

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

C.M., Appellant)	
)	
and)	Docket No. 11-982
)	Issued: September 20, 2011
DEPARTMENT OF THE NAVY,)	
SAN FRANCISCO BAY AREA, Oakland, CA,)	
Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2011 appellant filed a timely appeal from a March 3, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that found that she received 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 used the correct pay rate in calculating an overpayment of compensation; (2) whether appellant received an overpayment in the amount of \$4,927.41 for the period September 27, 1989 through May 16, 2006 because she was paid wage-loss compensation at an incorrect rate; and (3) whether OWCP properly denied waiver of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

On appeal appellant contends that her disability began on February 2, 1989, not September 27, 1989, and that OWCP inappropriately found that an overpayment was created based on finding that she was not entitled to a consumer price index (CPI) increase.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 13, 2009, the Board found that OWCP properly terminated appellant's monetary compensation on May 17, 2006 on the grounds that she had no restrictions due to her accepted depression but that she remained entitled to medical benefits.² In a second May 13, 2009 decision, the Board found that the proper pay rate for compensation purposes was that of the date disability began, or September 27, 1989. The case was remanded to OWCP to recalculate appellant's pay rate as of September 27, 1989.³

OWCP subsequently determined that appellant's weekly pay rate as of September 27, 1989, the date disability began, was \$449.87 and recalculated her compensation for the period September 27, 1989 through May 16, 2006. On August 28, 2009 it issued a preliminary determination that appellant received an overpayment in compensation. OWCP found that she received compensation totaling \$330,800.69 for the period September 27, 1989 through May 16, 2006, using the date disability began pay rate, when she should have received \$325,873.28, resulting in an overpayment of \$4,927.41. By using the date disability began, of September 27, 1989, appellant was not entitled to a CPI increase until one year after disability occurred and not entitled to the CPI increase granted on March 1, 1990. Appellant was found without fault and was advised of her rights if she disagreed with the preliminary finding. She was provided an overpayment questionnaire and informed that she must submit the questionnaire in order for waiver of the overpayment to be considered. Appellant was also provided an overpayment action request which advised her that she could request a telephone conference with OWCP on the issues of fault and possible waiver of the overpayment. On September 3, 2009 appellant requested a telephone conference with OWCP.

On October 20, 2009 OWCP finalized the preliminary overpayment finding. Appellant filed an appeal with the Board. In an order dated October 26, 2010, the Board found the case not in posture for a decision as appellant requested a prerecoupment telephone conference that was not held. Further the October 20, 2009 final overpayment decision did not include an explanatory memorandum that would allow the Board to make informed adjudication of the case.⁴ The law and the facts of the previous Board decisions and orders are incorporated herein by reference.

On November 2, 2010 OWCP forwarded appellant a new overpayment questionnaire and informed her that if she failed to furnish the information within 30 days, waiver would be denied. It scheduled a telephone conference on November 24, 2010. In letters dated November 20 and 22, 2010, appellant disputed the fact of overpayment, arguing that it was error to preclude

² Docket No. 08-1242 (issued May 13, 2009).

³ Docket No. 08-1119 (issued May 13, 2009).

⁴ Docket No. 10-211 (issued October 26, 2010).

the addition of a CPI increase. She stated that because an overpayment did not exist, she would not forward any financial information.⁵

In a memorandum of conference dated November 24, 2010, a claims examiner informed appellant of the issues of fault and possible waiver of the overpayment. It was noted that no financial information had been received and that, without financial information, waiver could not be considered. Appellant asserted that an overpayment did not exist because the CPI factor should not have been considered in finding an overpayment. She submitted additional correspondence disputing the fact of overpayment.

On March 3, 2011 OWCP finalized the overpayment decision. It found appellant without fault. OWCP discussed appellant's disagreement with fact of overpayment, noting that she contended that she was entitled to the CPI increases and that an overpayment did not exist. It explained how the CPI was calculated and advised appellant that, since she did not provide financial information, she was not entitled to waiver of the overpayment in compensation.

LEGAL PRECEDENT -- ISSUE 1

OWCP is directed by statute to compute compensation based on an employee's monthly pay, which is defined under section 8101(4) of FECA as the greater of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time federal employment.⁶

ANALYSIS -- ISSUE 1

By decision dated May 13, 2009, the Board found that appellant's proper pay rate for compensation purposes was that of the date disability began, or September 27, 1989, and remanded the case to OWCP to recalculate appellant's pay rate as of that date.⁷ As noted in that decision, appellant's pay rate on September 27, 1989 was \$23,393.00 per year or \$449.87 per week. Upon remand, OWCP correctly determined that appellant's pay rate for compensation purposes was \$449.87, and that she should have received compensation totaling \$325,873.28 for the period September 27, 1989 through May 16, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 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.⁸ Under FECA, monetary compensation for disability or impairment due to

⁵ Appellant had submitted correspondence with similar arguments on September 3 and October 26, 2009, and September 22 and 23 and October 13, 2010.

⁶ 5 U.S.C. § 8101(4).

⁷ *Supra* note 3.

⁸ 5 U.S.C. § 8102(a).

an employment injury is paid as a percentage of monthly rate.⁹ Section 8101(4) provides that “monthly pay” means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.¹⁰

ANALYSIS -- ISSUE 2

The Board will affirm the fact and amount of overpayment. The error in this case pertained to the rate of pay as of September 27, 1989. As found by the Board in the prior decision, OWCP initially used an incorrect pay rate in determining appellant compensation. When OWCP recalculated the amount of compensation due appellant based on the correct pay rate, that of the date disability began, OWCP discovered that appellant had received an overpayment in compensation in the amount of \$4,927.41.

Appellant’s compensation was initially based on a weekly pay rate in effect on February 2, 1989, or \$437.37 weekly. Although it might be expected that the weekly pay rate of September 27, 1989, the date disability began, of \$447.37, would have resulted in an underpayment of compensation, this higher pay rate actually resulted in a lower amount of compensation because the September 27, 1989 pay rate resulted in a delay until March 1, 1991 of application of the CPI increases which would be applied to appellant’s compensation rate.¹¹ In this case, the lower pay rate from the date of injury, or February 2, 1989, had resulted in higher compensation in some years due to the earlier and cumulative application of CPI increases. It was this difference that caused the \$4,927.41 overpayment to be created for the period September 27, 1989 through May 16, 2006. Total compensation paid at the date-of-injury pay rate was \$330,800.69 whereas the amount due under the correct pay rate, that of the date disability began, was \$325,873.28, yielding an overpayment of \$4,927.41.

Accordingly, the Board finds that appellant received an overpayment in compensation in the amount of \$4,927.41 for the period September 27, 1989 through May 16, 2006.¹²

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “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

⁹ See 5 U.S.C. § 8105, 8106, 8107.

¹⁰ 5 U.S.C. § 8101(4).

¹¹ See 5 U.S.C. § 8146a; *Franklin L. Armfield*, 29 ECAB 500 (1978) (holding that the claimant was not eligible for a cost-of-living increase, as provided by section 8146a, unless the date of his entitlement to compensation occurred more than a year before the effective date of the cost-of-living increase).

¹² See *Myles E. Terry*, Docket No. 04-86 (issued May 5, 2005) (although it might be expected that a higher recurrence pay rate would have resulted in an underpayment of compensation, this higher pay rate actually resulted in a lower amount of compensation due because the recurrence pay rate was from a subsequent date which resulted in a delay for the application of the consumer price increases which would be applied to the compensation rate).

good conscience.”¹³ Section 10.438 of OWCP regulations provides 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

ANALYSIS -- ISSUE 3

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ Appellant, however, had the responsibility to provide financial information to OWCP,¹⁷ and did not do so.

In its preliminary determination dated August 28, 2009, OWCP clearly explained the importance of providing the requested financial information for determination of waiver. On November 2, 2010 OWCP forwarded appellant another overpayment questionnaire and informed her that waiver would be denied if she did not submit the requested financial information within 30 days. Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting her income and expenses. In fact, in correspondence dated November 20 and 22, 2010, she stated that, because an overpayment did not exist, she would not forward financial information. At the telephone conference, held on November 24, 2010, OWCP’s claims examiner informed appellant that, without the financial information, waiver could not be considered. Appellant did not forward the requested financial information. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Consequently, appellant did not submit the financial information required under section 10.438 of OWCP regulations, which is necessary to determine her eligibility for waiver. OWCP properly denied waiver of recovery of the overpayment in compensation in the amount of \$4,927.41.¹⁸

¹³ 5 U.S.C. § 8129.

¹⁴ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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 his or her position for the worse. *Id.* at § 10.437.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Supra* note 14.

¹⁷ 20 C.F.R. § 10.438.

¹⁸ *Id.*

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁰

CONCLUSION

The Board finds that OWCP properly determined appellant's pay rate for compensation purposes, that she received an overpayment of compensation in the amount of \$4,927.41, and properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 20, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *Cheryl Thomas*, 55 ECAB 610 (2004).

²⁰ *Id.*