United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 06-1371**
	)	**Issued: April 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Arlington, MA, Employer	)	

Appearances:
William E. Shanahan, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2006 appellant, through her attorney, filed a timely appeal from a February 22, 2006 merit decision of the Office of Workers' Compensation Programs (Office) denying her claim for augmented compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant is entitled to compensation at the augmented rate of 75 percent based on her same-sex marriage.

FACTUAL HISTORY

This case was previously before the Board on the issue of termination. Appellant, a letter carrier employed with the United States Postal Service, sustained injury to her low back. The Office accepted her claims for lumbar strains and a herniated disc at L4-5 for which she

underwent surgery.[1] By decision dated December 4, 2002, the Office terminated appellant's compensation benefits effective December 1, 2002, finding that she no longer had any employment-related disability or residuals of her accepted conditions. In a December 13, 2004 decision, the Board reversed the termination, finding that the Office did not meet its burden of proof to establish appellant was no longer disabled.[2] The Board found that the weight of medical opinion did not establish that her employment-related disability had ceased or that she was provided light duty consistent with her physical limitations. The facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

Following the Board's decision, the Office reinstated appellant's compensation benefits. By letter dated February 25, 2005, the Office, pursuant to its practice, sent appellant an EN1032 form to determine whether adjustments were to be made to her compensation payments based on the status of any eligible dependents. The information sought by the Office included an inquiry as to whether appellant claimed dependents in order to be eligible for augmented compensation under 5 U.S.C. § 8110. She completed the EN1032 form on March 4, 2005, marking in response to a form question that she was married and lived with her "husband or wife." Appellant also claimed as dependents, stepchildren born in 1990 and 1994. Subsequently, on April 15, 2005, appellant's attorney provided the Office with a copy of her marriage certificate, noting that appellant sought augmented compensation under the Federal Employees' Compensation Act (FECA) as of the date of her marriage. The Commonwealth of Massachusetts certificate of marriage, dated August 14, 2004, recorded the marriage of appellant to a female partner.

On May 3, 2005 the Office entered appellant on the periodic compensation payment rolls at the basic statutory compensation rate of 66 2/3 percent of her weekly pay rate rather than at the augmented rate of 75 percent. By letter dated May 20, 2005, counsel for appellant, requested that her compensation be paid at the augmented rate based on her August 14, 2004 marriage.

In a May 26, 2005 decision, the Office denied appellant's request for augmented compensation. The claims examiner noted that both parties to the marriage certificate were female and that appellant was not entitled to augmented compensation because the Defense of Marriage Act (DoMA) prohibited the Office from recognizing a marriage between two individuals of the same sex. The decision stated:

> "Section 8110 of the FECA, 5 U.S.C. § 8110, provides that a disabled employee with one or more dependents is entitled to augmented compensation, and defines dependent to include a wife or husband. Neither the FECA nor its implementing regulations define terms such as marriage, spouse, husband or wife. However, section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 define the term marriage to mean only a legal union between one man and one woman as husband and wife. This section also defines that the word spouse refers only to a person of the opposite sex who is a husband or wife."

[1] Appellant sustained injury on June 24, 1992, August 4, 1994, March 2, 1995 and May 24, 1999 while in the performance of her duties as a letter carrier.

[2] Docket No. 04-1386 (issued December 13, 2004).

Appellant, through counsel, requested an oral hearing on June 15, 2005. The Office Branch of Hearings and Review scheduled the oral hearing for January 19, 2006. The record reflects, however, that counsel later requested a review based on the written record. In a January 5, 2006 letter to the Office, counsel contended that the denial of appellant's claim for augmented compensation under the DoMA constituted a denial of due process. In a January 5, 2006 response, the hearing representative noted that he was unable to decide constitutional matters and that a decision would follow.

In a February 22, 2006 decision, the Office hearing representative affirmed the May 26, 2005 denial of augmented compensation. He found that the terms of marriage, spouse, husband and wife were not defined under the FECA or implementing federal regulations. However, section 3 of the DoMA, 1 U.S.C. § 7, defined the terms "marriage" and "spouse" as meaning only a legal union between one man and one woman as husband and wife. The hearing representative concluded:

> "From the explicit terms of the Defense of Marriage Act, for purposes of determining whether a [FECA] beneficiary should be considered to have a husband or wife, only a marriage between a man and a woman can be recognized. Augmented compensation benefits for those claimants who are married are limited to claimants whose marriage is within the definition set forth at 1 U.S.C. § 7. Thus, the marriage must be between two people of different sexes. The claimant, therefore, is not entitled to compensation based on same sex marriage."

LEGAL PRECEDENT

FECA provides a basic rate of monthly compensation for disability equal to 66 2/3 percent of an injured employee's weekly pay.[3] Under section 8110, this basic compensation rate may be augmented by a rate of 8 1/3 percent, a total of 75 percent, provided the injured employee has an eligible "dependent" as defined.[4] FECA provides:

> "(a) For the purpose of this section, 'dependent' means –
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> (1) a wife, if
>
> (A) she is a member of the same household as the employee;
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> (B) she is receiving regular contributions from the employee for her support; or
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> (C) the employee has been ordered by a court to contribute to her support…."[5]

A wife may qualify as a dependent if she is a member of the same household as the claimant, received regular contributions from the claimant for her support or the claimant is under court order to contribute to her support. In questions affecting relationship, such as the

[3] 5 U.S.C. §§ 8105(a) and 8106(a).

[4] 5 U.S.C. § 8110(b).

[5] *Id*. at § 8110(a).

validity of a marriage or divorce, the Board has looked to the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place.[6]

In 1996, the United States Congress passed the DoMA and the President signed it into law.[7] This statute provides in pertinent part: "In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States … the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."[8]

ANALYSIS

The issue presented is one of first impression before the Board: whether a same-sex civil marriage entered under the laws of the Commonwealth of Massachusetts is determinative of appellant's eligibility for augmented compensation under FECA.

In deciding whether an injured employee has a "wife" as a dependent under FECA, this Board has applied the marriage laws of the state in which the marriage took place. In *Mattie Lee Franklin (Charles Franklin)*,[9] the Board recognized that under well-established rules of conflict of laws "the validity of a marriage is determined by the law of the place where the marriage was consummated."[10] In *Franklin*, the claim was brought by a woman claiming to be the widow of the deceased federal employee. The Board noted that under the laws of the state of Washington, she was entitled to rely upon the presumption that her marriage was valid. It was noted that the Office did not procure evidence of sufficient proof to rebut the presumption in favor of the marriage. In numerous other cases, the Board has looked to the marriage laws of the states to determine the status of a "wife" or "husband" as a dependent under FECA or as a "widow" or "widower" entitled to compensation benefits.[11] The Board has reviewed such matters as

[6] *See Andrew J. Kravic*, 57 ECAB ___ (Docket No. 06-107, issued April 14, 2006); *Leon J. Mormann*, 51 ECAB 680 (2000); *Mary Bee McCabe (George S. Sampio)*, 35 ECAB 218 (1983).

[7] 1 U.S.C. § 7. *See* Pub. L 104-199, § 3(a), Sept. 21, 1996, 110 Stat 2419.

[8] *Id*.

[9] 3 ECAB 136 (1950).

[10] *Id*.

[11] *See, e.g., Patrice Newkirk (Maurice D. Newkirk)*, 18 ECAB 254 (1966) (a California court granted appellant an annulment of a voidable marriage, case was not in posture for decision as to the existence or nonexistence of a valid marriage.); *Venus H. Ryals (James O. Ryals)*, 18 ECAB 368 (1967) (marriage certificates were presented by two women claiming to be the widow of the deceased. The law of South Carolina created a presumption in favor of the validity of the second marriage in that the first marriage was terminated in divorce. However, this was a rebuttable presumption and the evidence presented warranted a ruling in favor of the first wife.); *Marolyn M. Videto (William R Videto)*, 23 ECAB 207 (1972) (the Office did not meet its burden of proof to terminate compensation as the evidence did not establish that appellant, the deceased employee's widow, had entered into a common law marriage); *Thomas Freitas*, 43 ECAB 367 (1992) (the entry of a judgment nisi of divorce did not change the marital status of the parties until such point as the judgment became absolute); *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (a common law wife is not recognized as a lawful spouse under Tennessee law and did not qualify as a dependent under FECA).

common law marriages, divorce, annulments and whether a prior marriage had been properly dissolved for the purpose of determining dependency under FECA.

In *Goodridge v. Department of Pub. Health*,[12] the Massachusetts Supreme Judicial Court ruled that excluding same-sex couples from civil marriage violated the Commonwealth's constitutional due process and equal protection clauses. The court defined civil marriage in Massachusetts as "the voluntary union of two persons as spouses to the exclusion of all others."[13] The impact of the court's decision was to legalize same-sex marriage in the state. As of May 14, 2004, same-sex couples were able to apply for and obtain marriage certificates within the state. One such couple was appellant and her female partner.

In order to determine appellant's eligibility for augmented compensation under section 8110, the Board must first look to the marriage laws of the state of Massachusetts. As noted, the civil marriages of same-sex couples are now recognized in that Commonwealth pursuant to the majority holding in *Goodridge*. The case record establishes that as of August 14, 2004, a civil marriage was entered between appellant and her same-sex partner. Under the Board's case law, appellant would be entitled to augmented compensation based on the status of her "wife" as a dependent member of the same household following their marriage. However, compensation payable under FECA is not a benefit granted under state law. Rather, appellant's claim to benefits is premised on her status as an injured federal worker and her application for benefits under federal law.[14] For this reason, the Board must consider for the first time the impact of the Defense of Marriage Act on a claim for benefits under FECA.[15]

The Defense of Marriage Act

In 1996, the United States Congress passed the Defense of Marriage Act.[16] As applicable to the instant claim, Congress provided that in determining the right of parties to benefits under FECA, the statute and implementing regulations are to be interpreted as recognizing marriage as a legal union between only one man and one woman. The language of the DoMA does not define the specific terms "husband" and "wife." However, the legislative history supports that the purpose of this statutory provision was to limit any definition of the terms "marriage," "spouse," "husband" or "wife" within any federal ruling, regulation or interpretation by

[12] 440 Mass. 309; 798 N.E.2d 941 (2003).

[13] 798 N.E.2d at 969.

[14] FECA represents the extent to which Congress has waived the constitutional sovereign immunity of the United States in federal workers' compensation matters. *See John B. Lee, Jr.*, 43 ECAB 670 at 684 (1992).

[15] The Board notes that there is a dearth of relevant legal authority adjudicating federal benefits and the impact of the DoMA. In several instances, claims have arisen concerning same-sex couples located in states which do not recognize such civil marriages. *See, e.g., Johnson v. OPM*, 102 FMSR 81636 (March 6, 2002). In a memorandum decision of August 17, 2004, the U.S. Bankruptcy Court for the Western District of Washington considered application of federal bankruptcy laws to a joint filing involving debtors in a same-sex marriage entered in British Columbia, Canada. *In re Kandu*, Docket No. 03-51312.

[16] *See supra* note 7.

administrative agencies, to those individuals of opposite sex in a legally recognized union.[17] During the House debate regarding this provision, Congressman James Sensenbrenner stated:

> "Because this United States Code does not contain a definition of marriage, a State's definition of marriage is regularly utilized in the implementation of federal laws and regulations. Such deference is possible now because … the differences in State marriage laws, although numerous, are relatively minor. Every State concurs in the most basic marital qualification, that a valid marriage must be between one man and one woman. There never has been any reason to make this implicit understanding explicit until now…. Consequently, section 3 of the Defense of Marriage Act amends the United States Code to make it clear for purposes of federal law marriage means what Congress intended it to mean, that is, a legal union between one man and one woman as husband and wife. Congress certainly has the authority to define qualifications, conditions and obligations surrounding the application of federal law and the disbursement of federal benefits."[18]

Congress did not specifically identify FECA in discussing whether or not federal benefits were to be withheld in marriages of same-sex partners. However, the legislative history did include a statement that 17 areas of federally enacted legislation and programs would be affected if the DoMA became law, specifically banking, bankruptcy, civil service, consumer credit, copyright, education, federal lands and resources, housing, immigration, judiciary, *labor,* military, social security, taxation, veterans, the Soldiers' and Civil Relief Act, and welfare.[19] (Emphasis added.)

The practical impact of the DoMA is that it applies only to federal laws. The determination of who may enter a marriage continues to be a function of state law.[20] The argument of appellant on appeal is that the denial of augmented compensation by the Office is in violation of FECA and that application of the DoMA represents a denial of her right to due process and equal protection under the Constitution. In the application of FECA to the factual circumstances of this case, the Board finds that the Office properly denied augmented compensation benefits to appellant based on the DoMA. Although she was married in

[17] *E.g.*, "H.R. 3396 solidly reinforces these previous U.S. and State Supreme Court findings by simply restating the current and long-established understanding of marriage as the social, legal and spiritual union of one man and one woman." Statement of Congressman Tim Hutchinson, Cong. Rec., July 11, 1996, H7,442. "We do not need to explain that for thousands of years and across many, many different cultures, a definition of marriage that transcends time has always been one man and one woman united for the purposes of forming a family." Statement of Congressman Steve Largent, Cong. Rec., July 11, 1996, H7,443. Congresswoman Patsy Mink of Hawaii noted that the passage of this legislation would preclude same-sex marriage partners from being considered spouses when deciding federal retirement benefits, health benefits under federal programs, federal housing benefits, burial rights, rights to family and medical leave and other programs which allow special rights to spouses. Statement of Congresswoman Mink, Cong. Rec., July 12, 1996, H7,481.

[18] Statement of Congressman James Sensenbrenner, Cong. Rec., July 12, 1996, H7,484.

[19] Statement of Congressman Jesse Jackson, Jr., Cong. Rec. July 12, 1996, H7,496.

[20] *See* H.R. Rep No. 104-664, at 3, *reprinted in* 1996 U.S.C.C.A.N. at 2934.

Massachusetts on August 14, 2004, the DoMA precludes the Board from finding that appellant's same-sex partner is a dependent wife under section 8110.

Constitutional Challenge

On appeal to the Board and before the Office, counsel for appellant has contended that application of the DoMA to deny augmented compensation violates appellant's right to equal protection in the recognition of her marriage. The Board notes that as a quasi-judicial body of the executive branch, it is not the proper forum in which to challenge the constitutionality of an Act of Congress.[21] In *Linda K. Richardson*,[22] the Board noted that, as an administrative body, it must presume the constitutionality of acts of Congress, stating:

> "The Board has long recognized that it is not the proper forum to challenge the constitutionality of an act of Congress. Adjudication of the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies. Administrative agencies are entrusted to administer statutes and thus perform quasi-judicial duties by ascertaining facts and interpreting the law in carrying out the will of the legislature. It is a 'judicial function,' however, within the constraints of the separation of powers, for the courts to exercise power to determine the constitutional legality of congressional enactments. The exercise of jurisdiction of the federal courts regarding constitutional issues is calculated to directly uphold and preserve the principle of separation of powers.
>
> "The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions…."[23] (Citations omitted.)

The Board is not the proper forum for consideration of appellant's constitutional arguments involving the DoMA and its application to federal workers' compensation benefits under FECA.[24] The due process and equal protection questions raised by appellant invite the Board to overstep its proper function and the separation of powers between the executive and judicial branches of government. These arguments must be pursued elsewhere.

CONCLUSION

The Board finds that appellant is not entitled to augmented compensation under FECA based on her same-sex marriage due to the DoMA.

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[21] *See Cristino Rodriguez*, 8 ECAB 428 (1955); *Dr. Alan T. Webb*, 47 ECAB 395 (1995).

[22] 47 ECAB 171 (1996).

[23] *Id*. at 176-77.

[24] The Board notes that appellant has not argued for augmented compensation based on the status of the listed step children as dependents under FECA. This matter was not adjudicated below and is not before the Board in the present appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 5, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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