

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

J.N., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, DALLAS FORT WORTH)
AIRPORT, Coppel, TX, Employer)

Docket No. 11-1613
Issued: February 7, 2012

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 5, 2011 appellant filed a timely appeal of a June 14, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision finding an overpayment. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$19,144.93 for the period September 27, 2005 through September 30, 2008; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant alleged that the Office of Personnel Management (OPM) was to reimburse OWCP for disability paid between September 27, 2005 and September 30, 2008 in the amount of \$19,144.93. He stated that there was a clerical error.

FACTUAL HISTORY

On May 9, 2003 appellant, then a 36-year-old bagger screener, filed a traumatic injury claim alleging that he injured his right knee in the performance of duty. OWCP accepted his claim for contusion of the right knee on June 26, 2003. On August 10, 2004 appellant underwent a right knee arthroscopy, partial meniscectomy and synovectomy. OWCP referred him for vocational rehabilitation services. The vocational rehabilitation counselor identified positions within appellant's work abilities including user support analyst. In a letter dated June 14, 2005, OWCP proposed to reduce his wage-loss compensation based on his capacity to earn wages as a user support analyst. By decision dated July 14, 2005, OWCP reduced appellant's compensation benefits effective August 7, 2005 based on his wage-earning capacity.

On August 13, 2008 appellant elected to receive retirement benefits effective September 27, 2005. In a letter dated August 14, 2008, OWCP requested \$20,444.55 from OPM as reimbursement for compensation paid him from September 27, 2005 through August 2, 2008.

Appellant underwent additional knee surgery on March 30, 2009 for a right medial compartment partial arthroplasty and right anterior cruciate ligament repair.

An OWCP claims examiner spoke with Michael Flagg from the Office of Personnel Management on August 6, 2008 regarding appellant's election of the OPM annuity and confirmed that he received \$935.00 from OPM. Nothing had been offset for the reimbursement of compensation received during the election period as requested by OWCP in the August 14, 2008 letter. On August 12, 2008 OWCP received a check in the amount of \$2,444.50 from the United States Treasury on behalf of appellant.

On May 12, 2011 OWCP made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$19,144.93 because he elected retirement annuity on September 27, 2005 but received wage-loss compensation for total disability through September 30, 2008. It found that he was without fault in the creation of the overpayment. OWCP provided appellant with a calculation of the amount of the overpayment totaling \$21,589.43, less the \$2,444.50 payment by OPM resulting in an outstanding overpayment balance of \$19,144.93. It requested that he complete an overpayment recovery questionnaire and provide financial information supporting waiver within 30 days. Appellant did not comply with the request for information within the allotted time.

By decision dated June 14, 2011, OWCP finalized the overpayment in the amount of \$19,144.93 and declined to waive the overpayment. It requested that appellant repay the overpayment in the amount of \$550.00 a month until the repayment was complete.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA² provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116 of FECA defines the 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.⁴ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ The beneficiary must elect the benefit that he or she wishes to receive.⁶

ANALYSIS -- ISSUE 1

Appellant received OPM benefits as of September 27, 2005 based on his August 13, 2008 election form. As such, any wage-loss compensation he received from OWCP after September 27, 2005 constitutes an overpayment of compensation.⁷ The record establishes that OWCP paid appellant compensation until September 30, 2008; thus he received an overpayment. The Board will affirm the fact of overpayment as no offset as made to prevent the receipt of dual benefits.

OWCP calculated the overpayment as \$21,589.43 for the period September 27, 2005 through September 30, 2008. It reduced the overpayment by the payment received from OPM of \$2,444.50 to total an outstanding overpayment of \$19,144.93.⁸

² 5 U.S.C. §§ 8101-8193, 8102.

³ *Id.*

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

⁷ *Franklin L. Bryan*, 56 ECAB 310 (2005); *A.L.*, Docket No. 09-1529 (issued January 13, 2010).

⁸ OWCP's procedure manual explains that there is an agreement between OWCP and OPM which allows for offset against amounts payable for the retirement and disability funds if there are accrued benefits which have not yet been paid to the debtor, because of a retroactive election of benefits. Under this agreement, OPM will reimburse OWCP up to the amount of accrued benefits without certification of notice to satisfy due process. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.9(a) (May 2004).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payments to which the individual is entitled.⁹ The only exception to this requirement that an overpayment must be recovered is set forth 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.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of FECA or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations¹⁰ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed the resource base of \$4,800.00 for an individual.¹¹ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹²

Recovery of an overpayment is 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 position for the worse.¹³ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.¹⁴

⁹ 5 U.S.C. § 8129(a).

¹⁰ 20 C.F.R. § 10.436.

¹¹ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹² *Id.*

¹³ 20 C.F.R. § 10.437(b).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

ANALYSIS -- ISSUE 2

Appellant did not submit a completed overpayment recovery questionnaire or any financial information outlining his income, expenses and assets. As he did not submit complete financial information, there was insufficient evidence before OWCP to determine that recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁵ As appellant failed to submit the requested information, as required by section 10.438 of its regulations, he was not entitled to a waiver.¹⁶ The Board finds that OWCP properly denied waiver of the \$19,144.93 overpayment of compensation.

With respect to the recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁷ As appellant is no longer in receipt of compensation under FECA, the Board has no jurisdiction over this aspect of his case.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$19,144.93 for the period September 27, 2005 through September 30, 2008 for which he was not at fault and for which he did not establish that he was entitled to waiver of recovery of the overpayment.

¹⁵ *See id.* at § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹⁶ *Id.*

¹⁷ *D.R.*, 59 ECAB 148 (2007).

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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