

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

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<b>R.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1985</b>
	)	<b>Issued: March 23, 2018</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>VANDENBURG AIR FORCE BASE, CA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 25, 2017 appellant filed a timely appeal from a September 6, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has received an overpayment of compensation in the amount of \$2,000.33 for the period February 21 through March 4, 2017; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant contends that he had no reason to believe that his schedule award compensation would expire on February 21, 2017. He claims that an OWCP letter dated November 21, 2016 informed him that the expiration date was May 31, 2017. Appellant asserts

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

that repayment of the overpayment would cause him severe mental and financial hardship as he has obligated personal and family expenses.

### **FACTUAL HISTORY**

On January 15, 1997 appellant, then a 61-year-old supervisory electronics engineer, filed a traumatic injury claim (Form CA-1) alleging that, on January 14, 1997, he wrenched his left knee when he slipped on a wet sidewalk and twisted his left leg and knee while in the performance of his work duties. OWCP accepted his claim for sprain of the left knee and left leg on March 3, 1997. On November 29, 2002 it accepted that appellant sustained a recurrence of disability on June 10, 2002.

By decision dated November 28, 2008, OWCP granted appellant a schedule award for 15 percent permanent impairment of the left leg. The period of the award ran from June 19, 2008 to April 17, 2009, totaling 43.2 weeks.

On May 5, 2011 OWCP expanded acceptance of appellant's claim to include loose body in the left knee. It subsequently authorized a total left knee arthroplasty performed on October 28, 2013 by Dr. Robert K. Peterson, a Board-certified orthopedic surgeon.

On October 27, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

In a decision dated February 6, 2016, OWCP granted appellant a schedule award for an additional 21 percent permanent impairment of the left leg, totaling 36 percent permanent impairment. The award covered a period of 60.48 weeks from October 29, 2014 to February 21, 2017.

In a June 8, 2017 letter, OWCP advised appellant of its preliminary determination that he had received a \$2,000.33 overpayment of compensation because it did not terminate his schedule award payments on February 21, 2017 and continued to make payments through March 4, 2017 in the amount of \$2,000.33. It also made a preliminary finding that he was without fault in the creation of the overpayment because he was not aware or could have been reasonably expected to know that OWCP had incorrectly paid compensation after February 21, 2017. OWCP advised appellant that he could submit evidence challenging the fact and amount as well as requesting waiver of recovery of the overpayment. It informed him that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a preresumption hearing. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

On June 27, 2017 appellant requested a decision based on the written evidence. He submitted an April 17, 2017 letter informing OWCP that he had not received a schedule award compensation check for the period March 17 through April 17, 2017. Appellant related that he had expected to receive this check based on a November 21, 2016 OWCP letter which indicated that his schedule award compensation would expire on May 31, 2017. He submitted a completed Form OWCP-20. Appellant noted that he did not have any of the incorrectly paid checks in his possession. He also noted that he had not transferred by loan, gift, sale, *etc.*, any property or cash. Appellant claimed that he had normal financial commitments and obligations which included his

personal and household expenses and expenses related to his former spouse,<sup>2</sup> 41-year-old daughter, and 19-year-old grandson who he listed as dependents on the Form OWCP-20. He noted that he assisted his former spouse with Medicare and health insurance, automobile and home maintenance, property tax payments, and provided her with miscellaneous help. Appellant also assisted with the payment of school tuition and expenses for his daughter and grandchildren. In addition, he was committed and obligated to complete the installation of an “out” building that he started in April 2017 and expected to complete it by the end of the summer. Appellant reported total monthly income of \$7,893.06 and assets totaling \$5,172.28. He also described monthly expenses and claimed that he had recently refinanced a loan to get cash to pay off credit cards and to restore a rental property. Appellant submitted financial information. This included bank statements indicating that appellant had a checking account balance of \$781.36 and a money market savings account balance of \$5,127.73 as of June 13, 2017.

By decision dated September 6, 2017, OWCP finalized its preliminary determination that appellant received a \$2,000.33 overpayment of compensation for the period February 21 through March 4, 2017. It explained that the overpayment occurred because it failed to terminate appellant’s schedule award payments on February 21, 2017 and continued to make additional payments through March 4, 2017. OWCP found appellant without fault and that he was not entitled to waiver of recovery of the overpayment. It noted that there was no evidence to support that recovery would be against good conscious or defeat the purpose of FECA. OWCP calculated appellant’s monthly income from OPM retirement benefits and other unspecified income reported, for a total monthly income of \$7,893.06. For monthly expenses, it calculated \$1,598.42 for mortgage, \$610.11 for food, and \$713.72 for utilities. OWCP noted that there was no financial documentation to support appellant’s other claimed expenses in the amount of \$14,690.88. It found that his monthly income exceeded the amount needed to meet ordinary and necessary living expenses. OWCP determined that appellant’s assets included a home, rental property, \$5,217.52 in a savings account, and \$781.36 in a checking account and exceeded both resource bases of \$4,800.00 for an individual and \$8,000.00 for an individual with dependents. It indicated, however, that, although appellant listed his 41-year-old daughter and 19-year-old grandson, who both had different addresses from him, as dependents, he did not submit any evidence of their financial dependency. Recovery of the overpayment was requested in full.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>3</sup> and its implementing regulations<sup>4</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

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<sup>2</sup> A March 2, 2002 judgment, from a Superior Court of California, dissolved appellant’s marriage effective July 12, 2002. Appellant, in a November 18, 2002 letter, indicated that, based on a court order dated March 7, 2002 and amended on September 20, 2002, he had to pay his ex-spouse \$425.00 monthly until his retirement. He contended that, after his retirement, the Civil Service Retirement System (CSRS) under the Office of Personnel Management (OPM) would continue to pay his ex-spouse \$425.00 a month plus a cost-of-living adjustment (COLA) in dividing his annuity. Appellant claimed that, after his death, CSRS would continue to pay his ex-spouse \$425.00 a month plus a COLA in a survivor annuity.

<sup>3</sup> *Supra* note 1 at § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

loss or loss of use, of scheduled members or functions of the body. Section 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.<sup>5</sup>

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>6</sup> When an overpayment has been made to an individual 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 the individual is entitled.<sup>7</sup>

FECA procedures identify various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.<sup>8</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,000.33, for the period February 21 through March 4, 2017.

OWCP granted appellant a schedule award for 15 percent permanent impairment of the left leg on November 28, 2008 for the period June 19, 2008 through April 17, 2009. On February 6, 2016 it granted him an additional schedule award for 21 percent permanent impairment of the left leg, totaling 36 percent permanent impairment that ran from October 29, 2014 through February 21, 2017. The evidence of record establishes that appellant continued to receive schedule award payments from OWCP after February 21, 2017, the date the award was scheduled to expire, until March 4, 2017. Consequently, any concurrent payments appellant received from OWCP beginning February 22, 2017 constituted an overpayment of compensation benefits. OWCP properly calculated the \$2,000.33 overpayment by totaling the amount of compensation checks appellant received during the period February 21 through March 4, 2017. The Board affirms its finding of fact and amount of overpayment.

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<sup>5</sup> *Id.* Effective May 1, 2009, OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013). See *J.L.*, Docket No. 14-0898 (issued March 26, 2015).

<sup>6</sup> *Supra* note 1 at § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004); see *V.F.*, Docket No. 10-1394 (issued February 23, 2011).

## 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>9</sup> These statutory guidelines are found in section 8129(b) of FECA which provides: "Adjustment or recovery of an overpayment by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>10</sup> If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

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>11</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>12</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>13</sup>

Section 10.438 of OWCP regulations provide 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. This information will also be used to determine the repayment schedule, if necessary. Failure to submit

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<sup>9</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>10</sup> *Supra* note 1 at § 8129(b).

<sup>11</sup> *Supra* note 4 at § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedure provides 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, *supra* note 8 at Chapter 6.200.6(a) (June 2009); *B.F.*, Docket No. 13-0785 (issued September 20, 2013).

<sup>12</sup> *Id.* at § 10.437(a), (b).

<sup>13</sup> *Id.* at § 10.437(b)(1).

the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. Repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because his assets exceed the resource base of \$4,800.00 for an individual, as provided in OWCP's procedures.<sup>15</sup> The Board notes that the applicable resource base is \$4,800.00 as the record establishes that appellant was divorced from his wife on July 12, 2002 and he failed to submit any evidence to establish his claimed 41-year-old daughter and 19-year-old grandson as dependents. In evaluating appellant's assets, the Board notes that on the Form OWCP-20 he completed, and in bank statements he submitted, appellant acknowledged that he had assets in his checking and money market savings accounts totaling \$5,909.09, which exceeds the resource base of \$4,800.00.<sup>16</sup> 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 to consider the first prong of the test, *i.e.*, whether his monthly income exceeded his monthly ordinary and necessary expenses by more than \$50.00.<sup>17</sup> Appellant did not establish that he was entitled to waiver on the basis of defeating the purpose of FECA.<sup>18</sup>

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.<sup>19</sup>

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<sup>14</sup> *Id.* at § 10.438.

<sup>15</sup> *Id.* at § 10.436.

<sup>16</sup> The Board notes that appellant's rental property is not included in the evaluation of his assets because the value of this property is not contained in the case record. The Board furthermore notes that contrary to OWCP's finding, appellant's primary home cannot be included in his assets. OWCP procedures specifically states that in evaluating assets for purpose of a waiver determination, the value of a principal family home shall not be considered. Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.200.6.a(4)(b) (June 2009).

<sup>17</sup> *Supra* note 4 at § 10.436; *see M.H.*, Docket No. 17-0766 (issued July 3, 2017).

<sup>18</sup> *See K.K.*, Docket No. 09-0207 (issued October 2, 2009).

<sup>19</sup> *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

Appellant generally contends on appeal that recovery of the overpayment would create a financial hardship and thus be against equity and good conscience. As explained, the record does not support this contention. Appellant has failed to establish that OWCP abused its discretion by refusing to waive recovery of the overpayment.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases when OWCP seeks recovery from continuing compensation benefits under FECA. As appellant is no longer in receipt of compensation benefits, the Board has no jurisdiction over the recovery of the overpayment.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant has received an overpayment of compensation in the amount of \$2,000.33 for the period February 21 through March 4, 2017. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2018  
Washington, DC

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

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

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

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<sup>20</sup> See *Lewis George*, 45 ECAB 144, 154 (1993).