

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

2008 MSPB 228

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

**Patricia K. Zelenka,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. 328 9 643

October 3, 2008

Joseph D. Gebhardt, Esquire, and Myrrel C. Hendricks, Jr., Esquire,
Washington, D.C., for the appellant.

Christopher H. Ziebarth, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed a 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 recovery of the overpayment. For the reasons we set forth below, we GRANT the appellant's petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still finding that the appellant is not entitled to a waiver.

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 associate 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 was overpaid \$45,341.22. IAF, Tab 3, subtab 2c.

¶3 OPM subsequently denied the appellant's request to have the debt waived and found that the collection in reasonable installments would not cause financial hardship. IAF, Tab 3, subtab 2a, 2b. After the appellant appealed OPM's reconsideration decision to the Board, the administrative judge (AJ) determined

¹ Under 5 C.F.R. § 831.1209(a), OPM is required to terminate the annuity of a Civil Service Retirement System (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, 2001, the base salary for the appellant's position was \$41,686.88, the 80% limit was \$33,348.80, and her income was \$54,104.00. 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.

that the appellant was not eligible for waiver of the overpayment because recovery would not be against equity and good conscience, but she did reduce the appellant's repayment schedule to \$250.00 per month. IAF, Tab 13, Initial decision (ID) at 5-10, 16-17. The appellant filed a petition for review (PFR) reasserting her claim that she is entitled to a waiver of the debt. On PFR, there were, among other things, questions concerning the appellant's monthly medical expenses, and it was unclear as to whether the AJ considered whether the appellant was entitled to a partial waiver of the overpayment. *See Zelenka v. Office of Personnel Management*, 107 M.S.P.R. 522, ¶¶ 9-15 (2007). Thus, the appeal was remanded to the AJ for further consideration and review of the appellant's expenses and income. *Id.* ¶ 16.

¶4 On remand, the AJ afforded the appellant the opportunity to submit an updated statement of her expenses, along with supporting documentation. Remand Appeal File (RAF), Tabs 4, 5. Because the appellant waived her right to a hearing, the AJ decided the case based upon the written record. Remand Initial Decision (RID) at 3. The AJ reviewed the appellant's updated income and expense documentation and determined that the appellant is not eligible for a waiver of the overpayment. RID at 5-11. The appellant has filed a PFR of the RID in which she challenges, inter alia, the AJ's mathematical calculations in finding that a waiver is not warranted. Remand Petition for Review File (RPFRF), Tab 1.

ANALYSIS

¶5 We grant the appellant's PFR for the purpose of addressing the accuracy of the AJ's calculations in determining the appellant's income and expenses and to apply those calculations to determine whether the appellant is entitled to a waiver of the overpayment. The remainder of the appellant's allegations in her PFR are without merit because they do not identify any new, material, and previously unavailable evidence, and they do not show any error in law or regulation by the

AJ that affects the outcome of this appeal. *See* 5 C.F.R. § 1201.115(d). Thus, we affirm the AJ's findings with regard to the exclusion and/or reduction of some of the appellant's claimed expenses as not reasonable.

¶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 of the Disposition of Overpayments under the Civil Service Retirement System and Federal Employees Retirement System*, § 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 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).

¶7 In this case, we have already found that the appellant was not at fault in causing the overpayment. *Zelenka*, 107 M.S.P.R. 522, ¶ 8. Nor was she required to set aside any payments received, at least until OPM sent her the April 6, 2006 notice. *Id.*

¶8 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 and that the AJ erred in finding otherwise. RPFRR, Tab 1. Financial hardship is deemed to exist when 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. 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).

¶9 The appellant argues on PFR that, after itemizing all of her expenses and income, the AJ's calculations were incorrect and resulted in an erroneous finding that she has the financial capability of repaying the overpayment. RPFRR, Tab 1 at 3. First, the appellant contends that the AJ double-counted her \$497 tax refund, which overstated her monthly income by \$41. The appellant is correct in this regard.

¶10 The record provides a spreadsheet that identifies the \$497 tax refund in her total income of \$81,601. RAF, Tab 5 at 280. However, the spreadsheet also broke out the tax refund and separately identified \$81,104 as the appellant's "income from work." *Id.* The AJ took the total income of \$81,601 and divided it by 12 months to find that the appellant's regular annual income is \$6800 per

month. RID at 5. The AJ then took the appellant's \$497 tax refund, which was previously included in the total income amount, and divided the amount over a 12-month period and added an additional \$41 per month to the appellant's income due to the tax refund. *Id.* As a result, the \$497 tax refund was added a second time to the appellant's income. The appellant's correct monthly income is \$6800.

¶11 Second, the appellant also asserts that the AJ incorrectly computed the allowed monthly expenses to be \$6,410 instead of \$6460, a difference of \$50 per month. RPFRR, Tab 1 at 7-8. We agree. We have recalculated the total of the expenses as allowed by the AJ in the initial decision and find that the correct total should have been \$6460. RID at 10. However, because the AJ made additional mistakes in the calculation of the appellant's expenses which we must also correct, \$6460 is not the accurate total of the appellant's expenses.

¶12 Finally, the appellant also contends that the AJ miscalculated her monthly taxes and retirement contributions. As to the appellant's monthly taxes, the appellant asserts that the AJ calculated them as if she is paid bi-monthly instead of bi-weekly, which resulted in a miscalculation of her monthly expenses for required taxes. The appellant asserts that this mistake caused her monthly taxes to be understated by \$123. RPFRR, Tab 1 at 10-12.

¶13 The initial decision reflects that the AJ identified the following taxes as indicated on the appellant's payroll stub: \$185.00 for social security taxes; \$43.26 for Medicare taxes; \$308.43 for federal taxes; \$121.64 for Maryland taxes; and \$83.74 for Carroll County taxes for a sum of \$742.07. ID at 8. The AJ then apparently multiplied this sum by 2 to find a "monthly" total of \$1484.14. However, the appellant is correct in asserting that the AJ's formula for calculating the expense is wrong because it does not account for the fact that it is a "bi-weekly" or 26 pay period amount. RAF, Tab 5 at 278, 280. The appellant's correct tax expenditure amount is \$742.07 multiplied by 26 pay periods (\$19,293.82) and divided by 12 months for a monthly tax expense of \$1607.82, which is \$123.68 more than the AJ calculated.

¶14 Similarly, the AJ's calculations with regard to the appellant's retirement contributions are also incorrect. The AJ appears to have multiplied the appellant's bi-weekly pay period contributions in the amount of \$126.66 by 2 to arrive at a monthly expense of \$253.32. RID at 7. However, as the appellant correctly argues, her annual salary is paid in 26 pay periods rather than twice a month, which the AJ's calculations do not account for. The AJ should have multiplied the \$126.66² by 26 pay periods and then divided that sum (\$3293.16) by 12 months to arrive at the correct monthly retirement contribution expense of \$274.43. The following are the accurate allowed expenses, rounded to the nearest dollar:

\$1687.00	mortgage
\$ 539.00	food
\$ 700.00	utilities
\$ 453.00	insurance
\$1608.00	taxes
\$ 274.00	retirement investment accounts
\$ 120.00	installment contracts
\$ 340.00	transportation
\$ 356.00	medical
\$ 148.00	clothing
\$ 50.00	salon and barber expenses
\$ 60.00	work expenses
\$ 20.00	cat medication
\$ 100.00	household maintenance
\$ 100.00	ordinary and necessary expenses
<u>\$ 50.00</u>	<u>emergencies</u>
\$6605.00	Total monthly expenses

Thus, the appellant's monthly income is \$6800 and her total monthly expenses are \$6605 with a difference of \$195. Therefore, the evidentiary record supports a

² Although the AJ incorrectly noted that the appellant's most recent contributions were \$122.16 per pay period instead of \$126.66 per pay period, RAF, Tab 5 at 278, the AJ did use the correct amount of \$126.66 as the appellant's retirement contributions per pay period in her calculations, RID at 7 n.6.

finding that the margin available for debt collection is \$195, well under OPM's proposed monthly installments of \$350. RAF, Tab 5.

¶15 As set forth above, financial hardship warranting a waiver of an overpayment exists when the annuitant needs substantially all of her current income and liquid assets to meet ordinary and necessary living expenses and liabilities. 5 C.F.R. § 831.1404. Here, the appellant does not need substantially all of her income to meet those expenses and liabilities. We find that the appellant appears able to repay her debt to the government, albeit not at the rate of \$350 per month but at a lesser rate comparable with the monthly funds we find that she has available for this purpose. Therefore, we agree with the AJ's ultimate determination that the appellant is able to repay her debt to the government and she has not shown by substantial evidence that a waiver is warranted.³

¶16 Ordinarily, we would now address whether the appellant is entitled to an adjustment of the proposed monthly installments of \$350. *See Knox v. Office of Personnel Management*, 107 M.S.P.R. 353, ¶ 10 (2007); *Gott*, 97 M.S.P.R. 538, ¶ 11. However, and as we stated in our earlier decision remanding this appeal, under the circumstances in this case the Board lacks the authority to address the appellant's possible entitlement to an adjustment. *Zelenka*, 107 M.S.P.R. 522, ¶ 13; *Fearon v. Office of Personnel Management*, 107 M.S.P.R. 122, ¶¶ 14-15 (2007).

¶17 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

³ The appellant asserts that a waiver is warranted because recovery could be unconscionable under the circumstances. RPFRR, Tab 1 at 25-26. We will not address this argument because it goes beyond the scope of the issues to be addressed on remand. *See Zelenka*, 107 M.S.P.R. 522, ¶ 16 (“[w]e REMAND this appeal . . . for further adjudication . . . on whether the appellant is entitled to waiver of the overpayment on the grounds of financial hardship.”).

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 CSRS, and the appellant has the right under 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 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. *Fearon*, 107 M.S.P.R. 122, ¶¶ 14-15.

¶18 Accordingly, we find that the appellant has not shown that she is entitled to a waiver of recovery of the overpayment on the grounds of financial hardship.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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