



schedule award compensation, for which appellant was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On November 21, 2013 appellant, then a 49-year-old sheet metal mechanic (aircraft), filed a traumatic injury claim (Form CA-1) alleging that on November 16, 2013 when a temporary floorboard she stepped on gave way and she fell while in the performance of duty when. She stopped work on November 19, 2013, returned to full-time modified duty with restrictions on November 20, 2013, and full-time regular duty on December 5, 2013. OWCP initially accepted the claim for bilateral knee contusions, left knee sprain, contusion and sprain of the low back. It subsequently expanded acceptance of the claim to include bilateral knee chondromalacia patellae.

On May 11, 2015 appellant underwent an OWCP authorized left knee arthroscopy with patella debridement and lateral release.

On April 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

By decision dated May 17, 2016, OWCP granted appellant a schedule award for seven percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity. The schedule award was based upon bilateral knee permanent impairments. The period of the award ran for 25.92 weeks from April 5 to October 3, 2016. Appellant received \$20,379.34 in schedule award compensation.

On May 11, 2017 appellant underwent an OWCP-approved left knee arthroscopic patella synovectomy and debridement.

On December 4, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

By decision dated December 19, 2017, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity. This schedule award was also paid for bilateral permanent impairment of the knees. The period of the award ran for 28.8 weeks from November 15, 2017 through June 4, 2018. Appellant received \$22,916.08 in total schedule award compensation.

On October 4, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$20,379.34 had occurred because appellant had received two schedule awards, but was only entitled to one. It determined that she should have received the schedule award for eight percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity, the greater of the two schedule awards, and that the schedule award for seven percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity represented an overpayment. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP notified appellant that failure to submit the requested information within 30 days would result in the denial of waiver of recovery of the overpayment. Additionally, it notified her 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 prerecoupment hearing.

On October 23, 2018 OWCP received an overpayment action request form, dated October 17, 2018, on which appellant checked a box requesting that OWCP make a decision based on the written evidence regarding possible waiver of the overpayment. In an October 17, 2018 letter, appellant indicated that she did not know that the schedule award was erroneously issued and that the overpayment was not her fault. She indicated that she did not save any of the schedule award and that it was used to pay vehicle maintenance, medical expenses, and dental work. Appellant also noted that her attempt to start a cleaning business was unsuccessful. She indicated that she was seeking waiver based on financial hardship as paying any amount back would cause great hardship for her family. Appellant noted that she was the sole provider for her household as her spouse was retired and only received social security benefits. She did not contest the fact or the amount of the overpayment.

OWCP also received appellant's completed overpayment recovery questionnaire and financial evidence. Appellant reported total monthly income of \$3,289.10 for her household, which included her spouse's monthly social security benefits of \$984.00. In response to the question regarding her usual monthly household expenses, appellant reported total monthly expenses of \$2,948.11<sup>3</sup>; monthly installments of credit card debt of \$50.00; and total assets of \$5,576.49. Appellant submitted financial documentation supporting her claimed income and expenses.

By decision dated December 12, 2018, OWCP finalized the preliminary determination that appellant received an overpayment of compensation, for which she was without fault, in the amount of \$20,379.34 for the period April 5 through October 3, 2016. A detailed calculation of the \$20,379.34<sup>4</sup> overpayment, which noted each amount appellant received for the 25.92 week period April 5 to October 3, 2016, was provided. It found that appellant had a total monthly income of \$2,571.50,<sup>5</sup> total monthly expenses of \$1,656.32 (\$1,606.32<sup>6</sup> of household expenses and \$50.00 of debt) and total assets of \$5,577.09. OWCP denied waiver of recovery of the overpayment as appellant's income exceeded the expenses by \$915.28 and she retained significant financial assets. Recovery of the overpayment was directed by monthly installment payments of \$300.00 each month until the overpayment was absorbed.

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<sup>3</sup> This included \$1,265.80 for her mortgage; \$211.11 for cable; \$140.10 for her mobile phone; \$67.51 for automobile insurance; \$255.00 for her electrical bill; \$76.50 for her water bill; \$200.00 for medicine; \$21.99 for home security; \$300.00 for food; \$200.00 for gas; \$30.00 for dental; and \$180.00 for household supplies.

<sup>4</sup> In its calculation, OWCP miscalculated the overpayment amount as \$20,379.24. However, it noted on the cover letter and in its conclusion that the overpayment amount was \$20,379.34.

<sup>5</sup> The monthly income was listed as \$587.60 (net) for appellant and \$984.00 for her spouse. This amounts to \$1,571.60 as opposed to the \$2,571.60 total found by OWCP.

<sup>6</sup> The monthly household expenses were listed as: \$150.00 for food; \$632.90 for mortgage; \$127.50 for electricity; \$38.50 for water; \$70.00 for telephone; \$200.00 for vehicle gas; \$67.61 for car insurance; \$137.34 for medical/dental copay; \$71.22 for cable; \$38.50 for internet; and \$35.25 for auto repairs.

### 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 duty.<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$20,379.34, for which she was without fault.

In this case, appellant received two schedule awards for her bilateral lower extremities. In a May 17, 2016 schedule award, she received an award for seven percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity. In a December 19, 2017 schedule award, appellant received an award for eight percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity. The schedule awards were duplicative of each other with the exception of a one percent increase in permanent impairment of the left lower extremity in the December 19, 2017 schedule award. Appellant was not entitled to receive duplicative schedule award compensation for the same body part.<sup>10</sup>

The Board finds that OWCP properly determined the amount of overpayment as \$20,379.35, the amount of duplicative schedule award compensation.<sup>11</sup> The evidence of record shows that appellant received \$20,379.34 in her first schedule award and \$22,916.08 in her second schedule award. OWCP properly determined that she had received a \$20,379.34 overpayment as

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<sup>7</sup> 5 U.S.C. § 8102(a).

<sup>8</sup> *Id.* at § 8129(a).

<sup>9</sup> *Id.* at § 8116(a).

<sup>10</sup> *C.H.*, Docket No. 16-0968 (issued August 8, 2016).

<sup>11</sup> *See L.D.*, Docket No. 18-1317 (issued April 17, 2019).

the schedule award compensation was duplicative.<sup>12</sup> The Board further notes that appellant did not contested the fact or amount of the 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.<sup>13</sup> Section 8129 of FECA<sup>14</sup> provides that an overpayment must be recovered 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.<sup>15</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 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>16</sup> An individual's liquid assets include, but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.<sup>17</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 for the worse.<sup>18</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>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>14</sup> 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>15</sup> *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>16</sup> 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.400.4(a) (September 2018).

<sup>17</sup> *Id.*

<sup>18</sup> 20 C.F.R. § 10.437(a), (b).

<sup>19</sup> *Id.* at § 10.437(b)(1).

## ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture as to whether OWCP properly denied waiver of recovery of the \$20,379.34 overpayment.

The Board notes that whether recovery of the overpayment would defeat the purpose of FECA is a two prong test. Initially it is noted that appellant reported monthly household income and expenses for herself and her spouse in amounts that differed from OWCP's totals. Appellant reported total monthly income of \$3,289.10 for her household, which included \$984.00 in her spouse's social security income. OWCP reported a total monthly income of \$2,571.60, but failed to explain how this amount was calculated. It included appellant's spouse \$984.00 monthly income, but found without explanation that appellant had only \$587.60 in net monthly income. The Board notes that this would total \$1,571.60, not the \$2,571.50 found by OWCP. Appellant also reported total monthly household expenses of \$2,948.11 plus monthly installments of credit card debt of \$50.00, for a total of \$2,998.11. OWCP however found a total monthly expenses of \$1,606.32. While it listed appellant's monthly expenses, it failed to explain how it calculated the expenses. For example, OWCP listed appellant's monthly mortgage payment as \$632.90. A copy of appellant's April 1, 2017 mortgage statement of record, however, indicated the amount of \$1,253.99 with a handwritten notation which indicated that the monthly mortgage payment had increased to \$1,265.80. Additionally, OWCP failed to list some of the expenses appellant claimed, and submitted evidence of, such as her home security system. Given these discrepancies, it is unclear whether appellant needs substantially all of her current income to meet ordinary and necessary living expenses.

The Board further notes that appellant has claimed assets of \$5,576.49 for herself and her spouse, which is below the statutorily allowed resource base of \$10,300.00 for an individual with a spouse.

Furthermore, the Board finds that OWCP did not address and it is unclear from the record whether recovery of the overpayment would be against equity and good conscience such that appellant gave up a valuable right or changed her position for the worse in reliance on the initial schedule award payments for which the overpayment was declared.<sup>20</sup> Appellant indicated that she no longer had funds from the schedule award. She noted starting a cleaning business in 2016, which was unsuccessful, and for which she claimed a loss, as evidenced by her 2017 tax return. To the extent that appellant is claiming detrimental reliance on the schedule award payments, this issue should be further developed by OWCP on remand.

For the above reasons, the case is not in posture as to whether OWCP properly denied waiver of recovery of the \$20,379.34 overpayment.<sup>21</sup> The case will therefore be remanded to properly determine the amount of appellant's total income and expenses. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>20</sup> *Supra* note 18; *see C.H.*, Docket No. 16-0968 (issued August 8, 2016).

<sup>21</sup> Due to the disposition of this issue, appellant's argument on appeal will not be addressed.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$20,379.34 for the period April 5 through October 3, 2016 due to receipt of duplicative schedule award compensation, for which she was without fault. The Board further finds that the case is not in posture for decision as to whether OWCP properly denied waiver of recovery of the \$20,379.34 overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further development consistent with this decision.

Issued: October 29, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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