

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

R.M., Appellant)	
)	
and)	Docket No. 20-0686
)	Issued: May 20, 2021
U.S. POSTAL SERVICE, VANDERVEER)	
STATION POST OFFICE, Brooklyn, NY,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 9, 2020 appellant filed a timely appeal from a January 16, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount \$187,551.39 during the period June 24, 2014 through August 18, 2018 for which he was without fault, as he continued to receive wage-loss compensation while a third-party surplus was outstanding; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 7, 2011 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to his right hand, chest, and head when he slipped and fell down stairs while in the performance of duty. OWCP accepted the claim for a closed fracture of the right metacarpal bone, displacement of right intervertebral disc, without myelopathy, and closed fracture of two left ribs. Appellant stopped work on the day of the injury and has not returned. OWCP paid wage-loss compensation on the periodic rolls as of October 23, 2011.

In a February 1, 2011 letter, OWCP advised appellant that a third party may be liable for his work-related injury. It informed him that he should promptly take action to seek damages and to contact OWCP if there was a recovery against a third party. OWCP also requested that appellant complete an attached questionnaire within 30 days.

On August 13, 2011 appellant completed a Notice of Potential Third-Party Claim (Form 2562).

In a May 16, 2013 letter, the employing establishment advised appellant's representative of the third-party claim lien amounts for wage-loss benefits and medical payments. Copies of the compensation paid, which established the lien amount, were included.

By letter dated July 9, 2013, appellant's representative notified OWCP that a settlement of \$1,100,000.00 was pending and he requested consent from OWCP to settle appellant's claim.

In a July 22, 2013 letter, the Department of Labor, Office of the Solicitor of Labor (SOL) approved the Long Form Statement of Recovery (Form CA-1108), signed by appellant on July 22, 2013 and the amount of the Federal Government's statutory right to refund. By check dated August 9, 2013, appellant's representative issued a refund to OWCP in the full amount of the lien. On June 24, 2014 SOL closed the third-party aspect of appellant's case. It advised OWCP that a surplus of \$407,238.47 remained.

Appellant continued to receive compensation payments under FECA after the third-party notice was placed in the file by SOL indicating a third-party surplus of \$407,238.47. He received compensation in the gross amount of \$3,362.00, which included basic life insurance and post-retirement optional life insurance, every 28 days, commencing September 22, 2013.

In an August 27, 2018 letter, OWCP advised appellant that the third-party settlement awarded in 2013 resulted in a third-party surplus. It advised him that, until the surplus had been exhausted, he was not entitled to further wage-loss compensation or medical benefits under FECA. As appellant was no longer eligible to receive compensation and medical benefits from OWCP, OWCP stopped his benefits effective August 19, 2018.

On November 12, 2019 OWCP issued a preliminary overpayment determination of an overpayment of compensation in the amount of \$187,551.39 for the period June 24, 2014 through August 18, 2018 because appellant received wage-loss compensation during a period of a third-party surplus. It found that he was at fault in the creation of the overpayment because he knowingly accepted payments which he knew or reasonably should have known were incorrect. The

preliminary overpayment determination included a worksheet, which provided an explanation of the calculation of the \$187,551.39 overpayment, which was the gross amount of compensation received during the stated period. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoyment hearing.

In a November 30, 2019 letter, appellant indicated that he was unaware that he was not entitled to wage-loss compensation payments and medical benefits due to his third-party surplus. He advised that, once he settled his case, he was unable to return to work due to both work and nonwork-related conditions, which continue to persist to date. Appellant indicated that he disagreed with the overpayment as he was rightfully entitled to the payments he received.

In a December 6, 2019 Form OWCP-20, appellant indicated that he was married and had a monthly household income of \$8,549.00, expenses totaling \$9,699.00 and total funds/assets of \$665,222.00. He submitted financial documentation supporting his reported income, expenses, and assets. Appellant indicated that he had three dependents, a daughter aged 23, a son aged 19, and his father aged 89.

By decision dated January 16, 2020, OWCP finalized that the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$187,551.39 for the period June 24, 2014 through August 18, 2018 because he accepted wage-loss compensation when a third-party surplus was outstanding. It found that he was not at fault in the creation of the overpayment as he had not been advised of the effect of the surplus, but it denied waiver of recovery of the overpayment as his liquid assets exceeded the overpaid amount and recovery of the overpayment would not cause hardship. OWCP requested that appellant repay the overpayment in full or contact it within 30 days so that appropriate arrangements for recovery could be made.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.² Section 8132 of FECA outlines that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation to him or her for the same injury.³ The applicable regulations reiterate that, after the refund owed

² *Id.* at § 8102.

³ *Id.* at § 8132. *See E.K.*, Docket No. 18-0599 (issued February 26, 2020); *see also T.D.*, Docket No. 16-0565 (issued May 5, 2016).

to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.⁴ OWCP will resume the payment of compensation only after FECA beneficiary has been awarded compensation, which exceeds the amount of the surplus.⁵ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.⁶ Such an overpayment of compensation should be adjudicated and processed by OWCP according to the usual overpayment procedures.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$187,551.39 for the period June 24, 2014 through August 18, 2018.

Appellant received a third-party recovery of \$1,100,000.00. He was properly provided, through his then-counsel of record, a Form CA-1108, which he signed on July 22, 2013. The Form CA-1108 provided the calculations of the amount that needed to be refunded directly to the United States Government. After appropriate deductions for the costs of the third-party suit and attorney fees, a surplus was created against future compensation in the amount of \$407,238.47. Future compensation payments are to be charged against a surplus until it has been exhausted.⁸

For the period June 24, 2014 through August 18, 2018, appellant continued to receive compensation benefits in the amount of \$187,551.39 from his FECA claim. This amount was required to be credited against the remaining surplus rather than paid to him.⁹ Therefore, the Board finds that OWCP properly found an overpayment of compensation in the amount of \$187,551.39.

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 Section 8129 of FECA¹¹

⁴ 20 C.F.R. § 10.712.

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Third-Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

⁷ *Id.*

⁸ 20 C.F.R. § 10.712; *E.K.*, Docket No. 18-0599 (issued February 26, 2020).

⁹ *E.K., id.*; *see B.G.*, Docket No. 14-0850 (issued September 17, 2014).

¹⁰ *See T.D.*, Docket No. 20-0972 (issued January 28, 2021); *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).

¹¹ 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).

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.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 An individual’s liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner’s equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan (TSP) or 401(k)), jewelry, and artwork.¹⁴

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.¹⁵ 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.¹⁶

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 of recovery of the overpayment.¹⁷

¹² *A.C., id.; see V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹³ 20 C.F.R. § 10.436. OWCP’s procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Supra* note 6 at Chapter 6.400.4a(3) (September 2018). OWCP’s procedures further 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, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹⁴ *Id.* at Chapter 6.400.4b(3)(a) (b).

¹⁵ 20 C.F.R. § 10.437(a), (b).

¹⁶ *Id.* at § 10.437(b)(1).

¹⁷ *Id.* at § 10.438.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The Board notes that the record reflects that he has \$665,222.00 in total assets. These liquid assets exceed the allowable resource base of \$11,500.00 for an individual, such as appellant, who has a spouse plus at least one dependent within the meaning of FECA. As his current assets exceed the allowable resource base, he has not established that recovery of the overpayment would defeat the purpose of FECA. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether he needs substantially all of his current income to meet current ordinary and necessary living expenses.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹⁸

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has not shown that OWCP abused its discretion by refusing to waive recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$187,551.39 for the period June 24, 2014 through August 18, 2018. The Board also finds that OWCP properly denied his request for waiver of recovery of the overpayment.

¹⁸ See *T.D.*, *supra* note 10; *L.D.*, *supra* note 10; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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