

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, HOPE MILLS POST
OFFICE, Hope Mills, NC, Employer**

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**Docket No. 11-27
Issued: August 11, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 4, 2010 appellant filed a timely appeal from a July 27, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 found a \$13,519.75 overpayment of compensation for the period April 17, 2008 to October 24, 2009 as he received retirement benefits and actual earnings while on compensation; and (2) whether OWCP properly denied waiver of the overpayment.

On appeal, counsel does not contest the fact or amount of the overpayment. He asserts that OWCP's July 27, 2010 decision was "contrary to fact and law."

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By decision and order issued June 19, 2009,² the Board reversed April 16 and July 14, 2008 decisions of OWCP terminating appellant's wage-loss compensation and finding that he had no continuing disability after April 15, 2008. The Board remanded the case to OWCP for resumption of wage-loss compensation retroactive to April 16, 2008. The law and facts of the case as set forth in the Board's decision are incorporated by reference.

On July 1, 2009 appellant filed a claim for wage-loss compensation (Form CA-7) from April 16, 2008 onward. He submitted an affidavit of earnings and employment (Form CA-1032) stating that, during the 15-month period prior to June 26, 2009, he worked from March 18 to 28, 2009 for a self-storage company, earning a total of \$328.61 as a receptionist. From April 2 to July 1, 2009, appellant earned \$6,055.00 working for a private-sector blood donation company.³ He also received disability retirement benefits through the Office of Personnel Management (OPM) beginning on April 17, 2008.⁴

On July 16, 2009 OWCP placed appellant's case on the periodic compensation rolls retroactive to April 17, 2008. On July 14, 2009 it issued him an electronic \$22,583.71 net compensation payment covering the period April 17 to December 31, 2008, and a \$2,400.14 payment for the period July 5 to August 1, 2009. OWCP deducted life and health insurance premiums.

On August 24, 2009 appellant elected FECA benefits in lieu of OPM benefits effective April 7, 2008. In an October 21, 2009 letter, OPM advised OWCP that, prior to his election of benefits, appellant received \$31,382.87 in retirement annuity benefits while receiving compensation under FECA from April 17, 2008 to October 24, 2009. OPM directed OWCP to repay those funds.

On October 28, 2009 OWCP issued a net compensation payment of \$2,400.44 for the period September 27 to October 24, 2009. On November 10, 2009 it issued a net compensation payment of \$20,753.23, by subtracting the \$31,382.77 dual benefit amount from the \$52,136.00 owed appellant for the period April 17, 2008 to September 30, 2009.

By notice dated February 23, 2010, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$13,519.75 for the period April 17, 2008 to October 24, 2009 as he received a prohibited dual benefit from OPM while

² Docket No.08-2477 (issued June 19, 2009).

³ In a June 19, 2009 report, Dr. Charles S. Haworth, an attending Board-certified neurosurgeon, diagnosed degenerative disc disease at C6-7, T12-L3 and spondylolisthesis at L5-S1. He found appellant able to perform light-duty work. Dr. Haworth opined that appellant's current work at the blood donation company was within his physical limitations.

⁴ On August 11, 2009 OPM verified that appellant received \$12,373.45 in disability retirement benefits from May 1 to December 31, 2008 and \$8,452.61 in disability retirement benefits from January through July 2009, after deduction of appropriate health and life insurance premiums.

receiving compensation under FECA and had actual earnings from March 23 to July 1, 2009. It calculated that appellant received \$31,382.77 in compensation from April 17, 2008 to October 24, 2009 although he was only entitled to \$18,209.48, a difference of \$13,519.75.⁵ OWCP found appellant at fault in creating the overpayment. Appellant was afforded 30 days to request a telephone conference, prerecoument hearing or a final decision based on the record. OWCP also requested financial information and any additional arguments supporting waiver of the overpayment.

In a March 4, 2010 letter, appellant, through counsel, requested a telephonic prerecoument hearing on the issues of fact, amount, fault and waiver. At the hearing held on June 8, 2010, appellant asserted that he was not at fault as the overpayment was due solely to OWCP error. He answered the hearing representative's questions regarding his assets, expenses and income. The hearing representative advised appellant to submit a detailed listing of his income and expenses and copies of utility bills. Appellant did not submit any financial documentation prior to July 27, 2010.

By decision dated and finalized July 27, 2010, OWCP's hearing representative finalized the fact and amount of the preliminary overpayment finding. However, the hearing representative found that appellant was not at fault in creation of the overpayment as OWCP did not advise him when his case was placed on the periodic rolls or when compensation payments were issued. Although appellant was found to be without fault in the creation of the overpayment, OWCP found that he had not justified waiver of recovery of the overpayment as he failed to submit financial information as requested. The hearing representative directed recovery of the overpayment by lump-sum payment.⁶

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁷ 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 his duty.⁸ Section 8129(a) of FECA provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter 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."⁹

⁵ OWCP adjusted appellant's entitlement amount to reimburse him for the duplicate deduction of health and life insurance premiums.

⁶ The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004). As OWCP directed recovery by lump-sum payment, the Board does not have jurisdiction over the recovery issue.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8129(a).

Section 8116(d)(2) of FECA¹⁰ provides for limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.¹¹ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹² The beneficiary must elect the benefit that he or she wishes to receive.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$13,519.75. The record reflects that, from April 17, 2008 to October 24, 2009, appellant received compensation benefits under FECA at the same time that he received OPM disability retirement benefits and had actual earnings. His compensation benefits had not been offset by the correct amount of OPM benefits he received attributable to his federal service. The Board finds that this created an overpayment of compensation.¹⁴

On appeal, counsel does not contest the fact or amount of the overpayment. He asserts generally that OWCP's July 27, 2010 decision was "contrary to fact and law." However, there is no contrary evidence regarding the fact and the amount of the overpayment. Also, counsel alleged no specific error in OWCP's calculations. The Board finds that appellant received an overpayment of \$13,519.75 for the period April 17, 2008 to October 24, 2009.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): 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 the Act or would be against equity and good conscience.¹⁵

¹⁰ *Id.* at § 8116(d)(2).

¹¹ *Id.* at § 8116(a).

¹² 20 C.F.R. § 10.421(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8129.

OWCP regulations, at 20 C.F.R. § 10.438, state:

“(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.”¹⁶

The Board has held that OWCP must rely on current financial information when determining eligibility for waiver of an overpayment.¹⁷

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$13,519.75 overpayment, he bears responsibility for providing the financial information necessary to support a request for waiver of the recovery. OWCP requested that he provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. At the June 8, 2010 hearing, OWCP’s hearing representative again directed appellant to provide financial documents showing his income, assets and expenses. However, appellant did not submit the requested information. He did not supply the information that OWCP required to determine whether or not recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ The Board therefore finds that OWCP properly denied waiver of recovery of the overpayment pursuant to 20 C.F.R. § 14.438(b).¹⁹

On appeal, counsel contends that OWCP’s July 27, 2010 decision, including the denial of waiver, was “contrary to fact and law.” As stated, appellant failed to submit financial information as requested. Therefore, OWCP properly denied waiver of recovery of the overpayment.

¹⁶ 20 C.F.R. § 10.438.

¹⁷ *Thomas E. Ray*, 51 ECAB 344 (2000) (the Board remanded the case for further development on the issue of waiver where the Office relied on three-year-old financial information in its waiver determination); *Carol R. Graham*, Docket No. 02-2198 (issued February 4, 2003) (the Board remanded the case for further development on the issue of waiver as the Office relied on financial information that was 16 months old in determining the claimant’s eligibility for waiver of the overpayment); *Ronald E. Smith*, 36 ECAB 652 (1985) (the Board found that the Office should have attempted to obtain current financial information prior to determining the claimant’s eligibility for waiver).

¹⁸ 20 C.F.R. § 10.438(a).

¹⁹ See *Madelyn Y. Grant*, 57 ECAB 533 (2006). See also *D.R.*, Docket No. 09-1537 (issued April 15, 2010).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,519.75 for the period April 17, 2008 to October 24, 2009. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board