

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

K.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 14-739
Issued: June 26, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
MICHAEL E. GROOM, Alternate Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 14, 2014 appellant filed a timely appeal from a January 8, 2014 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,597.32 from April 22 through August 24, 2013; and (2) whether it abused its discretion by denying waiver of the overpayment.

FACTUAL HISTORY

On August 15, 2005 appellant, then a 35-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she developed right carpal tunnel syndrome as a result

¹ 5 U.S.C. § 8101 *et seq.*

of duties of her federal employment. OWCP accepted the claim for right carpal tunnel syndrome on September 13, 2005. On November 16, 2012 appellant stopped work and received wage-loss compensation for total disability. She was placed on the periodic rolls.

On April 22, 2013 appellant returned to light-duty part-time work as a modified mail processing clerk. She worked five hours per day five days for a week at a salary of \$54,800.00.

In a fiscal adjustment form dated September 10, 2013, a claims examiner determined that appellant received an overpayment of \$11,597.32 from April 22 through August 24, 2013 as she was not entitled to any compensation payments after her return to work.

By letter dated September 25, 2013, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$11,597.32 from April 22 through August 24, 2013 because she received compensation after her return to full-time work. It found that she was without fault in the creation of the overpayment. OWCP noted that appellant was on the periodic rolls and received net compensation every 28-calendar days in the amount of \$2,597.80, which she received for the period March 10 through August 24, 2013. It found that she improperly received wage-loss compensation through August 24, 2013 after she returned to full-duty work on April 22, 2013. With its preliminary determination, OWCP included an overpayment recovery questionnaire for consideration of the issue of waiver and explained that failure to submit the requested information within 30 days would result in denial of waiver.

On September 25, 2013 appellant advised OWCP that she had only worked five hours a day since April 2013 and that she did not work at the employing establishment from November 16, 2012 through April 22, 2013.

On October 15, 2013 appellant contested the preliminary overpayment decision, noting that she was not on full duty and worked only five hours a day, that she was not at fault and that the amount was incorrect because she was not working full duty. She submitted an overpayment recovery questionnaire on the same date, noting a monthly income of \$2,300.00, usual monthly expenses of \$3,277.00 and available funds of \$300.00. Appellant did not request a precoupment hearing, a decision based on the written evidence or a telephonic conference with OWCP.

On October 17, 2013 appellant claimed 340.44 hours of leave without pay from April 22 through October 4, 2013, noting that she had worked in a modified position for five hours a day during that period.

By letter dated October 23, 2013, OWCP advised appellant that her claim for compensation for 340.44 hours between April 22 through October 4, 2013 was approved in the amount of \$5,920.25.

In a memorandum to the file dated November 4, 2013, a claims examiner noted that the fiscal adjustment form of September 10, 2013 had calculated a full-time return to work instead of part-time return to work. Therefore, the overpayment of April 22 through August 24, 2013 would have to be recalculated as appellant had returned to work only five hours a day.

In a memorandum to the file dated November 15, 2013, a claims examiner noted that because appellant was compensated for three hours of leave without pay per shift between April 22 and October 4, 2013, no adjustment was required to the overpayment amount of \$11,597.32.

By letter dated November 26, 2013, OWCP reissued its preliminary determination that appellant received an overpayment of compensation in the amount of \$11,597.32 from April 22 through August 24, 2013 because she received wage-loss compensation after her return to full-time work. It found that she was without fault in the creation of the overpayment. This preliminary determination was substantially the same as the September 25, 2013 preliminary determination and included another overpayment recovery questionnaire.

By decision dated January 8, 2014, OWCP finalized the preliminary determination, finding that appellant was overpaid in the amount of \$11,597.32 for the period April 22 through August 24, 2013 because she received wage-loss compensation after her return to work. It found that she was without fault in the creation of the overpayment because she was not aware that she was not entitled to the payment received. OWCP determined that the overpayment was not subject to waiver because appellant did not contest the overpayment finding or provide evidence in response to the preliminary determination. It found that the entire amount was due as recovery of the overpayment would not defeat the purpose of FECA or be against equity or good conscience.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.² FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.³ OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁴ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁵ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work and has earnings but continues to receive wage-loss compensation.⁶

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.500(a).

⁵ *See Daniel Renard*, 51 ECAB 466, 469 (2000).

⁶ *See L.S.*, 59 ECAB 350, 353-54 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

ANALYSIS -- ISSUE 1

The Board finds that OWCP correctly determined that appellant received an overpayment of compensation in the amount of \$11,597.32 from April 22 through August 24, 2013. The record demonstrates that she received an overpayment during the relevant period because she received monthly payments of wage-loss compensation after returning to part-time work on April 22, 2013. OWCP calculated the \$11,597.32 overpayment by totaling the amount from five compensation checks that appellant received during the period April 22 through August 24, 2013 at the monthly rate of \$2,597.80, including one check covering the period from April 7 through May 4, 2013 for which she was overpaid by \$1,206.12. For checks during the period May 5 through August 24, 2013, she was overpaid in the amount of \$2,597.80 per month. Two thousand five hundred and ninety seven dollars and eighty cents multiplied by four payments, added to the \$1,206.12 overpayment, results in a total overpayment of \$11,597.32.

OWCP erroneously found that appellant returned to full-time work as of April 22, 2013, when, in fact, she had returned to part-time work at five hours per day. It initially based the overpayment on a return to full-time work for the period from April 22 through August 24, 2013. On October 23, 2013 she was compensated for the three hours of leave without pay. A memorandum from OWCP explains that the figure of \$11,597.32 did not need to be adjusted because appellant had already been compensated for 340.44 hours of leave without pay in the amount of \$5,920.25 resulting from her part-time wage loss. She was then compensated again for her part-time wage loss during the relevant period on October 25, 2013, pursuant to her October 17, 2013 request for leave without pay. It was correct not to adjust the amount of overpayment from \$11,597.32, because she was compensated twice for the leave without pay during the relevant period to which she was entitled. Thus, the Board finds that the use of full-time return-to-work calculations was harmless error.

As appellant received wages for five hours of work from the employing establishment from April 22 through August 24, 2013, she was not entitled to temporary total disability compensation from OWCP for this same period, but rather was only entitled to receive partial disability compensation.⁷ She received partial disability compensation from OWCP for the period from April 22 through October 4, 2013 for three hours and total disability compensation for the period from April 22 through August 24, 2013. Thus, the Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$11,597.32 for the period from April 22 through August 24, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁸ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.⁹ The only exception to this requirement is found in

⁷ See *D.W.*, Docket No. 14-229 (issued April 17, 2014).

⁸ 5 U.S.C. § 8129(a).

⁹ *Id.*

section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹¹ OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in sections 10.434 and 10.437 of the implementing federal regulations.¹²

Section 10.438 of FECA's implementing regulations provide that 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. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹³

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹⁴

ANALYSIS -- ISSUE 2

In this case, appellant was found to be without fault in the creation of the overpayment. The Board finds that the issue of waiver of recovery is not in posture for decision. Accompanying the September 25 and November 26, 2013 preliminary notices of overpayment, OWCP provided her with an overpayment recovery questionnaire to obtain information about her monthly income, assets, and expenses. Appellant responded to the questionnaire included with the September 25, 2013 preliminary notice on October 15, 2013, contested the amount of overpayment, and provided financial information. However, OWCP, in its January 8, 2014 final determination, stated that she had not responded to the overpayment recovery questionnaire contained in its November 26, 2013 preliminary decision and that she had not contested the finding. The September 25, 2013 preliminary notice dealt with the same overpayment amount and period as the November 26, 2013 notice.

¹⁰ *Id.* at § 8129(b).

¹¹ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

¹² 20 C.F.R. §§ 10.434 and 10.437.

¹³ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476, 479 (2001).

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Under the implementing regulations, 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.¹⁵ Under OWCP's procedures, if a claimant submits new evidence or arguments for the waiver of an overpayment (but without a request for a hearing) after a preliminary finding "without fault," the overpayment examiner shall fully consider the evidence of record, review the case file, including any new evidence, consider the associated costs and consider whether the evidence warrants waiver of the overpayment.¹⁶ Appellant challenged the amount of the overpayment and provided financial information to OWCP, but neither her argument, nor the financial information were considered in OWCP's January 8, 2014 final determination.

As OWCP failed to consider appellant's evidence to make detailed findings and state the reasons supporting its January 8, 2014 decision, the Board finds that this decision must be set aside in part and remanded for consideration of the issue of whether she was entitled to waiver of the overpayment in the amount of \$11,597.32, pursuant to the standards set out in 20 C.F.R. § 126. Following such further development as OWCP deems necessary, it shall issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$11,597.32 for the period from April 22 through August 24, 2013 because she received temporary total disability compensation after she returned to part-time work. The Board further finds that she was without fault in the creation of the overpayment and that OWCP improperly denied consideration of waiver of recovery based on the evidence of record.

¹⁵ 20 C.F.R. § 10.126.

¹⁶ See Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 6.200.4(c) (June 2009).

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case remanded for further development consistent with this decision.¹⁷

Issued: June 26, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁷ Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.