

**United States Department of Labor
Employees' Compensation Appeals Board**

P.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dayton, OH, Employer**

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**Docket No. 07-1439
Issued: May 12, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' overpayment decision dated March 29, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$65.34 from October 30 to November 7, 2005 and an overpayment in the amount of \$2,206.30 from November 8 to December 24, 2005; (2) whether the Office properly found that appellant was at fault in creating the overpayment in the amount of \$2,206.30 for the period November 8 to December 24, 2005; and (3) whether the Office abused its discretion in denying waiver of the overpayment which occurred between October 30 to November 7, 2005 in the amount of \$65.34.

FACTUAL HISTORY

Appellant, a 41-year-old flat sorter, filed a Form CA-2 claim for benefits on July 22, 1996. The Office accepted the claim for bilateral carpal tunnel syndrome and placed her on the periodic rolls. The Office paid appellant appropriate compensation for temporary total disability compensation.

By telephone call dated May 12, 2005, appellant informed the Office that she had applied for disability retirement with the Office of Personnel Management (OPM).

In a telephone call dated December 21, 2005, appellant informed the Office that she had received approval from OPM for disability retirement, effective November 8, 2005 and that it was her intention to elect to receive those benefits. She stated that she had not yet received those benefits. The Office advised appellant that if she selected a date from the past as her effective date of her election an overpayment would be created; the Office would then have to collect this overpayment.

By letter to appellant dated December 21, 2005, the Office noted that she had informed them by telephone call that she had received approval from OPM for disability retirement, effective November 8, 2005 and wanted to elect to receive those benefits. The Office advised appellant that it was enclosing an election form so that she could choose between receiving benefits from either OPM or the Office. The Office further noted that appellant had only received the notice of entitlement but had not yet received such benefits from OPM. The letter further stated:

“Annuity benefits paid by OPM ... and benefits for wage loss paid by [the Office] are not payable for the same period of time. Employees entitled to both [the Office] [and] and OPM benefits must elect which benefit to receive.”

On January 6, 2006 appellant signed an election of benefits form, electing to receive OPM benefits effective November 8, 2005. In a letter received by the Office on January 9, 2006, she informed the Office that she elected to receive compensation benefits from OPM, retroactive to November 8, 2005. Appellant further advised that she had not yet received such compensation from OPM.

By letter dated January 11, 2006, the Office asked OPM to inform the Office as to whether it had made any payments to appellant since November 8, 2005 so that it could compute the amount of overpayment appellant owed the Office, if any or request an OPM refund. OPM did not respond to the Office's January 11, 2006 request and the record does not indicate that the Office received a refund from OPM for benefits paid during the period in question.

On May 19, 2006 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$2,261.74 for the period October 30 through December 24, 2005. The Office noted that the overpayment from October 30 through November 7, 2005, in the amount of \$65.34, had occurred because applicable health benefit and life insurance premiums were not deducted from appellant's continuing compensation payments of the period; the overpayment from November 8 through December 24, 2005, in the amount of \$2,206.30, came about because

she received dual benefits from both the Office and the OPM for that period.¹ The Office further advised that she had been found without fault with regard to the period October 30 through November 7, 2005 and with fault regarding the period November 8 through December 24, 2005. With regard to the latter period, the Office found that appellant should have reasonably been aware that she was not entitled to compensation benefits from the Office while concurrently receiving retirement benefits from OPM. The Office found that she was at fault in the matter because she should have been aware that the payments she had been receiving were incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention or request a prerecoupment hearing. The Office further advised her that, when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience.

On June 2, 2006 appellant requested a prerecoupment hearing for the overpayments, which was held on January 9, 2007. At the hearing her attorney argued that appellant should not be found to be at fault in creating the overpayment which occurred between November 8 and December 24, 2005. Counsel asserted that, when OPM notified appellant of its approval of her entitlement to benefits, effective November 8, 2005, she had already received her monthly compensation check from the Office. He argued that, based on the Office's letter of December 21, 2005, which advised her to elect whether to receive benefits from either the Office or OPM, appellant assumed that any money she owed the Office would be collected from the initial payment from OPM. Appellant's attorney stated that this was a reasonable interpretation of the Office's December 21, 2005 letter given the content of the Office's letter to OPM dated January 11, 2006.

On February 7, 2007 appellant completed the Form OWCP-20 and submitted documentation in support of the financial information provided. In her financial statement, she stated a total monthly household income of \$4,023.71. Appellant listed monthly expenses totaling \$3,751.47 with assets of \$49,831.85, including checking and savings accounts, cash on hand and the value of an IRA fund. She stated that her mortgage is \$1,144.52 per month and that she had a second equity loan with payments of \$195.00 per month. Appellant listed \$480.00 in expenses for food, \$100.00 for clothing and automobile and life insurance payments totaling \$377.70. She indicated that she makes credit card payments to Triangle Credit Union and National City Equity in the amounts of \$4,226.62 and \$251.27 per month, respectively. Appellant indicated that her total utilities, consisting of electricity, gas, fuel, water and telephone, average \$576.36 per month. She stated that her miscellaneous household expenses are approximately \$400.00 per month, including gasoline expenses for her car.

In a decision dated March 29, 2007, an Office hearing representative finalized the preliminary determination regarding the overpayment of \$2,261.74. The hearing representative found that appellant was without fault for the \$65.34 overpayment created due to the Office's failure to make health and life insurance deductions; however, the hearing representative found that she was not entitled to waiver because she was at fault in creating the portion of the

¹ Although the Office continuously stated that the sum of \$65.34 and \$2,206.30 was \$2,261.74, it appears that the Office inadvertently transposed numbers. The sum of \$65.34 and \$2,206.30 is \$2,271.64.

overpayment of compensation for the periods she received dual benefits from both the Office and OPM for the period November 8 through December 24, 2005, in the amount of \$2,206.30.

LEGAL PRECEDENT -- ISSUE 1

Regarding the overpayment for the period October 30 through November 7, 2005, under the Federal Employees' Group Life Insurance (FEGLI) program, most civilian employees of the Federal Government are eligible to participate in basic life insurance with one or more options.² The coverage for basic life is effective unless waived³ and premiums for basic and optional life coverage are withheld from the employee's pay.⁴ Under the FEGLI program, insurance remains in effect until canceled and premiums due are to be deducted from the injured employee's compensation payments. The injured employee remains responsible for all insurance premiums. When FEGLI premiums are incorrectly withheld, the entire amount of the unpaid premium is deemed an overpayment of compensation because the Office must pay the full premium to the OPM upon discovery of the error.⁵

Similarly, for health insurance premiums, OPM regulations provide guidelines for registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”

Regarding the overpayment for the period November 8 through December 24, 2005, it is well established that an injured employee must make an election between compensation for

² See *James Lloyd Otte*, 48 ECAB 334, 337 (1997); Part 870 -- Basic Life Insurance, subpart B -- Coverage; see 5 C.F.R. § 870.201.

³ 5 C.F.R. § 870.204(a).

⁴ *Id.* at § 870.401(a).

⁵ See *Otte*, *supra* note 2.

disability and retirement pay; the employee may not receive both.⁶ Section 8116(a) of the Federal Employees' Compensation Act⁷ ("Act" or FECA) places the following limitations on the right to receive compensation:

"(a) while an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which that, installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the [Department of Veterans Affairs] unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code."

5 U.S.C. § 8116(a) provides that a beneficiary may not receive wage-loss compensation receive compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive and the election, once made, is revocable.⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$65.34 for the period October 30 through November 7, 2005. The record shows that an overpayment occurred because basic health and life insurance premiums were not deducted from her compensation during this period. The Office calculated the amount of overpayment by determining the premiums for the health and basic life insurance which should have been deducted from her compensation from October 30 through November 7, 2005. The Office properly found an overpayment of \$65.34 based upon the amount of deductions that should have been made for health and basic life insurance. Based

⁶ See *John Russell Miller*, 6 ECAB 544 (1954) (U.S. Navy retirement pay); *Marcel F. Hubert*, 6 ECAB 539 (1954) (Coast Guard retirement pay); *Mariquita Atcheson (George Atcheson, Jr.)*, 5 ECAB 570 (annuity under the Foreign Service Retirement System); *Ben D. Pate*, 4 ECAB 70 (1950) (annuity under the Civil Service Retirement Annuity Act of July 3, 1926); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000 (January 1997).

⁷ 5 U.S.C. § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

The Board also finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,206.30 for the period November 8 through December 24, 2005.

The Office properly paid appellant wage-loss compensation during the period November 8 through December 24, 2005. An overpayment was created because on January 6, 2006 appellant elected to receive OPM retirement benefits effective November 8, 2005, but as noted wage-loss compensation was paid from November 8 through December 24, 2005. The record does not indicate that the Office received any refund from OPM for the compensation benefits paid during this time period.

Because appellant concurrently received disability retirement pay and compensation for temporary total disability, during the time period in which she elected to receive OPM benefits, the Board finds that she received a dual benefit. As a result an overpayment in the amount of \$2,206.30 in compensation occurred for the period November 8 through December 24, 2005.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁹ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”¹¹

⁹ 5 U.S.C. § 8129(a)(b).

¹⁰ *Bonnye Mathews*, 45 ECAB 657 (1994).

¹¹ 20 C.F.R. §10.433(a).

ANALYSIS -- ISSUE 2

Regarding the overpayment in the amount of \$65.34, the Office properly determined that appellant was not at fault in the creation of the overpayment because she did not know and should not have known that the Office had failed to deduct insurance premiums during the applicable time period.

Regarding the overpayment in the amount of \$2,206.30, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. To establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time she received the compensation checks in question, she knew or should have known that the payments were incorrect.¹²

In determining that appellant was at fault in the creation of the overpayment, the Office found that she accepted a payment, which she knew or should have known to be incorrect. The record establishes that appellant did not elect to receive OPM benefits until January 6, 2006 and that these OPM benefits were retroactive to November 8, 2005. There is no indication that when appellant was receiving the wage-loss compensation payment in 2005 she should have known that she was not going to be entitled to them later on. There was no overpayment at the time appellant received the compensation in question. Therefore, the Board finds that the Office erred in finding appellant at fault in creating the overpayment.¹³

As appellant was without fault under the third standard outlined above, a determination should be made as to whether the overpayment of compensation in the amount of \$2,206.30 may be waived. The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$2,206.30 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Under section 8129 of the Act, 5 U.S.C. § 8129(b) and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹⁴ Waiver of overpayment is not possible if the individual is at fault in creating the overpayment.¹⁵ The Office must determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁶

¹² *Diana L. Booth*, 52 ECAB 370 (2001).

¹³ *See Edward E. Donahue*, (Docket No. 04-1742, issued August 3, 2005).

¹⁴ *See supra* note 9.

¹⁵ *Jorge O. Diaz*, 51 ECAB 124 (1999).

¹⁶ 20 C.F.R. § 10.434.

The applicable regulations provide that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by the Office.¹⁷ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁸

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

ANALYSIS -- ISSUE 3

In the instant case, appellant stated that she had \$3,751.47 in expenses and her total monthly income of \$4,023.71. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁹ Appellant has thus fallen short of showing that she needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed. Therefore, she does not qualify for waiver under the "defeat the purpose of the Act" standard.²⁰

Further, there is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period October 30 through November 7, 2005.²¹ Pursuant to its regulations, the hearing representative therefore did not abuse her discretion by issuing its March 29, 2007 final decision denying waiver of recovery of the overpayment in the amount of \$65.34.

CONCLUSION

The Board finds that the Office properly determined that appellant received overpayments of compensation in the amount of \$65.34 and \$2,206.30. The Board finds that the

¹⁷ *Id.* at § 10.436.

¹⁸ *Id.* at § 10.437.

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial overpayment Actions*, Chapter 6.200.6(a)(3) (October 2004).

²⁰ *See Nina D. Newborn*, 47 ECAB 132 (1995).

²¹ The hearing representative noted in addition that appellant's assets exceeded the allowable base of \$10,880.00 for a household of five.

Office properly denied waiver of the overpayment in the amount of \$65.34, but that the Office improperly found appellant at fault in creation of the overpayment in the amount of \$2,206.30, which occurred between November 8 through December 24, 2005.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part and remanded for further proceedings consistent with this opinion.

Issued: May 12, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board