

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

**2011 MSPB 9**

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Docket No. CH-0845-09-0943-I-1

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**Roberta L. Vojas,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

January 21, 2011

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Richard Cain, Jr., Esquire, Collinsville, Illinois, for the appellant.

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

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The Office of Personnel Management (OPM) filed a petition for review of the initial decision that affirmed in part and modified in part its reconsideration decision. For the reasons set forth below, we GRANT the petition for review and AFFIRM the initial decision insofar as the administrative judge found that OPM proved the existence of an overpayment of disability retirement annuity benefits under the Federal Employees' Retirement System (FERS) and that the appellant is not entitled to an adjustment of the repayment schedule for financial hardship. We VACATE the initial decision insofar as the administrative judge modified the

amount of the overpayment and found that the appellant is not entitled to a waiver of the overpayment, and REMAND the appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order.

### BACKGROUND

¶2 On or about October 31, 2005, the appellant submitted a claim with the Office of Workers' Compensation Programs (OWCP) based upon a recurrence of her work-related injury, and went on leave without pay awaiting OWCP's decision. Initial Appeal File (IAF), Tab 5 at 40. In September 2006, the appellant applied for a FERS disability retirement annuity. *See* IAF, Tab 5 at 12-13. OPM approved the appellant's application in April 2007, and began paying FERS annuity benefits retroactive to October 29, 2005. IAF, Tab 3, subtab 2a at 1, 5, subtab 2d at 1, 20-22, Tab 11 at 3. OWCP accepted the appellant's recurrence claim on November 5, 2007. IAF, Tab 5 at 40. On December 4, 2007, the appellant elected to receive benefits under the Federal Employees' Compensation Act (FECA) retroactively effective October 29, 2005, in lieu of FERS annuity benefits. IAF, Tab 3, subtab 2d at 16, Tab 5 at 42, 48, 67. It is undisputed that the appellant received both FERS annuity benefits and FECA benefits covering the period from October 29, 2005, through March 31, 2008. *See* IAF, Tab 3, subtab 2a at 1, subtab 2d at 4, Tab 5 at 60, Tab 11 at 3.

¶3 In initial and reconsideration decisions, OPM informed the appellant that she was not entitled to receive both FERS annuity benefits and FECA benefits, and that she received an overpayment of \$21,504.61 in FERS annuity benefits,<sup>1</sup> which must be repaid in monthly installments of \$150.00 until the debt is repaid. IAF, Tab 3, subtabs 2a, 2c. It further determined that the appellant was not entitled to a waiver of the overpayment under [5 U.S.C. § 8470](#)(b) because she

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<sup>1</sup> OPM's initial decision explains that the appellant received an overpayment of \$51,358.09, but that OPM recovered \$29,853.48 from OWCP, leaving an unpaid balance of \$21,504.61. IAF, Tab 3, subtab 2c at 1.

knew or should have known that she was not entitled to receive FECA and FERS annuity benefits for the same period of time, and that she was not entitled to an adjustment of the repayment schedule for financial hardship. *Id.*, subtab 2a at 2-3.

¶4 The appellant filed a Board appeal of OPM's reconsideration decision, alleging that the amount of the overpayment should be reduced by \$8,276.00 and \$686.80, the amount of Federal taxes that OPM withheld from her annuity benefits and remitted to the Internal Revenue Service (IRS) on her behalf for tax years 2007 and 2008. *See* IAF, Tab 1 at 11-13, Tab 5 at 49, 79, 81, Tab 11 at 3. She asserted that she applied for a FERS annuity while her OWCP claim was still pending based upon her belief that she would be terminated after a year of being on leave without pay. *See* IAF, Tab 1 at 11, Tab 5 at 5-6, 8. She alleged that soon after OWCP approved her claim in November 2007, she contacted Carol Faag at OPM in order to stop payment of her FERS annuity benefits in light of her election to receive FECA benefits. IAF, Tab 3, subtab 2b at 1, Tab 5 at 3, 5. Despite this, she continued to receive FERS annuity benefits through March 2008. IAF, Tab 3, subtabs 2a at 1, 2d at 4. The appellant further alleged that the IRS determined that she had no tax liability for the annuity benefits she received because she was not entitled to this income, IAF, Tab 5 at 82-85, and allegedly informed her or her tax preparer, Judy Duffy, that the appellant could not recover the remittance because "the employer" must recover it by filing a Form 941, *id.* at 3, 86. The appellant further alleged that "[i]t would be next to impossible to pay OPM anything when I have no income to survive let alone to pay back." IAF, Tab 5 at 7-8.

¶5 OPM responded that an overpayment exists and that the appellant knew she was not entitled to receive benefits from OWCP and OPM for the same period of time. IAF, Tab 3. It further contended that it properly withheld Federal taxes from the appellant's annuity benefits, reported the tax withholdings on a 1099-R Statement of Annuity Paid, and remitted payment to the IRS, and now the

appellant must recover the remittance from the IRS. IAF, Tab 9 at 2; *see* IAF, Tab 10 at 7. As it was undisputed that the appellant received an overpayment of annuity benefits, the administrative judge determined that the sole issues for adjudication were the amount of the overpayment and whether the appellant was entitled to an adjustment of the repayment schedule. IAF, Tabs 6, 12, 15. She further determined that the \$21,504.61 overpayment must be reduced by \$4,756.86, based upon a subsequent payment by OWCP to OPM. IAF, Tab 6 at 1. Thus, OPM conceded that the new amount of the overpayment was \$16,747.75. *Id.*

¶6 After holding a telephonic hearing, Hearing Tape (HT), the administrative judge issued an initial decision that affirmed the reconsideration decision with respect to the existence of the overpayment, the waiver issue, and the repayment schedule, but which modified OPM's reconsideration decision with respect to the amount of the overpayment. Initial Decision (ID) at 1-2, 5. She determined that: (1) The Board has jurisdiction over this appeal, ID at 1; (2) OPM proved that it overpaid the appellant FERS annuity benefits, ID at 4; (3) the overpayment amount of \$16,747.75 should be reduced by \$8,267.00 for tax withholdings in 2007, and \$686.80 for tax withholdings in 2008, as the appellant established that the IRS determined the remittance was improper, and there was no evidence that the IRS used the remittance on the appellant's behalf to satisfy a tax claim; thus, the overpayment remaining was \$7,793.95, *id.*; (4) as the appellant admitted that she knew she had no right to receive both OWCP and FERS benefits, she was not without fault in the matter and, thus, is not entitled to a waiver of the overpayment,<sup>2</sup> ID at 4-5; and (5) the appellant failed to show that she was entitled

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<sup>2</sup> This appeal arises from OPM's overpayment of a FERS disability retirement annuity. In the initial decision, the administrative judge incorrectly cited to the regulations at 5 C.F.R. Part 831, which apply to civil service retirement annuities. *See* ID at 2, 4-5. She should have cited the regulations at 5 C.F.R. Part 841. As the standards are the same under both retirement systems, this error is non-prejudicial.

to an adjustment of the repayment schedule for financial hardship, ID at 5.

¶7 OPM filed a petition for review of this decision, alleging that the administrative judge ignored Board precedent in finding that the amount of the overpayment must be reduced by the amount of Federal taxes withheld and remitted to the IRS on the appellant's behalf, and that the administrative judge accepted the appellant's bare assertions and failed to make specific findings concerning the appellant's alleged inability to recover the remittance from the IRS.<sup>3</sup> Petition for Review (PFR) File, Tab 1. The appellant did not respond.

### ANALYSIS

#### OPM's misinterpretation of overpayment cases involving IRS-related issues

¶8 On review, OPM alleges that the administrative judge "improperly ignored Board precedent" in deciding to reduce the amount of the overpayment by the amount of the remittance. See PFR File, Tab 1. It contends that pursuant to the Board's findings in *Cebzanov v. Office of Personnel Management*, [96 M.S.P.R. 562](#), ¶ 11 (2004), and dicta in *Henderson v. Office of Personnel Management*, [92 M.S.P.R. 383](#), ¶ 7 n.2 (2002), *overruled on other grounds by Simpson v. Office of Personnel Management*, [96 M.S.P.R. 52](#) (2004), the appellant must recover the remittance from the IRS and pay the recovered amount to OPM. See PFR File, Tab 1 at 4-5. However, we find that neither case supports such a conclusion.

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<sup>3</sup> OPM does not challenge any of the other findings in the initial decision and the appellant has not filed a petition for review or cross-petition for review. See PFR File, Tab 1. Based upon our review of the record and the applicable law, we discern no error in the administrative judge's finding that the appellant received an overpayment of FERS disability retirement annuity benefits to which she was not entitled. We therefore affirm this finding. Contrary to the administrative judge's finding, the hearing tape does not reflect that the appellant agreed to the repayment schedule. See ID at 5; HT. Nonetheless, we find that the evidence and argument presented below fail to establish that the repayment schedule should be adjusted for financial hardship. See IAF, Tab 5 at 7-8, 100-109. Thus, the record evidence supports the administrative judge's decision to affirm the repayment schedule. See ID at 5.

¶9 In *Henderson*, the Board merely noted that Henderson could file a claim for a tax refund with the IRS to the extent that she disputed the amount of Federal taxes withheld from her survivor annuity benefits. See *Henderson*, [92 M.S.P.R. 383](#), ¶ 7 n.2. Contrary to OPM’s assertions, the Board in *Cebzanov* did not make findings on whether or not the overpayment should be reduced by the amount of the remittance. Instead, the Board remanded the appeal to determine whether an overpayment existed, and if so, the amount of the overpayment. See *Cebzanov*, [96 M.S.P.R. 562](#), ¶¶ 1, 15. The Board stated that if any adjustments to Cebzanov’s annuity benefits and resulting overpayment change his taxable income and thereby “affect his tax liability for past years,” then he could seek a remedy from the IRS with respect to his tax liability. *Id.*, ¶ 11. Accordingly, we find that neither *Henderson* nor *Cebzanov* dictates the appropriate action in this case. As discussed below, we believe that the most apt precedent is *Snee v. Office of Personnel Management*, [39 M.S.P.R. 227](#) (1988), in which the Board determined that a remand was required.

#### The amount of the overpayment

¶10 OPM bears the burden of proving the existence and amount of an annuity overpayment by preponderant evidence. *Holbrook v. Office of Personnel Management*, [105 M.S.P.R. 520](#), ¶ 6 (2007); see [5 C.F.R. § 845.307\(a\)](#). It is undisputed that OPM overpaid the appellant FERS annuity benefits, withheld Federal taxes from the annuity benefits, filed a 1099-R, and remitted the tax withholdings to the IRS on the appellant’s behalf. See IAF, Tab 9 at 1-2, Tab 10 at 7. Whether the overpayment should be reduced by the amount of Federal taxes that OPM withheld and remitted to the IRS hinges upon whether OPM or the appellant must recover the remittance from the IRS.

¶11 We agree with OPM that the administrative judge did not make explained findings on this threshold issue. See ID at 3-4; PFR File, Tab 1 at 5. In the initial decision, the administrative judge merely summarized the appellant’s bare assertions, statements, and explanations of the IRS’s alleged determinations (i.e.,

that “the IRS became convinced she was not legally entitled to this income,” that the appellant is the improper payee and therefore “she has no right to this money,” and “there is no legal basis and no mechanism for her to claim the money”) and concluded that the overpayment must be reduced by the “now improper tax withholding,” as the appellant established that “the IRS determined this payment improper and there is no evidence the IRS used this money on the appellant’s behalf to satisfy an IRS tax claim.” *See* ID at 3-4. The administrative judge failed to cite any authority or record evidence upon which she relied, and provided no explanation of the legal rationale behind her findings. *See Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980) (an initial decision must identify all material issues of fact, summarize the evidence on each such issue sufficiently to disclose the evidentiary basis for the administrative judge’s findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the presiding official’s conclusions of law, legal reasoning, and the authorities on which that reasoning rests).

¶12 The record before us does not contain reliable evidence of the IRS’s procedures and determinations concerning recovery of the remittance, and consequently does not support the administrative judge’s findings. The written communications between the IRS and the appellant solely address the appellant’s proposed tax liability for the income she received from OPM. *See* IAF, Tab 5 at 76-85. The mere fact that the IRS found the appellant had no tax liability does not establish that the IRS determined the appellant has no right or ability to recover the remittance. *See id.* at 85. Similarly, although the IRS apparently did not credit the remittance to the appellant’s IRS account, this is insufficient on its own to show that the appellant has no legal basis or mechanism for recovering the remittance. *See* HT (testimony of the appellant); IAF, Tab 10 at 8-9.

¶13 Further, the appellant’s unsworn written statement that the IRS allegedly informed her tax preparer, Judy Duffy, that “the employer” must recover the money it remitted to the IRS on the appellant’s behalf is hearsay. IAF, Tab 5 at 86; *see* HT (testimony of the appellant). Although hearsay is admissible in Board proceedings and may be accepted as preponderant evidence even without corroboration, hearsay must be evaluated on a case-by-case basis to determine if it is inherently truthful and more credible than the evidence offered against it. *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶¶ 26-27 (2010). The Board evaluates the probative value of hearsay under factors including the availability of persons with firsthand knowledge to testify at the hearing, whether the out-of-court statements were sworn, whether the declarants were disinterested witnesses to the events and whether their statements were routinely made, the consistency of the out-of-court statements with other statements and evidence, whether there is corroboration or contradiction in the record, and the credibility of the out-of-court declarant. *Id.* (citing *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#), 87 (1981)). The record does not reflect that Ms. Duffy was unavailable to testify at the hearing, or that the appellant attempted, but was unable, to obtain sworn statements or affidavits from Ms. Duffy or the IRS representative with whom Ms. Duffy allegedly spoke. In light of this and the lack of corroborating evidence, we find that the factors weigh against assigning significant probative weight to the statement the appellant attributed to the IRS. *See Ray v. Department of the Army*, [97 M.S.P.R. 101](#), ¶ 43 (2004) (citing *Borninkhof*, 5 M.S.P.R. at 87), *aff’d*, 176 F. App’x 110 (Fed. Cir. 2006).

¶14 Absent reliable record evidence on this issue, we looked to the IRS instructions and forms for guidance. However, the IRS Instructions for the Form 1099-R does not address how one seeks a refund or any other type of recovery of money erroneously remitted to the IRS. *See* 2010 Instructions for Forms 1099-R

and 5498. The instructions merely state that if the filer discovers an error on the Form 1099-R, the filer must file a corrected Form 1099-R.<sup>4</sup> *Id.* at 7.

¶15 Based on the foregoing, we find that we do not have sufficient information in the record before us to determine this issue. In *Snee*, 39 M.S.P.R. at 228-31, the Board found it necessary to supplement the record before deciding the appeal under similar circumstances:

The contentions and arguments of the parties, particularly the agency, are based on certain assumptions concerning the manner in which IRS accounts for money withheld from income and the appropriate methods for recovering the money erroneously remitted to IRS. The assumptions are not supported by evidence.

*Id.* at 230. Consequently, the Board issued an order directing the IRS to provide certain information concerning the manner in which the remittance was accounted for and the appropriate procedures for recovering the remittance. The Board relied heavily upon this additional evidence from the IRS in deciding it was against equity and good conscience to require collection of the remitted funds from the appellant because OPM had a means of collecting the remittance from the IRS, but failed to attempt such recovery or even to make adequate inquiry of the IRS as to the most effective and least burdensome procedure to the appellant.<sup>5</sup>

*Id.* at 230-31.

¶16 For the reasons set forth above, we VACATE the portion of the initial decision that made findings on the amount of the overpayment, and REMAND this appeal to the Central Regional Office to obtain additional evidence. *See Cohron v. Office of Personnel Management*, [96 M.S.P.R. 466](#), ¶¶ 18-23 (2004)

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<sup>4</sup> This differs from a Form 941-X, which provides that an employer must file an amended Form 941-X to correct the overreported amounts and to request a refund of the amount. *See* 2009 Form 941-X; IAF, Tab 5 at 86-99.

<sup>5</sup> We note these findings were based upon OPM's use of a Form 941 to report the tax payment. *Snee*, 39 M.S.P.R. at 230-31.

(remanding the appeal where OPM proved the existence of the overpayment, but not the amount); *Snee*, 39 M.S.P.R. at 230-31.

¶17 On remand, the administrative judge shall obtain additional evidence from the parties and issue a subpoena to the IRS in accordance with [5 U.S.C. § 1204\(b\)\(2\)\(A\)](#) and [5 C.F.R. § 1201.73\(c\)](#) to obtain information concerning: (1) the manner in which the IRS accounts for remittances of tax withholdings paid by OPM; (2) whether the IRS credited the appellant's IRS account for the remitted amounts paid by OPM; (3) whether the appellant received a tax refund or a tax credit based upon the remitted amounts paid by OPM to the IRS on the appellant's behalf; (4) the appropriate IRS procedures for recovering remittances where OPM filed a Form 1099-R and remitted payment to the IRS on the appellant's behalf; (5) whether OPM made any effort to recover the remittance from the IRS; (6) whether the appellant has the ability to recover the remittance from the IRS; and (7) any other information that the administrative judge deems necessary to adjudicate the issue of the amount of the overpayment. Based upon this new evidence and any other reliable evidence contained in the record, the administrative judge shall make explained findings on the issue of whether OPM or the appellant must recover the remittance from the IRS pursuant to the IRS's procedures, and consequently, whether the amount of the overpayment must be reduced by the remittance.

The appellant's entitlement to a waiver of the overpayment

¶18 Recovery of an overpayment may be waived when the annuitant is without fault and recovery would be against equity and good conscience. [5 U.S.C. § 8470\(b\)](#); *Zucker v. Office of Personnel Management*, [114 M.S.P.R. 288](#), ¶ 7 (2010); *Gulan v. Office of Personnel Management*, [86 M.S.P.R. 16](#), ¶ 7 (2000); [5 C.F.R. §§ 845.301](#), 845.302. The appellant has the burden of proving by substantial evidence that she is entitled to a waiver or adjustment of the overpayment. *Stewart v. Office of Personnel Management*, [102 M.S.P.R. 272](#), ¶ 5 (2006); 5 C.F.R. §§ 845.307(b), 1201.56(a)(2).

1. *Whether the appellant was without fault for the overpayment*

¶19 A recipient of an overpayment is without fault if she performed no act of commission or omission that resulted in the overpayment. [5 C.F.R. § 845.302](#). The pertinent considerations in finding fault are as follows: (1) whether payment resulted from the individual's incorrect, but not necessarily fraudulent statement, which she should have known to be incorrect; (2) whether payment resulted from the individual's failure to disclose material facts in her possession which she should have known to be material; or (3) whether she accepted a payment which she knew or should have known to be erroneous. *Maseuli v. Office of Personnel Management*, [111 M.S.P.R. 439](#), ¶ 7 (2009); 5 C.F.R. § 845.302(a).

¶20 According to the May 1995 edition of OPM's "Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and the Federal Employees' Retirement System" (Policy Guidelines), individuals who notify OPM within 60 days of the receipt of an overpayment will automatically be found without fault, regardless of whether they knew or should have known that the payment was erroneous. *Gulan*, [86 M.S.P.R. 16](#), ¶ 8. Consequently, the mere fact that the appellant knew she received dual benefits, which she was not entitled to receive, is insufficient to establish that she was not without fault.

¶21 On November 5, 2007, OWCP notified the appellant that it was granting her benefits retroactive to October 2005. IAF, Tab 5 at 40. During OPM's proceedings and below, the appellant asserted that in November or December 2007 she contacted OPM "asking to stop being paid." *See* IAF, Tab 3, subtab 2b at 1, Tab 5 at 3, 5. Based on this, the administrative judge should have analyzed whether the appellant was without fault for the overpayment on the basis of her allegedly prompt notification to OPM. However, she failed to do so. Instead, the administrative judge concluded that the appellant was not without fault based solely on the fact that the appellant knew she had no right to receive FECA and FERS benefits for the same period of time. *See* ID at 4. This was improper.

2. *Whether recovery of the overpayment is against equity and good conscience*

¶22 Because the administrative judge found that the appellant was not without fault, she never reached the issue of whether recovery of the overpayment is against equity and good conscience. See [5 U.S.C. § 8470\(b\)](#); [5 C.F.R. § 845.301](#). Generally, recovery is against equity and good conscience when it would cause financial hardship, the appellant 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. *Zucker*, [114 M.S.P.R. 288](#), ¶ 7. The Board will waive recovery of an annuity overpayment based on unconscionability under only exceptional circumstances. *King v. Office of Personnel Management*, [114 M.S.P.R. 181](#), ¶ 20 (2010). In doing so, the Board will consider all relevant factors under a “totality-of-the-circumstances” approach to determine whether recovery is unconscionable. *Id.* Those circumstances may include, but are not limited to, cases in which: (1) there has been an exceptionally lengthy delay by OPM in adjusting an annuity; (2) OPM failed to respond within a reasonable length of time to an annuitant's inquiries regarding an overpayment; (3) OPM failed to act expeditiously to adjust an annuity in the face of specific notice; or (4) OPM was otherwise grossly negligent in handling the case. *Id.*

¶23 Here, there is a question concerning whether recovery by OPM would be against equity and good conscience. For example, the appellant alleged below that she made numerous inquiries to OPM concerning the overpayment, but that OPM did not timely respond, if it responded at all. IAF, Tab 3, subtab 2b, Tab 5 at 3, 6-7, 60-63, 70-71. The timing of the alleged inquiries and any subsequent responses is unclear from the current record, however. Based on the foregoing, the administrative judge should have analyzed whether recovery would be against equity and good conscience, including whether OPM failed to respond within a reasonable time to the appellant's inquiries concerning the overpayment and,

thus, whether recovery of the overpayment is unconscionable. However, she failed to do so.

¶24 Because the record does not reflect that the appellant withdrew the waiver issue, the administrative judge failed to properly analyze it, and the record requires clarification, we VACATE the initial decision concerning the waiver issue, and REMAND it for further adjudication. On remand, the administrative judge shall afford the parties the opportunity to present additional evidence and argument on the waiver issue. She shall then determine whether the appellant was without fault for the overpayment and whether recovery would be against equity and good conscience under the circumstances presented.

#### ORDER

¶25 For the foregoing reasons, we VACATE the initial decision insofar as the administrative judge made findings on the amount of the overpayment and the appellant's entitlement to a waiver of the overpayment, and REMAND the appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order and for issuance of a new initial decision that comports with the requirements of *Spithaler*.

FOR THE BOARD:

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