

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

J.H., Appellant

and

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

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**Docket No. 12-902
Issued: September 11, 2012**

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 15, 2012 appellant, through her representative, filed a timely appeal from the February 13, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied waiver of recovery of an overpayment. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly denied waiver of the recovery of a \$1,213.04 overpayment; and (2) whether it properly set the rate of recovery from continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In the prior appeal,² the Board found that appellant received a \$1,213.04 overpayment of compensation in September 2009 when she received compensation for temporary total disability after returning to full-time work. As she received the payment in question through direct deposit, the Board set aside OWCP's finding of fault and remanded the case for consideration of waiver based on appellant's current financial circumstances. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.³

Upon return of the case record, OWCP made a preliminary determination that appellant was not at fault in the creation of the overpayment, making her eligible for consideration of waiver. It asked her to complete an overpayment questionnaire and attach supporting documents, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips and any other records that would support the income and expenses listed on the questionnaire. OWCP notified appellant that failure to submit the requested information within 30 days would result in the denial of waiver, and no further request for waiver would be considered until the requested information was furnished.

Appellant requested waiver and submitted financial documentation. In her overpayment recovery questionnaire, she indicated \$16.00 in monthly income. Appellant listed over \$5,000.00 in usual monthly expenses and monthly installment debt.

At a telephonic hearing before an OWCP hearing representative on December 14, 2011, appellant testified as to her debts and general finances. The hearing representative informed her representative what additional financial documentation was necessary. After explaining that she would hold the record open for 30 days, and that it was critical for appellant to update her financial information, including information on foreclosure proceedings, within that 30-day period, as failure to do so would result in a denial of waiver, the hearing representative stated she would issue a decision in no later than 75 days.

In a February 13, 2012 decision, OWCP's hearing representative denied appellant's request for waiver. She found that appellant did not provide the financial documentation necessary to reliably support that she would be unable to repay the debt or that recovery would create a hardship. Further, the hearing representative found significant inconsistencies between the limited evidence submitted and appellant's testimony. For example, while appellant stated she had only sporadic income, she received \$29,981.36 in net compensation from August 26 to December 31, 2011. While she testified she had no employment, documentation showed a payroll deposit in July 2011.

OWCP's hearing representative found that the ordinary and necessary expenses that appellant documented came to \$2,322.67 a month, compared to net monthly compensation of

² Docket No. 11-114 (issued July 18, 2011).

³ On March 18, 2004 appellant, a 47-year-old processing clerk, sustained a traumatic injury in the performance of duty when she fell in a parking lot. OWCP accepted her claim for right leg contusion, right ankle fracture, left ankle fracture and left ankle arthritis.

\$3,286.90. She found that a repayment schedule of \$150.00 a month from continuing compensation was reasonable and would allow for collection of the debt while still providing appellant the ability to meet ordinary and necessary living expenses. The hearing representative noted that \$150.00 was less than five percent of appellant's monthly compensation benefits.

On appeal, appellant argues that recovery of the overpayment would create a severe financial hardship. She states that she has no problem sending OWCP's hearing representative any and all information requested, but the hearing representative did not send her a request for additional information before making her decision. Appellant states that she has major depression recurrent episode, and the hearing representative left her to "*remember*" the oral requests for documentation. (Emphasis added). She states that she assumed a letter would be forthcoming. Appellant also states that the hearing representative based her decision on speculation instead of facts. She then took issue with the hearing representative's treatment of her financial circumstances, noting that some of the information, such as foreclosure proceedings, was a matter of public record.

LEGAL PRECEDENT -- ISSUE 1

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴ OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of FECA or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent.⁷

An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is

⁴ 5 U.S.C. § 8129(a).

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.434.

⁷ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).⁸

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.⁹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether recovery of the overpayment would defeat the purpose of FECA or be against good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

ANALYSIS -- ISSUE 1

When OWCP made its preliminary finding that appellant was not at fault in the creation of the overpayment, it well advised both appellant and her representative of the financial documentation necessary to establish income, expenses and assets. OWCP also advised of the consequences for failing to provide the information requested. After receiving some financial documentation, OWCP's hearing representative informed both appellant and her representative during the telephonic hearing what further documentation was required. She gave no indication that she would be sending appellant a letter requesting this financial information and that appellant could wait to submit the documentation at that time. Instead, the hearing representative attempted to impress upon appellant and her representative how critical it was for the documentation they had just discussed to be submitted within 30 days. Failure to do so, she warned, would result in denial of waiver.

When it came time to issue a final decision, OWCP's hearing representative was compelled to find that appellant did not provide the financial documentation necessary to reliably support that she would be unable to repay the debt or that recovery would create a hardship. Documented monthly income exceeded documented monthly expenses by \$964.23, establishing that appellant did not need substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses. Recovery would therefore not defeat the purpose of FECA, nor would recovery be against equity and good conscience, as appellant did not establish detrimental reliance.

⁸ Federal (FECA) Procedure Manual, *id.*

⁹ 20 C.F.R. § 10.437(b).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 6.200.6.b(3).

¹¹ 20 C.F.R. § 10.438.

Accordingly, the Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board will affirm OWCP's February 13, 2012 decision on the issue of waiver.¹²

Appellant argues that OWCP's hearing representative based her decision on speculation and not fact. More accurately, she based her decision on the income and ordinary and necessary expenses that appellant properly documented, or in other words, on the only facts that appellant established, which, indeed, might not accurately reflect her true financial status. It is appellant's responsibility, however, to provide the information necessary to establish her true financial status, and if she does not, OWCP can do nothing more than base its decision on the evidence she has made available.

LEGAL PRECEDENT -- ISSUE 2

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹³

ANALYSIS -- ISSUE 2

With waiver denied, FECA requires OWCP to recover the debt. OWCP's hearing representative knew the rate of appellant's compensation and the probable extent of future payments, and she had before her appellant's overpayment recovery questionnaire, some financial documentation and appellant's testimony about her finances. She also considered the amount of the overpayment, how long it would take to recover, what percentage of appellant's monthly compensation the recovery amount represented, and whether the rate of recovery would allow appellant the ability to meet ordinary and necessary living expenses, insofar as they were properly documented in the record. The Board therefore finds that OWCP gave due regard to relevant factors in setting the rate of recovery from continuing compensation payments at \$150.00.¹⁴ The Board will affirm OWCP's February 13, 2012 decision on the issue of rate of recovery.

CONCLUSION

The Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board also finds that it properly set the rate of recovery from continuing compensation.

¹² The Board settled the issues of fact and amount of overpayment in the prior appeal.

¹³ 20 C.F.R. § 10.321(a).

¹⁴ See *Gail M. Roe*, 47 ECAB 268 (1995) (when an individual failed to provide the requested information on income, expenses and assets, the Board found that OWCP did not abuse its discretion in following minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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