

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

L.M., Appellant)	
)	
and)	Docket No. 13-1411
)	Issued: December 11, 2013
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Gainesville, FL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 28, 2013 appellant filed a timely appeal from a May 10, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether OWCP properly denied waiver of an \$11,044.57 overpayment of compensation from October 4, 2009 to May 2, 2010.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated February 6, 2013, the Board affirmed an OWCP determination that an overpayment of \$18,866.00 had occurred

¹ 5 U.S.C. § 8101 *et seq.*

over the period October 4, 2009 to September 25, 2010.² The Board noted that appellant received retirement benefits through the Office of Personnel Management (OPM) commencing October 4, 2009 while continuing to receive compensation payments. As to waiver of the overpayment, the Board found OWCP's finding of fault could only be affirmed for part of the overpayment period. For the period October 4, 2009 until receipt of the April 26, 2010 letter, OWCP did not establish a finding of fault and the case was remanded for further adjudication. The history of the case as set forth in the Board's prior decision is incorporated herein by reference.

By letter dated March 29, 2013, OWCP advised appellant of a preliminary determination that compensation paid from October 4, 2009 to May 2, 2010 of \$11,044.57 was an overpayment for which she was not at fault in creating. It enclosed an overpayment recovery questionnaire (OWCP-20) and advised her to complete the form and attach supporting financial documents. In addition, the letter noted that failure to submit the requested information within 30 days would result in denial of waiver.

OWCP also issued a separate March 29, 2013 preliminary determination letter with respect to the remaining \$7,821.43 overpayment. It reiterated that appellant was found at fault in creating the overpayment.

By decision dated May 10, 2013, OWCP finalized its determination with respect to the \$11,044.37 overpayment from October 4, 2009 to May 2, 2010. It denied waiver as appellant did not submit any financial documentation. In a separate decision dated May 10, 2013, OWCP finalized its determination of a \$7,821.43 overpayment from May 3 to September 25, 2010.

LEGAL PRECEDENT

Section 8129(b) of FECA³ provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."⁴ Since OWCP found appellant to be without fault in the creation of the overpayment, it may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses," and, also, if the beneficiary's assets do not exceed a specified amount as

² Docket No. 12-1706 (issued February 6, 2013).

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Id.* at § 8129(b).

determined by OWCP from data provided by the Bureau of Labor Statistics.⁵ For waiver under the “defeat the purpose” of FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁶

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

With respect to the submission of relevant financial information, OWCP regulations at 20 C.F.R. § 10.438 provide:

“(a) 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 or not recovery of an overpayment would defeat the purpose of FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) 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.”

ANALYSIS

In the prior appeal, the Board affirmed a finding that an overpayment of \$18,866.00 was created from February 4, 2009 to September 25, 2010 as appellant had received both wage-loss compensation under FECA as well as retirement benefits from OPM. The unresolved issue was the finding of fault and denial of waiver for the overpayment period prior to receipt of an April 26, 2010 letter. On return of the case record OWCP found that appellant received the April 26, 2010 letter by May 3, 2010. There is no contrary evidence and appellant did not raise any arguments with respect to this finding.

OWCP found that appellant was not at fault with respect to the overpayment from February 4, 2009 to May 2, 2010 in the amount of \$11,044.57.⁷ As to the remaining

⁵ OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁶ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

⁷ The record includes documentation indicating that the amount of compensation was paid from October 4, 2009 to May 2, 2010 was \$11,044.57.

overpayment from May 3 to September 25, 2010 in the amount of \$7,821.43, the Board found on a prior appeal that appellant was not entitled to waiver.⁸

The issue on appeal is whether OWCP properly denied waiver of the overpayment from October 4, 2009 to May 2, 2010. Appellant was advised in the March 29, 2013 preliminary determination to complete the OWCP-20 form, and attach relevant documents, within 30 days. In this regard 20 C.F.R. § 10.438 provides that appellant is responsible for submitting relevant financial information with respect to the waiver determination and failure to submit the requested information will result in a denial of waiver.

The record reflects that appellant failed to submit any financial information prior to the May 10, 2013 final decision. Pursuant to 20 C.F.R. § 10.438, OWCP may deny waiver and no further request for waiver is considered until the requested information is furnished. The Board finds that OWCP properly denied waiver of the \$11,044.37 overpayment.

On appeal, appellant stated that she found the March 29, 2013 preliminary determination to be confusing and thought that there would be an “automatic waiver” since she was not at fault. The preliminary determination clearly advised appellant that she must complete the enclosed OWCP-20 and attach relevant financial documents with respect to consideration of the waiver issue. In addition, she was specifically advised that, if she did not respond within 30 days, then waiver would be denied. Appellant may submit evidence to OWCP with a request for waiver. Based on the current evidence of record, OWCP properly denied waiver in this case.

CONCLUSION

The Board finds OWCP properly denied waiver of the overpayment from October 4, 2009 to May 2, 2010.

⁸ Appellant did not request review of the May 10, 2013 decision regarding the overpayment from May 3 to September 25, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 10, 2013 is affirmed.

Issued: December 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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