

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

2007 MSPB 308

Docket No. PH-831M-07-0316-I-1

**Patricia K. Zelenka,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 3 289 643

December 17, 2007

Joseph D. Gebhardt, Esquire, Washington, D.C., for the appellant.

James Williams, 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, AFFIRM the initial decision with regard to the amount of the overpayment, REVERSE the initial decision with regard to the finding that the appellant was at fault in causing the overpayment because she knew or should have known that the payment was erroneous, VACATE the initial

decision with regard to the determination to adjust the repayment schedule, and REMAND for further adjudication.

BACKGROUND

¶2 On January 26, 1991, the appellant retired on disability from the position of Distribution Clerk, P-05, Step 0, with the U.S. Postal Service. Initial Appeal File (IAF), Tabs 1 and 3, subtab 2a. In 1994, the appellant earned an Associates Degree in nursing. She worked at the Sinai Hospital in Baltimore, Maryland, and became a Trauma Nurse Coordinator. Hearing Tape (HT) 1A. Over the years, her pay increased substantially. *Id.* On April 6, 2006, OPM notified the appellant that her income had exceeded the 80% limitation.¹ IAF, Tab 3, subtab 2d. In a letter dated July 24, 2006, OPM ceased payment of the appellant's disability retirement annuity benefits as of June 30, 2006. *Id.* On October 18, 2006, OPM issued a decision advising the appellant that she had received disability retirement benefits between July 1, 2002, and June 30, 2006, to which she was not entitled because she had been restored to earning capacity in 2001 and each year afterwards, and that she had been overpaid \$45,341.22. IAF, Tab 3, subtab 2c.

¶3 On November 17, 2006, the appellant submitted a Financial Resources Questionnaire (FRQ) and requested to have the debt waived. IAF, Tab 3, subtab

¹ Under 5 C.F.R. § 831.1209(a), OPM is required to terminate the annuity of a Civil Service Retirement System 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, 2001, the base salary for the appellant's position was \$41,686.88, the 80% limit was \$33,348.80, and her income was \$54,104. The appellant's income for the calendar years 2002 through 2005 also exceeded the 80% limit. Accordingly, OPM was required to terminate the appellant's annuity effective June 30, 2002.

2b. In its March 30, 2007 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, that she knew or should have known that she was no longer entitled to disability retirement benefits, and that she should have set aside subsequent payments. IAF, Tab 3, subtab 2a. OPM found further that the collection in reasonable installments would not cause financial hardship. OPM informed the appellant that she could either remit a check or money order for a lump-sum payment of the full amount, or complete the enclosed Voluntary Repayment Agreement and repay that amount, plus interest, in monthly installment payments of \$350. *Id.* OPM advised the appellant that, if she did not elect one of the payment options or exercise her appeal rights, collection would resume under the Debt Collection Act, which includes referral to the Department of Justice for litigation, or to the Department of Treasury for collection action, including offset from payments that the appellant might be entitled to receive from other agencies. *Id.*; 31 U.S.C. §§ 3701-3733. The appellant did not remit a lump sum or sign the repayment agreement, but instead filed this appeal. IAF, Tab 1. While the appellant did not dispute the existence and amount of the overpayment in her petition for appeal, she did challenge OPM's determination that she was not entitled to a waiver. Specifically, the appellant denied that she was at fault in causing the overpayment. *Id.*

¶4 After affording the appellant a hearing, the administrative judge (AJ) issued a decision on August 12, 2007. IAF, Tab 13. The AJ determined that the appellant was not at fault in initially incurring the overpayment, but she should have set aside the annuity payments because she knew or should have known that she should not be receiving the disability retirement benefits. Initial Decision (ID) at 5-10. The AJ found further that the appellant is not eligible for a waiver of the overpayment because recovery of the overpayment would not be against equity and good conscience. Nonetheless, the AJ found that an adjustment in the

repayment schedule is appropriate and reduced the appellant's repayment schedule to \$250 per month. ID at 16-17.

¶5 On petition for review, the appellant maintains that she is entitled to a waiver because she was not at fault in causing the overpayment and because recovery is against equity and good conscience since repaying the debt would cause financial hardship. Petition for Review File (PFRF), Tab 1. In regard to financial hardship, the appellant argues that the AJ discounted the hearing testimony concerning the overwhelming and extraordinary medical expenses for her husband's continuing medical issues. *Id.*

ANALYSIS

¶6 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 overpayment. 5 C.F.R. § 831.1402. OPM policy guidelines provide that individuals who know or suspect that they are receiving overpayments are expected to set aside the amount overpaid pending recoupment, and that in the absence of exceptional circumstances, which do not include financial hardship, recovery in these cases is not against equity and good conscience. IAF, Tab 3, subtab, 2e, Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and Federal Employees' Retirement System (Policy Guidelines), § I.C.4; *Wright v. Office of Personnel Management*, 105 M.S.P.R. 419, ¶ 4 (2007). 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 of 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); *Hudson v. Office of Personnel Management*, 87 M.S.P.R. 385, ¶ 7 (2000). 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).

¶7 The AJ found that OPM's calculation of the overpayment was mathematically correct and that the appellant was overpaid \$45,341.22. ID at 3-4; IAF, Tab 3, subtabs 2a, 2c. The appellant has not challenged this finding on petition for review. PFRF, Tab 1. As the AJ's finding on this issue is uncontested on petition for review, we will not further address this issue in this Opinion and Order. See 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.)

¶8 The AJ found that the appellant was initially without fault in creating the overpayment but that the appellant knew or should have known that the payment was erroneous because she had received annual notice of the 80% income limitation and the Postal Service pay scales are publicly available. ID at 9-10. The fact that the appellant was on notice of the 80% income limitation does not necessarily mean that she knew or should have known that her earnings exceeded this limit. See *Hudson*, 87 M.S.P.R. 385, ¶¶ 10-11. While the appellant could have located the relevant Postal Service salary table on the internet, and made the requisite calculations, it was not her responsibility to do so. 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); *Fearon v. Office of Personnel Management*, 107 M.S.P.R. 122, ¶ 10 (2007). The appellant fulfilled her obligations in this matter by annually submitting her earned income report, along with making five to six telephone calls to OPM seeking information on the 80% limit. The appellant testified that each time she called OPM she was told that OPM would advise her when she exceeded the

limit. HT at 1A. The AJ found this testimony credible. ID at 7. Having taken these steps, she had reason to expect that OPM would notify her promptly if her benefits were terminated. We agree with the appellant that, when the payments continued, she had every right to assume that OPM had examined her income report and concluded that she was still entitled to a disability annuity. Thus, the record does not establish that the appellant knew or should have known that she was receiving benefits to which she was not entitled. *Fearon*, 107 M.S.P.R. 122, ¶ 10. We find that the appellant was not at fault in causing the overpayment. Nor was she required to set aside any payments received, at least until OPM sent her the April 6, 2006 notice.

¶9 Next, we turn to the question of whether recovery of the \$45,341.22 overpayment is against equity and good conscience. The appellant has claimed that recovery is against equity and good conscience on the grounds that it would cause financial hardship. *See e.g., Hudson*, 87 M.S.P.R. 385, ¶ 12. 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. *Id.*; 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. 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).

¶10 In this case, the AJ thoroughly reviewed the information on the appellant's FRQ concerning the appellant's expenses and elicited additional information at the hearing. HT 2. The AJ questioned the reasonableness of the appellant's mileage incurred to drive to a pharmacy approximately 27 miles from her home when there are other cities with pharmacies that are closer to her home and work, but the AJ gave the appellant the benefit of the doubt and did not discount this expense. However, the AJ did discount several of the appellant's listed expenses, i.e., the AJ found the appellant's allotment for routine auto maintenance to be excessive and reduced it to \$30 per month; the AJ reduced the appellant's monthly clothing allotment from \$250 to \$200; the AJ reduced the monthly allotment for the appellant's other necessary expenses from \$275 to \$200; the monthly allotment for household maintenance was reduced from \$250 to \$200; the monthly pet expenses for two cats was reduced from \$100 to \$75; and the appellant's food expense² was reduced from \$700 per month to \$550. ID at 12-14. The AJ also found that the appellant miscalculated her fuel expenses for her automobiles and that the appellant had counted her automobile insurance and AAA insurance twice, under "Transportation" costs and "Insurance" costs. ID at 13.

¶11 After itemizing the appellant's expenses, the AJ found that the appellant's monthly income is \$6,635 with monthly expenses of \$6,187, resulting in a difference of \$448. ID at 14. The AJ found that, even adding \$100 to the food bill and \$50 per month for emergency needs, the difference between the income and her expenses would be \$298. The appellant's petition for review does not challenge the AJ's specific mathematical calculations of her expenses as

² The record established that the appellant's average food bill was actually \$506 and the appellant testified that this was an area where she could probably cut back her expenses. HT 2A. The AJ relied upon the table prepared by the Department of Agriculture for the expected costs of food for a family of two, and allotted the appellant \$550 per month for food for her and her husband. ID at 13.

supported by the record and we have found none. Thus, the AJ found that the appellant did not establish entitlement to a waiver. Accordingly, because the difference with the most generous approach still left the appellant with \$298 each month, the AJ adjusted the appellant's repayment schedule from \$350 per month to \$250 per month.

¶12 Rather, the appellant argues that the AJ erred by finding that repayment of the overpayment would not cause a financial hardship. PFRF, Tab 1 at 14-15. The appellant has provided no documentary evidence, however, to support a different outcome. Specifically, the appellant asserts on petition for review that the AJ ignored or discounted hearing testimony concerning the "overwhelming and extraordinary medical expenses" for her husband's continuing medical issues.³ PFRF, Tab 1 at 14 n.8. However, even though the appellant and her husband both testified that his continuing medical issues, including severe vulnerability to infections and chronic urinary infections, cause "overwhelming and extraordinary" medical expenses due to frequent expensive in-patient operations that he will have to have the rest of his life, she has failed to provide any medical records and/or bills to support this claim. HTs 1A and 2A. Furthermore, even though the AJ may not have specifically identified his medical condition as an additional expense, it is apparent that the AJ considered his condition when she allotted \$250 for medical and dental expenses not reimbursed, and an additional \$100 to the food allotment to provide for his special diet. ID at 14-15. We agree that the evidentiary record supports a finding that the margin available for debt collection is \$298, well under OPM's proposed monthly installments of \$350.

³ The record shows that the appellant's husband was severely beaten as a teenager and as a result he suffers, inter alia, from hydronephrosis with narrowing of the right ureter, his urine is chronically infected, he has frequent otitis and vertigo, and severe hearing loss. HT 2A; IAF, Tab 11 at 3. Due to his medical conditions, he has never held a job long enough to be entitled to Social Security benefits. HTs 1A, 2A.

¶13 However, after the AJ issued this decision, the Board issued its decision in *Fearon*, which finds that the Board lacks the authority to address the appellant's possible entitlement to an adjustment. *Fearon*, 107 M.S.P.R. 122, ¶¶ 14-15. To begin with, 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 \$350 per month, the appellant has not entered into this agreement. Moreover, as found in *Fearon*, 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. 5 U.S.C. § 8347(d)(1). *Id.* OPM's determination that the appellant received an annuity overpayment affects her interests under the CSRS, and the appellant has the right under the CSRS to waiver 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 the 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 the CSRS. We therefore lack the authority to adjudicate the appellant's possible entitlement to an adjustment of the recovery schedule and we VACATE the initial decision in regard to this finding. *Fearon*, 107 M.S.P.R. 122, ¶¶ 14-15.

¶14 In light of the fact that OPM's guidelines allow for the possibility of a partial waiver of the overpayment, IAF, Tab 3, subtab 2e, Policy Guidelines, § I.A.2(b), we find that the circumstances in this case warrant a remand for further development of the record on the issue of financial hardship. First, the AJ was unaware of the impact the Board's holding in *Fearon* would have when she adjusted the appellant's repayment schedule. Second, the appellant's FRQ is now

a year old, and, under these circumstances, it would be appropriate to obtain updated financial information. *Nixon v. Office of Personnel Management*, 52 M.S.P.R. 672, 678 (1992); 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).

¶15 Specifically, while it is proper for the AJ to consider, as part of her calculation of the appellant’s income/expense margin, any changes in expenses and income that are anticipated to occur during the projected period of collection, the appellant still bears the burden in the first instance of establishing those expenses. *Wilcox v. Office of Personnel Management*, 46 M.S.P.R. 377, 381 (1990). Here, it is undisputed that the appellant’s husband suffers from numerous serious medical conditions, and while it appears that the appellant’s out-of-pocket expenses for monthly medical and dental treatments and/or medications were factored into the appellant’s expenses, the appellant has not provided any financial documentation to support her testimony that her husband has “extraordinary” recurring medical expenses that must also be factored into her monthly expenses. IAF, Tab 11; ID at 14. When information submitted by the appellant is incomplete, the AJ should request additional information so that she can make a reasoned determination of the question of financial hardship. *Lopez v. Office of Personnel Management*, 47 M.S.P.R. 186, 191 (1991). Because the AJ did not seek additional information with regard to the appellant’s claims of extraordinary medical expenses, the appellant should be provided the opportunity on remand to submit financial documentation to support her claim that she has anticipated monthly medical expenses related to her husband’s treatment.

ORDER

¶16 We REMAND this appeal to the Northeastern Regional Office for further adjudication and development of the record on 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 she 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:

William D. Spencer
Clerk of the Board
Washington, D.C.