscribed for optional life insurance and that the final overpayment for dual payment during the reported period was \$19,081.57.

On September 29, 2017 appellant requested a prerecoumment telephonic hearing with a representative of OWCP's Branch of Hearings and Review. She contested the fact of overpayment and requested waiver of recovery, asserting that she had no income when she received the compensation payment and that the monies were used to pay bills over the last two years.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), completed on October 2, 2017, in which she listed monthly income of \$5,000.00, monthly expenses of \$4,320.00, and assets of \$7,700.00.

During the prerecoumment hearing, held on March 13, 2018, counsel indicated that, in the event the overpayment was upheld, appellant could pay \$50.00 per month. Appellant testified regarding her finances. She indicated that her husband contributed \$3,200.00 per month, which made the household monthly income over \$8,000.00.

Appellant retired from the employing establishment, effective December 23, 2017. She elected Office of Personnel Management retirement benefits as of July 22, 2018.

In an April 4, 2018 updated overpayment recovery questionnaire (Form OWCP-20), appellant listed \$8,000.00 total monthly income, \$9,290.00 total monthly expenses, and \$12,500.00 in funds. She noted that she was paid a lump sum for an injury approximately one year prior to her workers' compensation payments began. No documentation was provided.

By decision dated May 25, 2018, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$19,081.57 for the period March 4 to October 30, 2016 because she received wage-loss compensation and schedule award compensation for accepted right upper extremity conditions concurrently. He found that she was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver

of recovery because her monthly income of \$8,000.00 exceeded her monthly expenses of “less than \$6,070.00” by more than \$50.00. The hearing representative explained that appellant no longer had listed expenses pertaining to her son, that she had not submitted documentation verifying her income and expenses, but that benevolently accepting the listed expenses, she still had enough income to repay the overpayment. Therefore, appellant had not established that recovery of the overpayment would defeat the purpose of FECA. The hearing representative required recovery of the overpayment by deducting \$400.00 from her continuing compensation payments every 28 days.⁵

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 his or her duty.⁶ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁷

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,081.57.

In this case, appellant received a schedule award for 11 percent permanent impairment of her right upper extremity due to a right shoulder injury under OWCP File No. xxxxxx517. The award ran from March 4 to October 30, 2016. OWCP also paid appellant wage-loss compensation for total disability under OWCP File No. xxxxxx244 commencing January 18, 2016 through the present for another right shoulder injury. It found an overpayment of compensation in the amount of \$19,081.57 resulted as appellant was not entitled to concurrently receive both wage-loss and schedule award compensation for the same part of the body.

⁵ The hearing representative noted that since the additional schedule award claim had not been paid, the case should be flagged so that prior to any payment, the funds will be applied to the overpayment. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004) (recovery from continuing entitlement).

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(a).

As appellant was not entitled to both wage-loss and schedule award compensation for both right shoulder injuries, the Board finds that OWCP properly determined that an overpayment of compensation was created.⁹

The Board further finds that OWCP properly calculated the amount of the overpayment as \$19,081.57, the amount that appellant received in wage-loss compensation and schedule award compensation for the two shoulder conditions. The Board notes that she has not disputed the amount of overpayment.

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.¹⁰ These statutory guidelines are found in section 8129(b) of FECA which provide: "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."¹¹ 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.¹²

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.¹³ 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 for the worse.¹⁴ To establish that a valuable right has been relinquished, it must be shown that the right was in fact

⁹ *E.S.*, Docket No. 16-1248 (issued May 15, 2017).

¹⁰ *See P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹¹ 5 U.S.C. § 8129(b).

¹² *See P.J.*, *supra* note 10.

¹³ 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. 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. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *see P.J.*, *supra* note 10; *B.F.*, Docket No. 13-0785 (issued September 20, 2013).

¹⁴ *Id.* at § 10.437(a), (b).

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.¹⁵

ANALYSIS -- ISSUE 2

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

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses. OWCP's hearing representative reviewed appellant's updated overpayment recovery questionnaire dated April 4, 2018 and found that "even without documentation, and benevolently accepting all listed expenses, appellant had sufficient funds to repay the overpayment." As noted above, the hearing representative found that appellant's expenses were "less than \$6,070.00" and that her monthly income of \$8,000.00 exceeded her monthly ordinary and necessary expenses by approximately \$2,000.00. As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁶ Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider whether her assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁷

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provides in pertinent part:

"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 the 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

¹⁵ *Id.* at § 10.437(b)(1).

¹⁶ *See supra* note 13

¹⁷ *See P.J., supra* note 10; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹⁸

ANALYSIS -- ISSUE 3

The Board also finds that OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant’s continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$400.00 from appellant’s continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on her. Therefore, it properly required recovery of the overpayment by deducting \$400.00 from her continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received a \$19,081.57 overpayment of compensation for the period March 4 to October 30, 2016, for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$400.00 from her continuing compensation payments every 28 days.

¹⁸ 20 C.F.R. § 10.441(a); *see P.J., supra* note 10; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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