

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

J.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
IMMIGRATION & CUSTOMS
ENFORCEMENT, Boston, MA, Employer**

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**Docket No. 15-1043
Issued: August 6, 2015**

Appearances:
Appellant, pro se
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 6, 2015 appellant filed a timely appeal from the December 17, 2014 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 a \$6,336.12 overpayment of compensation; and (2) whether he is eligible for waiver.

FACTUAL HISTORY

On August 1, 2013 appellant, a 41-year-old criminal investigator (special agent), sustained a traumatic injury in the performance of duty while exercising in the employing

¹ 5 U.S.C. § 8101 *et seq.*

establishment exercise room. OWCP accepted his claim for right knee strain and a torn right medial meniscus. Appellant received compensation for temporary total disability on the periodic rolls. He signed up for direct deposit.

Appellant returned to work full time and full duty on August 28, 2012. OWCP terminated his periodic rolls payments, but not before an automated payment for the period August 24 through September 20, 2014 was directly deposited into his account.

On October 14, 2014 OWCP issued a preliminary determination that appellant had received a \$6,336.12 overpayment of compensation. After showing how it calculated the amount of the overpayment, it found that he was without fault in creating it.

Appellant submitted an overpayment recovery questionnaire showing assets of approximately \$30,000.00, largely from his savings account. He indicated that he supported a son and a daughter. Appellant noted that he made several large purchases before receiving notification of the overpayment. He made a \$5,000.00 down payment on a car on September 10, 2014. Appellant paid \$563.63 for a Glock pistol for work on September 21, 2014 and \$143.53 for pistol magazines on September 26, 2014. He bought a new snow blower on October 12, 2014 for \$541.48. Appellant spent \$504.09 for new bathroom fixtures on that same date. The purchases totaled \$6,752.73, not including the monthly car payments of \$693.38 he committed to for the next three years. Appellant argued that he mistakenly counted on the overpaid compensation to pay for these purchases. "Had I known I was overpaid \$6,336.12 by the U.S. Department of Labor, I would not have made those purchases as still I have large upcoming end-of-the-year expenses that I need to budget for, including \$1,918.44 for property taxes, home heating oil, extracurricular activities for his children, and Christmas gifts for his children and family.

In a decision dated December 17, 2014, OWCP finalized its preliminary determinations. It denied waiver because appellant had sufficient assets, including a Thrift Savings Plan balance of \$239,375.64, to repay the debt without undue hardship. As appellant was no longer receiving compensation for wage loss, OWCP advised that it would request payment of the full amount within 30 days.

On appeal, appellant repeated that he had obligated monies for large purchases incorrectly assuming that he had more money than he actually did. As a result, he has had to dip into his savings account to pay his financial obligations. "If I had known about the specific overpayment amount of \$6,336.12 earlier, I would not have made those large purchases and would not have to endure a diminished quality of life."

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² "Disability" means the incapacity, because

² 5 U.S.C. § 8102(a).

of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁴

ANALYSIS -- ISSUE 1

Fact and amount of overpayment are not in dispute. Appellant returned to work, and an automated payment was directly deposited into his account before OWCP terminated payments. Because appellant is not entitled to compensation for wage loss after returning to work, his receipt of the extra compensation payment created an overpayment of compensation from the date he returned to work, August 28, 2014, to the date OWCP terminated payments, September 20, 2014.

OWCP's preliminary determination clearly calculated the amount of the overpayment. It divided the total amount of the check by the number of days the compensation covered, then multiplied the daily compensation amount by the number of days in the overpayment period. The Board will affirm OWCP's December 17, 2014 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of FECA or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent.

³ 20 C.F.R. § 10.5(f).

⁴ *Id.* at § 10.500(a); *see, e.g., Tammi L. Wright*, 51 ECAB 463 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁵ *Id.* at § 10.433(a).

⁶ *Id.* at § 10.434.

This base includes all of the claimant's assets not exempted from recoupment.⁷ Assets may include liquid assets such as cash, the value of stocks, bonds, savings account, mutual funds, and certificates of deposit, and nonliquid assets such as the fair market value of an owner's equity in property, such as a second home and furnishings/supplies, a boat, a camper, vehicles above the two allowed per immediate family, jewelry, and artwork.⁸

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.⁹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.¹⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment.¹¹ For that reason, appellant was eligible for consideration of waiver. On his overpayment recovery questionnaire, however, he represented that he had assets of approximately \$30,000.00, not including funds in his Thrift Savings Plan. Appellant therefore has a resource base exceeding \$8,960.00 for an individual with two dependents, which is administratively considered sufficient to repay a debt without hardship. The Board therefore finds that recovery of the overpayment will not defeat the purpose of FECA, which is to provide at least a subsistence of income for beneficiaries.¹²

A question remains whether recovery will be against equity and good conscience. This is the crux of appellant's case. Appellant argues that he detrimentally relied on the overpaid amount to make large purchases he would not have otherwise made. This is not a case of financial hardship, as he has sufficient assets to repay the debt. This is not a case of lack of knowledge, in which an individual against whom the overpayment is charged derived no personal gain from the incorrect payments and had no knowledge of the benefits that were paid. The issue that must be resolved is whether appellant detrimentally relied on the incorrect payment.

⁷ *Id.* at §10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

⁸ Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.6.a(4). Assets do not include the value of household furnishings (primary residence), wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home that the person maintains as the principal family domicile, or income-producing property, if the income from such property has been included in comparing income and expenses.

⁹ 20 C.F.R. § 10.437(b).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 6.200.6.b(3) (June 2009).

¹¹ *See generally Tammy Craven*, Docket No. 05-249 (issued July 24, 2006) (order granting petition for reconsideration and reaffirming prior decision) (an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account because he or she may lack the requisite knowledge at the time of acceptance, which is necessarily the time of deposit).

¹² Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 6.200.6.a (June 2009).

The record does not support that appellant gave up a valuable right or changed his position for the worse in reliance on the overpaid amount. When a claimant argues that he changed his position for the worse, it must be shown that he made a decision that he would not otherwise have made but for the receipt of benefits, and that this decision resulted in a loss. Appellant argues the former, but has not established the latter. As noted earlier, conversion of the overpayment into a different form, from which the claimant derived some benefit, is not considered a loss. Accordingly, the money appellant spent on a car, pistol, magazines, snow blower, and bathroom fixtures is not considered a loss. He did not change his position for the worse. Rather, appellant simply converted his assets from one form to another. He purchased tangible property from which he derived some benefit.¹³

In the case of *G.W.*,¹⁴ the claimant argued that he relied on the overpaid compensation to help relatives financially, to pay for his daughter's wedding, and to make purchases, such as a new car, a swimming pool, appliances, and electronics. The Board found, however, that the claimant did not qualify for waiver under the principle of detrimental reliance because there was no evidence he gave up a valuable right or changed his position for the worse. As in the present case, conversion of the overpayment did not constitute a loss for this purpose. The claimant had gained a benefit from his many purchases.

In the absence of evidence establishing detrimental reliance, the Board finds that recovery of the overpayment will not be against equity and good conscience. As recovery will not defeat the purpose of FECA, OWCP is required to recover the overpayment. The Board's jurisdiction to review the collection of an overpayment, however, is limited to cases in which OWCP decreases later payments of compensation to which the individual is entitled.¹⁵ Because appellant returned to work and is no longer entitled to wage-loss compensation, OWCP must recover the debt by other means. The Board therefore lacks jurisdiction to review the issue.

CONCLUSION

The Board finds that appellant received a \$6,336.12 overpayment of compensation. The Board further finds that he is not eligible for waiver.

¹³ As for the large upcoming end-of-the-year expenses for which he still needed to budget, appellant cannot very well argue that he would detrimentally rely on the overpayment prospectively.

¹⁴ Docket No. 12-1171 (issued October 25, 2012).

¹⁵ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board