

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

J.K., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS & BORDER PROTECTION,
U.S. BORDER PATROL, Santee, CA, Employer**

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**Docket No. 24-0097
Issued: March 12, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 15, 2023 appellant filed a timely appeal from a May 22, 2023 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.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,025.06 for the period February 28 through March 27, 2021, for which he was without

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 22, 2023 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.*

fault, because he received schedule award compensation to which he was not entitled; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On November 26, 2019 appellant, then a 40-year-old supervisory border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right arm when driving on uneven dirt roads while in the performance of duty. OWCP accepted the claim for right shoulder strain, right shoulder superior glenoid labrum lesion, right shoulder impingement syndrome, and right shoulder joint other subluxation. It paid appellant wage-loss compensation from January 23 to February 29, 2020.

On November 20, 2020 appellant filed a claim for compensation (Form CA-7). By decision dated February 11, 2021, OWCP granted him a schedule award for five percent permanent impairment of the right upper extremity. The period of the award ran from November 18, 2020 through March 7, 2021.

The record documents that appellant received schedule award payments of \$20,927.70 for the period November 18, 2020 through January 30, 2021; \$7,918.59 for the period January 31 through February 27, 2021; \$2,064.60 for the period February 28 through March 7, 2021; and \$8,025.06 for the period February 28 through March 27, 2021.

On April 16, 2021 OWCP notified appellant of its preliminary overpayment determination that he received an overpayment of compensation in the amount of \$8,025.06 for the period February 28 through March 27, 2021 because he received an extra schedule award payment following his final schedule award payment. It noted that he was entitled to receive a supplemental payment for the number of days of his approved award during the month of March 2021, but that an additional full periodic roll payment should not have been paid. OWCP further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It provided him with an overpayment recovery questionnaire (Form OWCP-20) and advised that he should fully complete the Form OWCP-20 and submit supporting financial documentation. OWCP also provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoupment hearing.

On May 17, 2021 OWCP received appellant's request for a decision based on the written evidence, completed Form OWCP-20, and supporting financial documentation. Appellant related that he was without fault in the creation of the overpayment and that he believed that the payments he received were part of the five percent schedule award due to him. He listed monthly income of \$5,837.64, monthly expenses of \$3,979.34, and assets of \$23,740.45.

By decision dated July 26, 2021, OWCP finalized its preliminary overpayment determination that appellant received an overpayment of compensation in the amount \$8,025.06

³ *Order Remanding Case*, Docket No. 21-1282 (issued May 4, 2022).

for the period February 28 through March 27, 2021. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. Further, OWCP noted that repayment of the full amount, \$8,025.06, was due within 30 days. It advised appellant that if he was unable to pay the debt in full to arrange a monthly payment plan.

On August 24, 2021 appellant filed a timely appeal to the Board. By a May 4, 2022 order, the Board set aside OWCP's July 26, 2021 decision, finding that the case was not in posture for decision.⁴ The Board found that OWCP failed to provide adequate findings explaining how the overpayment was calculated and failed to specify findings regarding the documentation appellant submitted as to whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The Board remanded the case to OWCP to issue a new preliminary overpayment determination, which provided proper findings of fact and conclusions of law and afforded him due process rights to seek waiver of recovery of the overpayment.

In a revised notice of preliminary determination of overpayment dated February 7, 2023, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$8,025.06 for the period February 28 through March 27, 2021, because he had been paid \$10,089.66 in schedule award compensation during this period when he was only entitled to receive \$2,064.60. It advised him of its determination that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed Form OWCP-20 to determine a reasonable recovery method and informed him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records supporting income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a prerecoupment hearing.

Appellant subsequently requested review of the written record and waiver of the overpayment. He submitted a completed Form OWCP-20 wherein he reported that he had monthly income of \$5,160.00, monthly expenses of \$5,099.28, and assets of \$1,967.01. Appellant submitted supporting financial documentation.

On April 14, 2023 OWCP requested that appellant provide further supporting financial documentation regarding his reported expenses. It noted that it was unable to verify his claimed utility and other expense amounts as he had not submitted supporting documentation. OWCP also related that it could not verify appellant's income without further documentation. It afforded him 30 days to respond. No response was received.

By decision dated May 22, 2023, OWCP finalized its preliminary overpayment determination, finding that appellant had received an \$8,025.06 overpayment of a schedule award compensation because it had issued an extra schedule award. It explained that he received a final schedule award payment of \$2,064.60 on March 7, 2021 and an additional payment of \$8,025.06 on March 27, 2021. OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. Therefore, it concluded that the

⁴ *Id.*

evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by directing appellant to pay installment payments of \$230.00 each month.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of FECA provides, in pertinent part, that 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.⁵

OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,025.06 during the period February 28 through March 27, 2021, for which he was without fault, as he received schedule award compensation to which he was not entitled.

On February 11, 2021 OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The period of the award ran for 15.6 weeks from November 18, 2020 through March 7, 2021. Following the initial payment of \$20,927.70 for the period November 18, 2020 through January 30, 2021, OWCP paid appellant \$7,918.59 from January 31 through February 27, 2021. On March 26, 2021 it issued a final schedule award payment in the amount of \$2,064.60 for the period February 28 through March 7, 2021. OWCP, however, subsequently issued an extra schedule award payment covering the period February 28 through March 27, 2021 in the amount of \$8,025.06.

As noted above, OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.⁷ Appellant was not entitled to the \$8,025.06 payment as he had already been fully compensated for the schedule award.⁸ Consequently, OWCP properly determined that he received an overpayment of compensation in the amount of \$8,025.06 for the period February 28 through March 27, 2021.⁹

⁵ 5 U.S.C. § 8129(a).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1f(1)(i) (September 2020); *see A.B.*, Docket No. 23-0197 (issued August 1, 2023); *V.R.*, Docket No. 22-0086 (issued May 3, 2022); *T.C.*, Docket No. 20-0302 (issued November 12, 2020).

⁷ *Id.*

⁸ *See A.B.*, *supra* note 6.; *T.S.*, Docket No. 19-1895 (issued September 22, 2020); *M.J.*, Docket No. 19-1665 (issued July 29, 2020).

⁹ *See A.B.*, *id.*; *V.R.*, *supra* note 10; *S.L.*, Docket No. 21-0902 (issued December 22, 2021).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁰ 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 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.¹¹

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary, because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ Also, 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.¹⁴ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁵

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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁶ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁷

¹⁰ 5 U.S.C. § 8129.

¹¹ *A.B.*, *supra* note 6; *R.K.*, Docket No. 22-1193 (issued December 14, 2022); *I.R.*, Docket No. 22-0088 (issued May 5, 2022); *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹² 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. *Supra* note 10 at Chapter 6.400.4a(2)(3) (September 2020).

¹³ *Id.* at Chapter 6.400.4a(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *A.B.*, *supra* note 6; *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹⁴ *Id.* at Chapter 6.400.4a(2).

¹⁵ *Id.* at Chapter 6.400.4(b)(3).

¹⁶ 20 C.F.R. § 10.437(a)(b); *A.B.*, *supra* note 6; *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁷ *Supra* note 6 at Chapter 6.400.4c(3).

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ However, appellant had the responsibility to provide financial information and documentation to OWCP but failed to do so.¹⁹

In its preliminary overpayment determination, dated February 7, 2023, OWCP requested that appellant provide a completed Form OWCP-20 with supporting financial documentation, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. It advised him that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant submitted a completed Form OWCP-20 reporting monthly income of \$5,160.00, monthly expenses of \$5,099.28, and assets of \$1,967.01. As his reported income exceeded his reported expenses by more than \$50.00 the Board finds that he does not need substantially all of his income for ordinary and necessary living expenses.²⁰ The Board also finds that appellant did not submit the evidence necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²¹

Accordingly, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,025.06 for the period February 28 through March 27, 2021, for which he was without fault, because he received schedule award compensation to which he was not entitled. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁸ 20 C.R.F. § 10.436.

¹⁹ *Id.* at § 10.438; *P.G.*, Docket No. 23-0530 (issued October 24, 2023); *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

²⁰ *Supra* note 18.

²¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board