

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

A.C., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Birmingham, AL, Employer**)

**Docket No. 12-824
Issued: August 23, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2012 appellant filed a timely appeal from a January 18, 2012 decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. 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 found a \$2,896.64 overpayment of compensation for the period April 20 to November 19, 2011 as appellant received compensation for four hours a day when she was entitled to compensation for only two hours a day; (2) whether it properly denied waiver of the overpayment although she was not at fault; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that she is entitled to waiver of the overpayment as she was not at fault in its creation. She does not contest the fact or amount of the overpayment.

FACTUAL HISTORY

This is appellant's third appeal before the Board in the case. Pursuant to the second appeal, by decision and order issued January 10, 2008,² the Board reversed the October 19, 2006 decision reducing her compensation to zero under 5 U.S.C. § 8115 based on her ability to perform the selected position of full-time registered nurse. The Board found that the selected position did not properly represent appellant's wage-earning capacity. The Board further found that OWCP's May 13, 2007 decision denying a request for a hearing was moot. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

Appellant remained off work through April 2009. She received wage-loss compensation for total disability on the periodic rolls. On May 13, 2009 OWCP obtained a second opinion from Dr. Lyle Shehi, a Board-certified psychiatrist, who opined that appellant could perform limited-duty work for four hours a day, gradually increasing to full time. A vocational rehabilitation effort from June 3 to October 7, 2009 did not result in employment. Appellant remained off work through September 2010.

On October 12, 2010 appellant began working for four hours a day in a modified nursing assistant position at the employing establishment. She received wage-loss compensation for the remaining four hours a day.

On April 10, 2011 appellant's work schedule increased from four to six hours a day. She received compensation for four hours a day from April 20 to November 19, 2011 while working six hours a day. In a November 29, 2011 worksheet, OWCP calculated that appellant's date of injury pay rate as of March 18, 1996 was \$398.50 multiplied by the two-thirds compensation rate. Appellant earned \$322.94 a week as of April 10, 2011, resulting in a 51 percent loss of wage-earning capacity. Adding cost-of-living increases resulted in a \$179.75 weekly pay rate or \$719.00 every four weeks. OWCP determined that the period April 20 to November 19, 2011 was 214 days. Dividing the \$719.00 pay rate by 28 days resulted in a \$2,567.85 daily pay rate, multiplied by the 214 days in the period at issue to equal \$5,495.11 in wage-loss compensation paid. However, appellant was only entitled to \$2,598.57 based on this formula, resulting in an overpayment of \$2,896.64.

In a notice dated November 30, 2011, OWCP advised appellant of its preliminary determination that she received an overpayment in the amount of \$2,896.64 from April 20 to November 19, 2011 as she received wage-loss compensation for four hours a day whereas she was only entitled to receive compensation for two hours a day. Appellant was without fault in creation of the overpayment. OWCP afforded her 30 days to request a telephone conference, precoupment hearing or a final decision based on the record. It also requested financial information and any additional arguments supporting waiver of the overpayment. OWCP

² Docket No. 07-1728 (issued January 10, 2008).

provided appellant an overpayment recovery questionnaire (Form OWCP-20) and explained that the financial information was necessary to “determine a fair repayment method.”

Appellant did not complete and return the overpayment recovery questionnaire or otherwise provide any financial information before January 18, 2012.

By decision dated January 18, 2012, OWCP finalized the fact and amount of the preliminary overpayment finding. It found that although appellant was not at fault in creation of the overpayment, she had not justified waiver of recovery of the overpayment as she failed to provide financial information as requested. OWCP directed recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation payments.

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 his duty.³ 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.”⁴

ANALYSIS -- ISSUE 1

The record establishes that appellant received total wage-loss compensation under FECA on the periodic rolls through September 2010. On October 12, 2010 she began working four hours a day and received compensation for the remaining four hours a day. Appellant’s work schedule increased from four to six hours a day as of April 20, 2011. Although she only had two hours of daily wage loss, she still received compensation for four hours a day through November 19, 2011. OWCP calculated that whereas appellant received \$5,495.11 in wage-loss compensation paid from April 20 to November 19, 2011, she was only entitled to \$2,598.57, resulting in an overpayment of \$2,896.64. The Board finds that the calculations set forth above in the November 30, 2011 preliminary notice of overpayment are correct. Also, appellant did not contest the fact or amount of the overpayment on appeal.

As appellant was entitled to receive only two hours of wage-loss compensation a day for the period April 20 to November 19, 2011, OWCP properly determined that an overpayment in the amount of \$2,896.64 was created for the period.

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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

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 FECA or would be against equity and good conscience.⁵

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits and FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of the claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established or a reasonable, specified period of time. It is the individuals' burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.⁶ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁷

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁸ Recovery of an overpayment is also considered to be against equity and good conscience when any 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.⁹

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.¹⁰

⁵ 5 U.S.C. § 8129.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disability Management*, Chapter 6.600.6(a) (June 2009). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

⁷ *Sherry A. Hunt*, 49 ECAB 467 (1998).

⁸ 20 C.F.R. § 10.437(a).

⁹ *Id.* at § 10.437(b).

¹⁰ 20 C.F.R. § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant did not establish entitlement to waiver of recovery of the \$2,896.64 overpayment under the above-described standards. Appellant did not provide financial information to show that she was entitled to waiver of the overpayment. Despite being advised by OWCP's November 30, 2011 letter of the importance of providing financial information on an overpayment recovery questionnaire form, she failed to provide such information. For these reasons, OWCP properly determined that appellant did not show that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Therefore, it properly denied waiver of recovery of the \$2,896.64 overpayment.¹¹

On appeal, appellant does not contest the fact or amount of the overpayment. She asserts that OWCP should waive recovery of the overpayment as she was not at fault in its creation. As set forth above, appellant failed to submit the requested financial information. Therefore, she did not establish that recovery of the overpayment would either defeat the purpose of FECA or be against equity and good conscience. Therefore, OWCP's denial of waiver was appropriate.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant facts, so as to minimize any hardship.¹²

ANALYSIS -- ISSUE 3

Appellant did not provide any information regarding her current financial circumstances. It is her responsibility to provide information about income, expenses and assets.¹³ OWCP set the recovery of the overpayment at \$100.00 from continuing compensation payments. It calculated the repayment amount so as to minimize hardship in recovering the overpayment. OWCP therefore did not abuse its discretion in finding that appellant should repay her overpayment at the rate of \$100.00 per compensation period. The Board will affirm OWCP's January 18, 2012 decision on the issue of the rate of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,896.64 for the period April 20 to November 19, 2011. The Board further finds that OWCP properly denied waiver of the recovery of the overpayment. The

¹¹ See *R.W. (A.T.)*, 59 ECAB 241 (2007).

¹² 20 C.F.R. § 10.1441(a). See also *G.B.*, Docket No. 11-1568 (issued February 15, 2012).

¹³ *Id.* at § 10.438.

Board further finds that OWCP properly directed recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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