

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 252

Docket No. PH-831M-07-0022-I-1

**Deborah A. Fearon,
Appellant,
v.
Office of Personnel Management,
Agency.**

OPM Claim No. CSA 3 199 667

October 26, 2007

Deborah A. Fearon, Lowell, Massachusetts, pro se.

Jessica Johnson, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the reconsideration decision by the Office of Personnel Management (OPM), finding that the appellant had received an annuity overpayment and was not entitled to waiver of the overpayment. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and REMAND for further adjudication.

BACKGROUND

¶2 On November 19, 1989, the appellant retired from her position as a Psychiatric Nursing Assistant, GS-6, Step 5, and began receiving a disability retirement annuity under the Civil Service Retirement System (CSRS). *See* Initial Appeal File (IAF), Tab 4, Subtab 5. By letter dated April 15, 2006, OPM informed the appellant that, as a result of a routine computer match, it had discovered a “discrepancy” between the earned income she reported to OPM and the figure reported by the Social Security Administration (SSA). *Id.* at 2-3. In particular, OPM found that the appellant’s earned income for 2003, as reported by the SSA, was \$28,533, which exceeded the earnings limitation for her continued entitlement to disability retirement benefits, i.e., 80 percent of the current rate of pay for the position she occupied immediately before her retirement.¹ The letter did not indicate how much earned income the appellant had previously reported to OPM. However, OPM invited the appellant to dispute the SSA figure by submitting documentation of her 2003 earnings. *Id.* The appellant did not respond at this time.

¶3 By letter dated May 24, 2006, OPM informed the appellant of its determination that she had been restored to earning capacity, and that her eligibility for disability retirement benefits had terminated on June 30, 2004. IAF, Tab 4, Subtab 4. OPM further determined that from July 1, 2004, through

¹ OPM is required to terminate the annuity of a CSRS disability retirement annuitant who is restored to earning capacity before reaching 60 years of age; earning capacity is deemed to be restored “if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.” 5 U.S.C. § 8337(d). In making its determination, OPM will compare the annuitant’s income for a calendar year with the gross annual rate of basic pay in effect on December 31 of that year. 5 C.F.R. § 831.1209(b). As of December 31, 2003, the rate of pay for a GS-6, Step 5 position in the appellant’s locality pay area was \$34,056, resulting in an earnings limitation of \$27,244.80. *See* IAF, Tab 4, cover letter and Subtab 5 at 6.

June 30, 2005, the appellant had been overpaid in the amount of \$10,366. *Id.* The existence and amount of the overpayment are not in dispute. IAF, Tab 7 at 2.

¶4 On June 20, 2006, the appellant completed and submitted a Financial Resources Questionnaire (FRQ), which OPM interpreted as a request for reconsideration of its initial decision and for waiver of the overpayment collection. IAF, Tab 4, Subtab 3. In its August 11, 2006 reconsideration decision, OPM determined that the appellant was not eligible for a waiver on the grounds that she was not without fault in causing the overpayment. IAF, Tab 4, Subtab 2. OPM further found that collection in reasonable installments would not cause financial hardship. OPM informed the appellant that she could either remit a check or money order for \$10,366 by September 11, 2006, or complete the enclosed Voluntary Repayment Agreement and repay that amount, plus interest, in monthly installment payments of \$250. Additionally, OPM advised the appellant that, if she did not elect one of the payment options or exercise her appeal rights, the matter could be referred to the Department of Justice for litigation, or to the Department of the Treasury for collection action, including offset from payments that the appellant might be entitled to receive from other agencies. *Id.*

¶5 The appellant did not remit a lump sum or sign the repayment agreement, but instead chose to exercise her appeal rights before the Board. In her initial appeal, she stated that the proposed payments of \$250 per month would cause her financial hardship. IAF, Tab 1. While she did not dispute the existence and amount of the overpayment, she did challenge OPM's determination that she was not entitled to a waiver. IAF, Tab 7 at 2. In particular, she denied that she was at fault in causing the overpayment. *Id.* She did not request a hearing. IAF, Tab 1. Based on the written record, the administrative judge (AJ) determined that the appellant was not without fault, and therefore ineligible for a waiver. The AJ further found that he could not address the question of whether the appellant was entitled to an adjustment of the repayment schedule, as it did not appear that

OPM could collect the debt by administrative offset. IAF, Tab 15 (Initial Decision, Feb. 5, 2007) (ID).

¶6 On petition for review, the appellant maintains that she was not at fault in causing the overpayment, and relies on her evidence and argument submitted below. Petition for Review File (PFRF), Tab 1. OPM has filed a response. PFRF, Tab 3.

ANALYSIS

¶7 Recovery of an overpayment from the Civil Service Retirement and Disability Fund will be waived when the annuitant is without fault and recovery would be against equity and good conscience. 5 U.S.C. § 8346(b); 5 C.F.R. § 831.1401. A recipient of an overpayment is without fault if she has performed no act of commission or omission that resulted in the overpayment. 5 C.F.R. § 831.1402. Recovery is against equity and good conscience when it would cause financial hardship, the annuitant can show that because of the overpayment she relinquished a valuable right or changed positions for the worse, or recovery could be unconscionable under the circumstances. 5 C.F.R. § 831.1403(a). The appellant bears the burden of establishing her entitlement to a waiver by substantial evidence. 5 C.F.R. § 831.1407(b). Substantial evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1).

¶8 Under OPM regulations, the pertinent considerations in finding fault are as follows:

- (1) Whether payment resulted from the individual's incorrect but not necessarily fraudulent statement, which he/she should have known to be incorrect;
- (2) Whether payment resulted from the individual's failure to disclose material facts in his/her possession which he/she should have known to be material; or

(3) Whether he/she accepted a payment which he/she knew or should have known to be erroneous.

5 C.F.R. § 831.1402(a). Contrary to the decision below, we find that the appellant has met her burden of showing by substantial evidence that she is not at fault in causing the overpayment.

¶9 With regard to the first two considerations, the AJ found that the appellant had misreported her earned income for 2003, and was therefore not without fault in the overpayment. ID at 5. However, we find no evidence that the appellant made incorrect statements or omissions of material fact that delayed the termination of her disability benefits. First, it is noteworthy that OPM failed to submit a copy of the appellant's earned income report for the relevant year, whereas the appellant has provided a signed statement in which she avers that she reported her earned income correctly. IAF, Tab 10 at 2. Moreover, even if the appellant did misreport her earned income, OPM has not alleged that she underreported the amount, or that the amount she reported was below the 80% threshold. To the contrary, a document submitted by OPM suggests that the appellant reported earnings of \$34,687, more than the correct figure of \$28,533. IAF, Tab 4, Subtab 5 at 1 (Disability Survey Earnings Match 2003). As both figures exceed the 80 percent threshold for continued entitlement to a disability annuity, we fail to see how the discrepancy could have resulted in the overpayment.

¶10 The AJ also found that the appellant knew or should have known that the payment was erroneous because she had received annual notice of the 80 percent income limitation and the General Schedule salary tables are publicly available. *Id.* However, the fact that the appellant was on notice of the 80 percent income limitation does not necessarily mean that she knew or should have known that her earnings exceeded this limit. *See Hudson v. Office of Personnel Management*, 87 M.S.P.R. 385, ¶¶ 10-11 (2000). While the appellant could have visited the OPM website, located the relevant General Schedule salary table, and made the

requisite calculations, it was not her responsibility to do so.² Rather, it was the responsibility of OPM to determine the appellant's continued entitlement to payments on the basis of her earned income report. *See* 5 C.F.R. § 831.1209(i). The appellant fulfilled her obligations in this matter by submitting her earned income report, and having done so, she had reason to expect that OPM would make the correct determination and notify her promptly if her benefits were to be terminated. When the payments continued, she had every right to assume that OPM had examined her earned income report and concluded that she was still entitled to a disability annuity. Hence, the record does not establish that the appellant knew or should have known that the overpayment was in error.

¶11 Having found that the appellant met her burden of proof on the issue of fault, we turn to the question of whether recovery of the \$10,366 overpayment would be against equity and good conscience. The appellant has claimed that recovery would be against equity and good conscience on the grounds that it would cause financial hardship. Financial hardship is deemed to exist where the annuitant from whom collection is sought needs substantially all of her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. 5 C.F.R. § 831.1404. Ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, food, clothing, insurance (life, health, and accident), taxes, installment payments, medical expenses, support expenses when the annuitant is legally responsible, and other miscellaneous expenses which the individual can establish as being ordinary and necessary. 5 C.F.R. § 831.1405. In determining whether living expenses are ordinary and necessary, the Board applies a reasonable person test regardless of the annuitant's accustomed standard of living. *Miller v. Office of Personnel Management*, 99 M.S.P.R. 104, ¶ 16 (2005), *aff'd*, 449 F.3d 1374 (Fed. Cir.

² Nor would this have been a simple task, as evidenced by OPM's initial failure to use the correct salary chart. *See* IAF, Tab 4, cover letter.

2006). The Board will give the appellant the benefit of the doubt unless the expense clearly constitutes an extravagance or a luxury. *Gott v. Office of Personnel Management*, 97 M.S.P.R. 538, ¶ 11 (2004). In the absence of a specific challenge by OPM, an appellant seeking waiver of an annuity overpayment should not be required to substantiate her expenses and income unless the information appears incomplete or unreasonable on its face. *Gulan v. Office of Personnel Management*, 86 M.S.P.R. 16, ¶ 12 (2000).

¶12 The appellant's FRQ, completed on June 20, 2006, indicates an average monthly income of \$2,858 and liquid assets of \$200.³ IAF, Tab 4, Subtab 3. She claims monthly expenses of \$650 for housing, \$300 for food, \$145 for utilities, \$40 for household maintenance, \$15 for clothing, \$60 for non-reimbursable medical and dental expenses, \$280 for insurance premiums, \$158 for transportation, \$809 for taxes, and \$120 for other ordinary and necessary living expenses. In addition, OPM policy guidelines provide for \$50 of emergency expenses, which raises the total to \$2,727. *See* Policy Guidelines, § I.D.9.; *Ewing v. Office of Personnel Management*, 100 M.S.P.R. 224, ¶ 7 (2005). Based on these figures, the margin available for debt collection is \$131, well under OPM's proposed monthly installment of \$250. To liquidate the entire overpayment would require 79 monthly installments of \$131, plus one additional payment of \$17, and this schedule would extend far beyond OPM's 3-year recovery objective. *See* Policy Guidelines, § V.A.6. Thus, it appears that the appellant may be eligible for at least a partial waiver. *See id.*, § I.D.13.

³ OPM policy guidelines define a liquid asset as cash or an asset that is readily convertible to cash with little or no loss of value. IAF, Tab 4, Subtab 6, Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and Federal Employees' Retirement System (Policy Guidelines), § I.D.6. As a general rule, only liquid assets in excess of \$5,000 are considered available for debt repayment. *Id.*, § I.D.8; *see also Fusco v. Office of Personnel Management*, 42 M.S.P.R. 501, 506 (1989).

¶13 We find that further development of the record is necessary to resolve the financial hardship issue. The appellant's FRQ is now over a year old, and under these circumstances it would be appropriate to obtain updated financial information. *See Nixon v. Office of Personnel Management*, 52 M.S.P.R. 672, 678 (1992); *see also* 5 C.F.R. § 831.1404(a)(1) (in determining whether recovery would cause financial hardship, a pertinent consideration is "[t]he individual's financial ability to pay *at the time collection is made*") (emphasis in original).

¶14 In the event the appellant is found to be ineligible for a waiver, OPM regulations provide that she may nevertheless be entitled to adjustment of the repayment schedule if she shows that it would cause financial hardship to make payment at the rate scheduled. 5 C.F.R. § 831.1401; *see also Derrico v. Office of Personnel Management*, 42 M.S.P.R. 491, 499 n.9 (1989) (standard of financial hardship necessary to establish entitlement to an adjustment not as strict as in the waiver context). However, we agree with the AJ that the Board lacks the authority to address the appellant's possible entitlement to an adjustment.

¶15 First, there is no repayment schedule in effect at this time. The appellant no longer receives an annuity from which OPM could deduct installment payments, and while OPM has proposed a Voluntary Repayment Agreement under which she would pay \$250 per month, the appellant has not entered into this agreement. Moreover, the scope of this appeal is limited to determinations of actions or orders by OPM that affect the appellant's "rights or interests" under the CSRS. *See* 5 U.S.C. § 8347(d)(1). OPM's determination that the appellant received an annuity overpayment affects her interests under CSRS, and the appellant has the right under CSRS to waiver of recovery of the overpayment if she is without fault and recovery would be against equity and good conscience. 5 U.S.C. § 8346(b). If the appellant were receiving a CSRS annuity, then a reduction in that annuity to recover an overpayment would also affect her rights and interests under CSRS, and would also fall within our jurisdiction. The appellant is not receiving such an annuity, however, and OPM's attempts to

recover the overpayment by other means, whether by persuading her to enter into a repayment agreement, or by referring the matter to the Department of the Treasury or the Department of Justice, do not affect her rights or interest under CSRS. We therefore lack the authority to adjudicate the appellant's possible entitlement to an adjustment of the recovery schedule.

ORDER

¶16 We REMAND this appeal to the Northeastern Regional Office for further adjudication and development of the record on the issue of whether the appellant is entitled to waiver of recovery of the overpayment on the grounds of financial hardship. On remand, the AJ shall order the appellant to submit an updated statement of her expenses, along with supporting documentation. The AJ shall also afford the appellant the opportunity to explain why each claimed expense is ordinary and necessary within the meaning of OPM's regulations. Prior to issuing an initial decision that reduces or disallows any of the appellant's claimed expenses, the AJ shall identify any matter which he believes requires additional substantiation or explanation, and shall afford the appellant a reasonable opportunity to provide such substantiation and explanation. The AJ shall also afford OPM the opportunity to submit evidence and argument regarding the financial hardship issue. The AJ shall then issue a new initial decision that provides a reasoned explanation as to whether the appellant is entitled to a full or partial waiver of recovery of the overpayment based on financial hardship.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.