

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

K.W., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Greensboro, NC, Employer**

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Docket No. 11-283

Issued: September 8, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 16, 2010 appellant filed a timely appeal from the September 9, 2010 merit decision of the Office of Workers' Compensation Programs findings an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ 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 appellant received a \$764.09 overpayment of compensation; and (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

On January 29, 2009 appellant, then a 28-year-old mail handler, injured her left shoulder and arm when she lifted a pallet of mail. OWCP accepted that she sustained sprains of her left shoulder, rotator cuff and upper arm and impingement syndrome of her left shoulder. Appellant

¹ 5 U.S.C. §§ 8101-8193.

stopped work after her January 29, 2009 injury but returned to limited-duty work on a full-time basis without wage loss on July 23, 2010.

In a July 28, 2010 notice, OWCP advised appellant of its preliminary determination that she received an \$818.33 overpayment of compensation because she returned to full-time work on July 23, 2010 but received total disability compensation through July 31, 2010.² OWCP also made a preliminary determination that she was not at fault in the creation of the overpayment because she was not aware nor could have reasonably been expected to know that OWCP paid compensation incorrectly. It advised appellant that she could submit evidence challenging the fact or amount, and request waiver of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at a preresoupment hearing, but that a preresoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

The record contains a memorandum of a telephone conversation indicating that appellant spoke to OWCP on August 5, 2010 and was advised that she needed to submit the requested financial information in order to determine whether she qualified for waiver of the overpayment or, if waiver was not warranted, to calculate the amount she would have to repay each month.³ During a September 9, 2009 telephone conversation, appellant was given an opportunity to provide the financial information over the telephone, but she refused to do so indicating that she was seeking legal counsel.

In a September 9, 2010 decision, OWCP determined that appellant received a \$764.09 overpayment of compensation.⁴ It found that appellant was without fault in the creation of the overpayment because she was not or could not have been aware that she was not entitled to the payment received. OWCP determined that the overpayment was not subject to waiver because she did not submit the requested financial information and there was no evidence in the record that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It indicated that appellant had called on August 5, 2010 asking how she could repay the overpayment since she could not afford to send the full amount in one payment. Appellant was advised that she needed to complete and submit the supplied Form OWCP-20 detailing her financial information and that this information would be used to determine whether she qualified for waiver of the overpayment or, if waiver was not warranted, to calculate the amount she would have to repay each month. OWCP indicated that it telephoned her on September 9, 2010 to advise her that it had not received the requested Form OWCP-20. In that

² OWCP provided a calculation showing that she was paid \$818.33 in compensation for the period July 23 to 31, 2010.

³ Around this time, appellant filed a claim for reimbursement of wage loss due to attending physical therapy sessions on July 23, 26 and 27, 2010 for treatment of her work injury.

⁴ OWCP explained why it had lowered the amount of the overpayment. After appellant received the July 28, 2010 overpayment notice, she filed a compensation claim for loss of wages due to attending therapy sessions on July 23, 26 and 27, 2010. The amount of compensation due to appellant for this period was \$54.24 and, therefore, this amount was deducted from the prior overpayment amount of \$818.33.

conversation appellant claimed to have sent the form in on August 7, 2010, but she had no copies. There is no record of receipt by OWCP of the OWCP-20 form. Appellant was asked if she agreed to a telephone conference to obtain her financial information but she responded that she “would not answer that and would seek legal counsel.”

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 her duty.⁵ Section 8129(a) of FECA provides, in pertinent part:

“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.”⁶

Section 8116(a) of FECA provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$764.09 overpayment of compensation. Appellant returned to full-time work without wage loss on July 23, 2010 but impermissibly received total disability compensation through July 31, 2010. The record contains evidence which shows that appellant received \$818.33 in compensation for the period July 23 to 31, 2010. After she received OWCP’s July 28, 2010 overpayment notice, she filed a compensation claim for loss of wages due to attending physical therapy sessions on July 23, 26 and 27, 2010. The amount of compensation due to appellant for this period was \$54.24 and, therefore, this amount was deducted from the prior overpayment amount of \$818.33. Therefore, OWCP properly determined that appellant received a \$764.09 overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP’s discretion pursuant to statutory guidelines.⁸ These statutory guidelines are found in section 8129(b) of FECA which states: “Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁹ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of her 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 determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁰ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.¹¹ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that action was based chiefly or solely in reliance on the payments or on the notice of payment.¹²

Section 10.438 of OWCP’s regulations 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 the 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.”¹³

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedure provides that 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).

¹¹ 20 C.F.R. § 10.437(a), (b).

¹² *Id.* at § 10.437(b)(1).

¹³ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 2

In the present case, OWCP properly determined that appellant did not establish entitlement to waiver of the overpayment of compensation under the above-described standards. Appellant is not entitled to waiver of the overpayment because she did not provide financial information within the appropriate time period to show that she was entitled to such waiver.¹⁴

On appeal appellant alleged that she mailed financial information to OWCP within the requested period, but the record does not contain any indication that such information was mailed or received. She had telephonic contact with OWCP prior to the issuance of the September 9, 2010 decision and was given an opportunity to provide financial information over the telephone. However, appellant refused this opportunity to provide financial information.

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

CONCLUSION

The Board finds that appellant received a \$764.09 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

¹⁴ See *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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