

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 07 May 2009

OALJ CASE NO.: 2008-DCA-00002

In the Matter of:

GREGORY ROCHA,
Debtor/Petitioner,

v.

U.S. DEPARTMENT OF LABOR,
Respondent.

DECISION AND ORDER

This matter arises under the provisions of the Debt Collection Act of 1982 (“DCA”), 5 U.S.C. § 5514, and the regulations issued thereunder at 29 C.F.R. § 20.74, *et seq.* The DCA authorizes agency heads to deduct amounts from an employee’s pay to satisfy a debt owed to the United States. Respondent, the U.S. Department of Labor (“DOL” or “Respondent”), Office of Workers’ Compensation Programs (“OWCP”), determined that Debtor Gregory Rocha’s (“Debtor’s” or “Petitioner’s”) pay should be offset to satisfy a debt resulting from payments which were made to Petitioner and forfeited pursuant to the Federal Employee’s Compensation Act (“FECA”). Petitioner disputed OWCP’s offset determination and appealed to the Office of Administrative Law Judges (“OALJ”).

Respondent has moved for summary decision with its 5/19/08 memorandum of law and supporting evidence (the “5/19/08 MOL”), arguing that Petitioner cannot challenge the validity of the underlying debt he owes OWCP or the issue of forfeiture as determined under the FECA appeal process with the Employee’ Compensation Appeals Board (“ECAB”) and can only challenge collection of the debt based on an allegation that the amount of the established debt differs from the amount sought by the agency through salary offset procedures.

Petitioner is proceeding *pro se*, and after several missed filing deadlines and promptings, he submitted his 4/13/09 Response to the 5/19/08 MOL (the “4/13/09 Response”). On April 29, 2009, Respondent submitted its reply to the 4/13/09 Response (the “4/29/09 Reply”) thereby closing the record.

I admit Respondent’s Exhibits (“RX’s”) 1–22 attached to the 5/19/08 Declaration of Edward Duncan (“Duncan Decl.”) in support of the 5/19/08 MOL and the 4/29/09 Reply into evidence without objection. In addition, I also admit Petitioner’s Exhibits (“PX’s”) “A”–“H” into evidence with no objection. Also, I mark as administrative law judge exhibits (“ALJX’s”) 1–3 the 5/19/08 MOL, the 4/13/09 Response, and the 4/29/09 Reply, respectively, and admit them into evidence with no objection.

I decide this matter based solely on the written submissions and documentation by the Petitioner and Respondent comprised of the 5/19/08 MOL, the 4/13/09 Response, and the 4/29/09 Reply as this matter can be resolved by review of the documentary evidence with no issues of credibility or veracity present. *See* 29 C.F.R. 20.81(c). As no genuine issues of fact remain to be decided, I grant Respondent's for the reasons stated below.

Findings of Fact

Petitioner was employed by the U.S. Department of the Army at Fort Carson, Colorado, as a Program Analyst. On April 19, 1993, he filed a CA-2, "Notice of Occupational Disease," claim for an emotional condition that he attributed to occupational actors. His claim was initially denied, but on appeal, was remanded by the ECAB for further development. By decision dated March 18, 1997, OWCP accepted Petitioner's claim for major depression and he received retroactive FECA compensation benefits. Petitioner was placed on the periodic roll and began receiving FECA wage loss compensation payments every 28 days. Duncan Decl. para. 2.

In 2001, an investigation was conducted by DOL's Office of Inspector General that revealed Petitioner had been self-employed in a DJ business since 1996 and was also operating a business, "FerruleTipCue", repairing pool cues. From 1996 to 2004, Petitioner submitted five CA-1032's, "Request for Information on Earnings, Dual Benefits, Dependents and Third Party Settlements", to the Colorado OWCP District Office falsely reporting that he was not employed or earning wages. However, Petitioner had been self-employed as a Disc Jockey since 1996 and had performed at events such as private parties and weddings while purportedly disabled with major depression. During this period of time, OWCP paid Petitioner over \$300,000 in FECA wage loss compensation benefits. Duncan Decl. para. 3.

On March 30, 2004, the Colorado Attorney General in El Paso County, Colorado, filed a criminal information that charged Petitioner, in relation to his receipt of FECA benefits, with violating: 1) one count of Colorado Revised Statutes § 18-4-40, theft of property; and 2) one count of Colorado Revised Statutes § 18-5-102, forgery. RX 1. On October 7, 2004, Petitioner pled guilty in the Colorado District Court of El Paso County in Colorado Springs, Colorado, to count one, theft, and count two, forgery. *Id.* Petitioner's guilty pleas were entered pursuant to a plea agreement dated July 7, 2004. *Id.* The District Court Judge accepted Petitioner's guilty plea to count one theft (misdemeanor), convicted him, and sentenced him to one year probation. *Id.* The District Court Judge also accepted Petitioner's guilty plea to count two, forgery (felony); however, on a two year deferred judgment and sentence. *Id.* Petitioner was also ordered to pay \$3,600 in restitution to OWCP (not a global settlement). *Id.* On October 15, 2006, the District Court Judge dismissed count two, forgery, as Petitioner properly fulfilled the terms of his probation. *Id.*; Duncan Decl. para. 4.

On December 20, 2004, OWCP terminated Petitioner's FECA benefits as a result of his guilty pleas and conviction relating to his receipt of FECA benefits, pursuant to 5 U.S.C. § 8148. RX 2. This decision was based on evidence of intentional fraud and Petitioner's guilty pleas and conviction relating to his receipt of FECA benefits. At the time, Petitioner was receiving \$2,723.22 every 28 days. Duncan Decl. para. 5.

By a separate decision dated December 20, 2004, OWCP declared compensation from January 24, 1996, through November 27, 2004, forfeited, pursuant to 20 C.F.R. § 10.525. RX 3. By letter dated January 18, 2005, Petitioner requested the OWCP Branch of Hearings and Review perform a review of the written record. RX 4.

By preliminary decision dated January 21, 2005, OWCP declared an overpayment in the amount of \$309,368.01, as result of the forfeiture of compensation paid to Petitioner from January 24, 1996, through November 27, 2004, and found Petitioner at fault for the overpayment. RX 5.

On August 3, 2005, the OWCP Branch of Hearings and Review affirmed the December 20, 2004, decision terminating Petitioner's FECA benefits and the December 20, 2004, forfeiture decision. Duncan Decl. para. 5; RX 6.

On August 20, 2005, Petitioner submitted to OWCP his first request for reconsideration of its August 3, 2005, decision. RX 7. By letter dated November 15, 2005, OWCP denied Petitioner's request. Duncan Decl. para. 6; RX 8.

On January 3, 2006, Petitioner submitted to OWCP a second request for reconsideration. RX 9. By letter dated February 17, 2006, OWCP informed Petitioner that his request was insufficient to warrant review. Duncan Decl. para. 7; RX 10.

On April 3, 2006, Petitioner submitted to OWCP a third request for reconsideration. RX 11.

By decision dated January 26, 2007, OWCP finalized its preliminary decision regarding the overpayment (the "1/26/07 OWCP Final Decision"). RX 13. The decision found Petitioner at fault and the matter of the overpayment was correct because Petitioner had been receiving periodic compensation for disability resulting from his accepted work injury yet on 10/7/04, Petitioner signed an agreement with the District Court, El Paso County, Colorado, pleading guilty to providing incorrect information regarding work activities and earnings from self employment; "thereby defrauding the Federal government." *Id.* In that letter, OWCP informed Petitioner that to date he had paid a total of \$612.50 in court-ordered restitution payments and had a remaining balance of \$308,755.01. *Id.* The 1/26/07 OWCP Final Decision was issued with appeal rights informing Petitioner of his right to request review of the overpayment decision with the ECAB within 90 days, or, for good cause shown, that ECAB may waive a failure to file within 90 days if application is made within one year from the date of the decision being appealed. *Id.*; Duncan Decl. para. 9; RX 13 at 1-2.

On March 16, 2007, OWCP denied Petitioner's request for modification of its 1/26/07 OWCP Final Decision. Duncan Decl. para. 8. There is no evidence that Petitioner ever appealed the 1/26/07 OWCP Final Decision to the ECAB within one year.

On December 5, 2007, OWCP informed Petitioner that his last payment was received on 8/16/07, he had a balance of \$305,768.01 and demanded payment. RX 14. Also on December 5,

2007, OWCP attempted to contact Petitioner's current employer to verify his employment and earnings. Duncan Decl. para. 9; RX 15.

On February 4, 2008, Petitioner submitted an untimely fourth request for reconsideration to OWCP and also requested a review by the ECAB of his case no. 120138004. Duncan Decl. para. 9; RX 16.

On February 22, 2008, OWCP called Leroy Kelly, Human Resources Specialist, 21st Mission Support Squadron, Peterson Air Force Base, Colorado, regarding salary offset for Petitioner and was informed that Petitioner was employed at the base and had a current annual salary of \$65,753. RX 17.

Also on February 22, 2008, OWCP informed Petitioner of its intention to recover the debt through salary offset with the U.S. Department of the Air Force and of his right to request a hearing before an Administrative Law Judge. Duncan Decl. para. 10; RX 18. In that letter, OWCP informed Petitioner that it considered \$250.00 to be a fair and reasonable amount to be deducted from his pay every two weeks to satisfy his indebtedness. *Id.* Petitioner was further informed he had 30 days to respond to OWCP's letter. *Id.*

On February 27, 2008, Petitioner requested his federal salary only be offset by \$200.00 per pay period to cover his debt. Duncan Decl. para. 11; RX 19.

On March 8, 2008, Petitioner requested a hearing with this Office.

On March 27, 2008, this Office issued a Notice of Docketing which required the parties to exchange and submit evidence in support of their positions. On May 8, 2008, this Office issued an Order Granting Request for Time Extension allowing Respondent's response to be due no later than May 19, 2008.

On May 19, 2008, Respondent filed the 5/19/08 MOL with supporting evidence in support of its position that the 1/26/07 OWCP Final Decision to offset Petitioner's salary to recover the overpayment was feasible, allowable, and appropriate under the DCA.

On January 29, 2009, I was assigned to this case and on February 2, 2009, I issued a notice of status conference and scheduling order that:

Petitioner shall serve on Respondent and file with this Office his legal brief and supporting evidence consisting of admissible affidavits and documentary evidence within 21 days from the date of this order in response to Respondent's Memorandum of Law dated and served on May 19, 2008, in this case.

On February 13, 2009, Petitioner mailed a request to the ECAB to once again attempt to appeal the 1/26/07 OWCP Final Decision. His filing referenced the same OWCP Claim no. 120138004 as in earlier denials of requests for reconsideration or modification. PX "A."; *see also* RX 16.

On February 18, 2009, I issued an amended scheduling order which extended the deadline for Petitioner to file his response to Respondent's 5/19/08 MOL to "no later than Wednesday, March 4, 2009."

On March 6, 2009, Petitioner filed a late request for more time to respond to the 5/19/08 memorandum of law because he admittedly received the re-served copy of Respondent's 5/19/08 MOL again on February 27, 2009. Petitioner also asks that I defer ruling in this case so he can renew his appeal with the ECAB.

On March 26, 2009, I issued an order to show cause why default should not be issued for Petitioner's failure to prosecute this case as he still had not filed a response to the 5/19/08 MOL. Petitioner's request for more time to file his response was granted and he was given until April 16, 2009 to serve his response to the 5/19/08 MOL.

On April 13, 2009, Petitioner submitted his response (the "4/13/09 Response") to the 5/19/08 MOL. Amongst other assertions made, Petitioner states that his most recent appeal to ECAB has been assigned docket number 2009-0948, dated 3/9/09. ALJX 2 at 1.

On April 29, 2009, Respondent submitted its reply (the "4/29/09 Reply") to the 4/13/09 Response.

Petitioner's debt to OWCP was \$305,768.01 as of 5/19/08 and is \$306,022.82 as of 4/29/09. RX 22.

Conclusions of Law

The DCA provides debtors with a right to a hearing prior to execution of salary offset concerning the existence or amount of the debt or the repayment schedule proposed by the agency. However, neither the DCA nor its implementing regulations vest an administrative law judge with the jurisdiction to substantively review the underlying debt where, as here, the debt is the result of overpayments made pursuant to FECA. Instead, review is governed solely by the provisions of FECA which state, in relevant part, that "[t]he action of the Secretary or his [or her] designee in allowing or denying a payment under this subchapter is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by mandamus or otherwise. 5 U.S.C. § 8128(b).

This Office interprets the statutory and regulatory provisions of FECA to mean that a final Secretary decision cannot be said to have been reached on a FECA issue unless the due process requirements of these FECA provisions have been met.

Therefore, the issues properly before me are: (1) whether Debtor's 2/08 or 2/09 requests the ECAB to appeal the 1/26/07 OWCP Final Decision act to "stay" this proceeding; (2) whether the debtor's agency has actually established both a debt and calculated its correct amount upon which an offset is based; and (3) whether the terms of the proposed repayment schedule are feasible, allowable and appropriate. *See, e.g., Milligan v. Dir., OWCP*, 1999-DCA-3, slip op. at

4-5 (ALJ March 30, 2000).

1. Debtor's Request for a Stay

As stated above, the statutory and regulatory provisions in place for the adjudication of FECA disputes must be considered. The FECA requires the Secretary of Labor ("Secretary") to make findings of fact regarding, and awards for or against, FECA compensation. 5 U.S.C.A. 8124(a). The Secretary has delegated the responsibility for the processing of FECA claims to OWCP claims representative designated by the Director. 5 U.S.C.A. 8124(b); 20 C.F.R. 10.131. The Secretary's rules provide that final OWCP decisions are subject to the review of the ECAB, 20 C.F.R. 10.139, and that the ECAB decision is "final as to the subject matter appealed and such decision shall not be subject to review, except by the Board." 20 C.F.R. 501.6(c). Further, the statute provides: The action of the Secretary or his [or her] designee in allowing or denying payment under this subchapter is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise. 5 U.S.C.A. 8128(b). These statutory and regulatory provisions of the FECA make it clear to me here that I lack the authority to conduct a substantive review of a final FECA decision of the Secretary.

Petitioner also asks that I defer ruling in this case so he can renew his appeal with the ECAB, which was docketed in March 2009. Is the 1/26/07 OWCP Final Decision¹ a *final* FECA decision of the Secretary? The ECAB never reviewed the 1/26/07 OWCP Final Decision. Nonetheless, I find that Petitioner's four or more filings of motions for reconsideration showed that he was aware of timing deadlines to timely appeal the 1/26/07 OWCP Final Decision.

I further find that Petitioner could have either requested review by the ECAB within 90 days of the 1/26/07 OWCP Final Decision, or, for good cause shown, the ECAB may have waived a failure to file within 90 days if Petitioner's application was made within one year from the 1/26/07 OWCP Final Decision. Petitioner did not, however, request review of the 1/26/07 OWCP Final Decision until February 4, 2008, more than one year after the 1/26/07 OWCP Final Decision. *See* Duncan Decl. para. 9; RX 13 at 1-2; RX 16. Thus, the 1/26/07 OWCP Final Decision became final through Petitioner's inaction and the passage of more than one year without an appeal to the ECAB. *Id.* Moreover, I further find that the due process requirements of the FECA provisions have been met in this case² and that Petitioner has chosen to allow his ECAB appeal rights to lapse.

¹ It is unnecessary to decide whether the 3/17/07 Denial is a final ruling as Petitioner did not have the right to have the 1/26/07 OWCP Final Decision reconsidered by virtue of 20 C.F.R. § 10.440(b).

² To ensure that FECA claimants are afforded their full due process rights, a multi-level review process is provided within the FECA statutory scheme. Before seeking repayment of an overpayment, OWCP provides a claimant with written notice of the fact and amount of the overpayment and its preliminary determination of whether the claimant is at fault in the creation of the overpayment. 20 C.F.R. § 10.431. *See* RX 13. The claimant is allowed 30 days of the notice, to submit additional evidence or to request a pre-recoupment hearing to challenge the preliminary finding of overpayment or fault, or for the purpose of requesting waiver. 20 C.F.R. § 10.432. If OWCP issues a final determination of overpayment, a claimant may appeal the decision to ECAB within a year of the OWCP final decision. 20 C.F.R. §10.440(b); ALJX 1 at 11.

Petitioner's request for a stay of this proceeding while his latest motion for reconsideration is pending with the ECAB is denied. The 1/26/07 OWCP Final Decision is final and conclusive for all purposes and with respect to all questions of law and fact and not subject to review by me. *See* 5 U.S.C.A. 8128(b) (1980). As a result, I lack the authority to conduct a substantive review of the 1/26/07 OWCP Final Decision. Moreover, Petitioner has not proven that he is likely to win on the merits of his latest motion for reconsideration, since his nearly-identical arguments have been rejected at least three times before. *See* RX 6; RX 8, and RX 12.

Additionally, it makes no difference that Petitioner's latest attempt to re-visit the 1/26/07 OWCP Final Decision is pending at the ECAB as the law is well-settled that the pendency of an appeal has no effect on the finality or binding effect of an earlier adjudicated determination, particularly when a case has been fully litigated on its merits. *Rice v. Dep't of Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993) *citing* *SSIH Equip. S.A. v. U.S. Int'l. Trade Comm'n.*, 718 F.2d 365, 370 (Fed. Cir. 1983); *see also* *Park Lake Resources LLC. v. U.S.D.A.*, 378 F.3d 1132, 1136 (10th Cir. 2004) (Issue preclusive effect for matters finally adjudicated on the merits). The same rule is applicable to the 1/26/07 OWCP Final Decision because on 8/3/05, the OWCP Branch of Hearing and Review affirmed the 12/20/04 forfeiture decision and Petitioner failed to appeal the 1/26/07 OWCP Final Decision in a timely manner. *See* RX 6. Thus the determination of the underlying amount owed by Petitioner to OWCP is \$306,022.82 as of 4/29/09, plus accruing interest. *See* RX 5; RX 13; RX 14; RX 18; and RX 20; RX 21; and RX 22. As a result, Petitioner has not shown good cause to further delay or "stay" this proceeding.

2. Establishment of Debt and Correct Amount.

The evidence shows that Petitioner, while employed by the U.S. Department of the Army, sought benefits pursuant to FECA for major depression and that OWCP accepted the claim and paid Petitioner FECA compensation benefits in excess of \$300,000.00. Duncan Decl. para. 2; RX 20-22. The basis of Petitioner's debt to OWCP is that his 2004 guilty plea and conviction for theft in relation to receipt of FECA compensation benefits resulted in a statutorily-required forfeiture of his FECA benefits in the original overpayment amount of \$309,368.01 under 5 U.S.C. § 8148(a)³—a decision which, as discussed above, is unreviewable pursuant to 5 U.S.C. § 8128(b). As of 4/29/09, the amount of the debt, including interest, was \$306,022.82. RX 22. Petitioner has not timely contested the existence or amount of the debt. *See* RX 5; RX 13; RX 14; RX 18; and RX 19. Based on the record before me, I find Respondent has established that Petitioner is indebted to OWCP in the amount of \$306,022.82, as of 4/29/09, plus interest. RX 22.

³ While styled "Forfeiture of benefits by convicted felons", 5 U.S.C. § 8148(a) is not limited to felony convictions but also includes violations of any other Federal or State criminal statute relating to fraud in the application or receipt of any benefit or work injury compensation. As stated above, from 1996 to 2004, Petitioner submitted five CA-1032's, "Request for Information on Earnings, Dual Benefits, Dependents and Third Party Settlements", to the Colorado OWCP District Office falsely reporting that he was not employed or earning wages. Instead, Petitioner had been self-employed as a Disc Jockey since 1996 and had performed at events such as private parties and weddings. During this period of time, OWCP paid Petitioner over \$300,000 in FECA wage loss compensation benefits. Duncan Decl. para. 3.

3. Terms of Proposed Repayment are Feasible, Allowable, and Appropriate.

Pursuant to applicable regulations, up to fifteen percent (15%) of an employee's "disposable pay" may be deducted from his or her pay for repayment of a delinquent debt. 29 C.F.R. § 20.84(a). Disposable pay is defined as an employee's basic and special pay, less the exclusions set forth in 5 C.F.R. § 581.105 for social security withholdings, health and basic life insurance payments, federal, state, and local taxes, and mandatory retirement deductions. 29 C.F.R. § 20.76(a).

Consistent with the substantive notice requirements of 29 C.F.R. § 20.78, OWCP's decision to seek salary offset was preceded by at least three progressively stronger written demands for payment. The 1/21/05 OWCP preliminary letter informed Petitioner of the \$309,368.01 overpayment created as a result of his forfeiture of FECA compensation benefits due to his criminal statute conviction relating to his receipt of FECA benefits. The 1/26/07 OWCP Final Decision confirmed the overpayment amount and gave notice to Petitioner that continued nonpayment of the forfeiture amount could result in salary deductions. Finally, the 12/5/07 OWCP letter to Petitioner informed him that he had a balance owed of \$305,768.01 and demanded payment.

In response to a 12/5/07 letter from Ms. Canner at OWCP, Peterson Air Force Base verified that Petitioner's annual pay was \$65,753.00 as of 2/22/08. RX 15 and RX 17. The information provided by the Air Force did not show deductions from Petitioner's annual pay. Petitioner's total gross pay period income is thus approximately \$2,528.96.

Also on 2/22/08, OWCP issued a letter to Petitioner informing him of its determination to use salary offset and confirmed with him his employment at Peterson Air Force Base and that the DCA and DOL regulations authorized it to recover the overpayments by salary offset in the amount not to exceed 15 percent of his disposable pay for any time period. Also in the letter, OWCP further informed Petitioner that \$250 per pay period was a "fair and reasonable amount" to be deducted from his salary pursuant to the annual salary information received from the Air Force that Petitioner's gross take home pay was \$2,529 per pay period.

In response, Petitioner acknowledged receipt of the 2/22/08 letter as of 2/27/08 and requested the reduced amount of \$200.00 per pay period as better being able to meet the salary offset requirement and also meet his many other financial obligations without further explanation as to specific "other financial obligations" or salary deductions. RX 18; RX 19.

Petitioner argues that he "will be forced into bankruptcy with this collection action" and proffers that he has no retirement benefits. ALJX 2 at 4. However, I have not received any documentary evidence to support an allegation that the proposed \$250 per pay period amount would cause a significant financial hardship to Petitioner. In addition, Petitioner has not argued that his disposable pay was calculated incorrectly. Thus, Petitioner has failed to establish that the proposed debt collection schedule proposed by Respondent is not feasible, allowable, and appropriate or that the salary offset would be against good conscience or contrary to sound

judgment. I further find that Respondent complied with the salary offset procedures as prescribed by the regulations.

As stated above, applicable regulations allow recovery of a debt by salary offset of up to 15% of disposable pay which, in this case, amounts to \$379.34 per pay period. Repayment of Petitioner's debt through salary offset in an amount of \$250.00 every two weeks is therefore found to be feasible, allowable, and appropriate under the circumstances of this case. As of 4/29/09, the amount of Petitioner's debt, including interest, was \$306,022.82. RX 18; RX 20-22.

ORDER

The Petitioner has been afforded all the due process required by the statutory and regulatory provisions of FECA with respect to his forfeiture of benefits in the amount of \$306,022.82. Furthermore, it is determined that Respondent complied with the salary offset procedures as prescribed by the regulations.

For the reasons stated above:

IT IS ORDERED that Petitioner, Gregory Rocha, shall pay to the United States Department of Labor the amount of \$306,022.82, payable as a deduction from Petitioner's pay in the amount of \$250.00 every two weeks until the debt is satisfied. This amount is found to be allowable, appropriate, and feasible. Salary offset deductions may commence as of the first full pay period following the date of this decision. 29 C.F.R. § 20.84(a).

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California