

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Carol Stream, IL,
Employer**

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**Docket No. 18-1059
Issued: February 6, 2019**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2018 appellant, through counsel, filed a timely appeal from an April 6, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the April 6, 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$31,473.32.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On September 9, 2003 appellant, then a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on September 8, 2003, he sustained a cervical strain and head injury in the performance of duty. In a supplemental statement he explained that his injuries occurred when he drove his fork lift into a parked truck. OWCP accepted the claim for concussion, cervical strain, and cervical spinal stenosis.

On March 30, 2007 appellant filed a claim for a schedule award (Form CA-7). By decision dated October 15, 2007, OWCP granted him a schedule award for two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity. By decision dated June 25, 2009, it awarded appellant an additional 11 percent permanent impairment of the right upper extremity and an additional 12 percent permanent impairment of the left upper extremity, resulting in a total of 13 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity. By decision dated April 16, 2012, OWCP granted him an additional 6 percent permanent impairment of the right upper extremity and 6 percent permanent impairment of the left upper extremity for a total of 19 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity.

By notice dated February 1, 2013, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$31,473.32 as the additional impairment he was granted in the April 16, 2012 decision had already been incorporated into his prior schedule awards for a total of 13 percent right upper extremity permanent impairment and 14 percent left upper extremity permanent impairment. It made the preliminary finding that he was not at fault in the creation of the overpayment and provided an overpayment recovery questionnaire (Form OWCP-20) for his completion. OWCP afforded appellant 30 days to respond and submit supporting financial documentation.

On February 26, 2013 appellant requested a telephonic prerecoupment hearing with an OWCP hearing representative.

Appellant subsequently submitted a completed Form OWCP-20 reporting monthly income of \$918.72 and monthly expenses of \$3,700.00. Under other funds, he reported \$50.00 cash on hand and \$573.57 in a checking account. Appellant also listed his claimed expenses.

By decision dated September 9, 2013, OWCP's hearing representative finalized the overpayment of compensation in the amount of \$31,473.32, finding that appellant was erroneously

⁴ Docket No.17-0276 (issued August 8, 2017); Docket No, 14-0195 (issued October 10, 2014).

paid a schedule award for an additional six percent permanent impairment of each upper extremity. The hearing representative denied waiver of recovery of the overpayment of compensation as appellant's income exceeded his expenses and ordered recovery by deducting \$400.00 from appellant's continuing compensation payments every 28 days.

On November 5, 2013 appellant, through counsel, appealed to the Board. By decision dated October 10, 2014, the Board affirmed in part and set aside in part OWCP's September 9, 2013 decision. The Board found that OWCP properly determined that an overpayment of compensation was created in the amount of \$31,473.32 based on the receipt of an additional six percent permanent impairment of each upper extremity, to which he was not entitled. The Board further determined, however, that OWCP had not properly considered whether denial of waiver of recovery of the overpayment would be against equity and good conscience or would defeat the purpose of FECA. The Board remanded the case to OWCP for further findings as to whether recovery of the overpayment should be waived.

On August 29, 2016 OWCP provided appellant a Form OWCP-20 and requested supporting documentation so that it could evaluate whether the overpayment should be waived. It noted that the 2013 Form OWCP-20 was outdated and requested that he provide updated financial information. OWCP afforded appellant 30 days to respond and provide supporting financial documentation.

By letter dated October 3, 2016, OWCP sent appellant a second request for an updated Form OWCP-20 and supporting financial information. It afforded him another week to respond.

On October 14, 2016 OWCP received a completed Form OWCP-20 which reported monthly income of \$1,952.00 and monthly expenses of \$1,883.00. Appellant also reported that he had \$60.00 cash on hand and a negative balance of \$791.91 in a checking account. He also listed his claimed expenses. No corroborating financial documentation was received.

By decision dated October 17, 2016, OWCP denied waiver of recovery of the overpayment of compensation in the amount of \$31,473.32. It found that appellant had failed to respond to its letters dated August 29 and October 3, 2016. OWCP further determined that it would recover the overpayment by deducting \$400.00 from his continuing compensation payments every 28 days.

On November 17, 2016 appellant, through counsel, appealed to the Board. By decision dated August 8, 2017, the Board set aside the October 17, 2016 decision denying waiver of recovery of the overpayment. The Board determined that OWCP had failed to properly consider a completed Form OWCP-20 overpayment recovery questionnaire that was received into the record prior to the issuance of the October 17, 2016 decision. The Board remanded the case for OWCP to fully consider the evidence followed by a *de novo* decision.

A telephone conference on the issue of waiver of recovery of the overpayment was held on March 7, 2018. Appellant stated that his monthly income was \$2,846.00 based on \$1,949.00 in social security benefits and \$897.00 in Federal Employees Retirement System (FERS) benefits. Monthly expenses were listed as \$850.00 for rent/mortgage, \$250.00 for food, \$100.00 for clothes/cleaners, \$140.00 for electricity, \$75.00 for water, \$95.00 for gas, \$180.00 for telephone/internet, \$330.00 for a car loan, \$300.00 for car insurance, \$150.00 gas for the car, \$200.00 for medication, \$230.00 for credit card payment, and \$150.00 for a paypal loan, resulting in total monthly expenses of \$3,025.00. OWCP noted a negative \$179.00 monthly amount after

deducting expenses from income. It requested that appellant provide documentation supporting his expenses on the issue of waiver. OWCP afforded he was 15 days to provide the requested supporting financial documentation.

On March 27, 2018 OWCP received an updated Form OWCP-20. Appellant reported monthly income of \$2,846.00 from social security disability and Office of Personnel Management benefits, and monthly expenses of \$3,155.00. He indicated that he had a balance of -\$800.00 in a checking account. Under expenses, appellant listed \$900.00 for rent or mortgage, \$400.00 for food, \$200.00 for clothing, \$605.00 for utilities, \$400.00 for other expenses, \$350.00 for car loan, and \$300.00 for insurance. He noted that he needed to file for bankruptcy. Appellant also submitted a handwritten statement in which he listed monthly expenses which included \$330.00 to Gateway one Lending and Finance, \$180.00 to paypal credit, \$159.51 to AT&T DirectTV and internet, \$83.00 for Sprint, \$240.00 for vehicle gas, \$200.00 for medicine, \$100.00 for cleaners, \$38.00 to Capitol One, \$49.00 to First Premier, \$55.00 to Merrick Bank, \$63.00 to Credit One Bank, \$120.00 to Commonwealth Edison Electric, \$260.00 for food, and \$247.41 for vehicle insurance. He also listed a bimonthly expense of \$135.00 for garbage and waste and a checking account balance of negative \$800.00. The only financial documentation appellant submitted was an automobile insurance bill and a copy of a rental agreement. The automobile insurance bill listed installment options and showing a current balance of \$2,379.10 and minimum payment due of \$242.41. The rental agreement noted a monthly rental fee of \$900.00. No further documentation regarding income or expenses was received.

By decision dated April 6, 2018, OWCP denied waiver of recovery of the \$31,473.32 overpayment of compensation. It found that appellant had not provided financial information establishing his income or expenses. OWCP concluded that he had not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It did, however, waive the interest on the overpayment and determined that appellant had sufficient income to repay the overpayment in the amount of \$200.00 every 28 days commencing May 6, 2018.

LEGAL PRECEDENT

Section 8129 of FECA provides that an individual who is without fault in the creation of or acceptance of an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁵ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁶

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

⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436 and 10.437.

⁶ See *Wade Baker*, 54 ECAB 198 (2002).

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.⁷

Section 10.437 provides that 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.⁸

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP, as 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.⁹ Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁰

ANALYSIS

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$31,473.32.

In a March 7, 2018 telephone conference, OWCP noted that appellant had forwarded a completed overpayment recovery questionnaire, Form OWCP-20, but had not submitted supporting financial documentation. During the telephone conference, appellant detailed total income of \$2,846.00 and total monthly expenses of \$3,025.00. OWCP informed him that documentation supporting the information provided was required prior to consider the issue of waiver. It afforded appellant 15 days to provide the requested financial evidence. OWCP informed him that if there was no response, a final decision would be made on the issues of waiver and repayment. The only financial evidence appellant submitted was a completed Form OWCP-20, with a handwritten supplement, in which he noted total expenses of \$3,155.00, a copy of an automobile insurance bill, and a rental agreement. No other documentation supporting his noted income or expenses was submitted.

In requesting waiver, the overpaid individual has the responsibility for submitting financial information.¹¹ Although appellant had been advised that he must submit documentation substantiating his income and expenses, he merely provided lists and failed to provide actual

⁷ 20 C.F.R. § 10.436. OWCP's 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)(1)(b) (June 2009).

⁸ *Id.* at § 10.437.

⁹ *Id.* at 10.438(a).

¹⁰ *Id.* at 10.438(b).

¹¹ *Id.*; see also *R.O.*, Docket No. 18-0076 (issued August 3, 2018).

documentation of his income and expenses as required by section 10.438 of its regulations. Thus, he has not established that recovery of the overpayment would defeat the purpose of FECA.¹²

Appellant also has not shown that he gave up a valuable right or changed his position for the worse in reliance on anticipated compensation payments. Thus, he has not shown that, if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all. Appellant, therefore, has not established that recovery of the overpayment would be against equity and good conscience.¹³

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.¹⁴

CONCLUSION

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$31,473.32.

¹² See *L.W.*, Docket No. 16-1179 (issued December 20, 2016).

¹³ See *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹⁴ 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. 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. *Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2019
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