

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

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W.B., Appellant)	
)	
and)	Docket No. 12-933
)	Issued: September 7, 2012
U.S. POSTAL SERVICE, NORTHERN OHIO PERFORMANCE CLUSTER, Cleveland, OH, Employer)))	

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On March 20, 2012 appellant filed a timely appeal from the February 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 appellant received a \$13,354.51 overpayment of compensation; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment; and (3) whether it properly required repayment of the overpayment by deducting \$375.00 from appellant's compensation payments every 28 days.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on July 26, 2007 appellant, then a 40-year-old mail handler, sustained a right shoulder sprain and right rotator cuff syndrome due to pulling mail carts. He performed limited-duty work for a period, but later stopped work when the employing establishment could not accommodate his work restrictions. Appellant received OWCP compensation on the periodic rolls.

Appellant was receiving compensation for the period November 16, 2010 to May 7, 2011 but the night differential and health benefits were taken out at an improper rate. The documents indicated that he was being overpaid night differential in the amount of \$764.74 a week. Appellant received the night differential for all 35 hours whereas he should have received it for only a 10.6 percent of the 35 hours. The correct amount would have been \$90.66 (versus the \$855.40 that he was being paid since November 16, 2010). It was also noted that incorrect health benefit code of 642 had been used which resulted in an incorrect deduction of health benefits from January 15 to May 12, 2011.

In a June 22, 2011 notice, OWCP advised appellant of its preliminary determination that he received a \$13,354.51 overpayment of compensation because it incorrectly computed his night differential pay during the period November 16, 2010 to May 7, 2011 and had incorrectly deducted incorrect health benefits from January 15 to May 7, 2011. It made a preliminary determination that he was without fault in the creation of the overpayment as he was not aware and could not have reasonably been expected to know that OWCP had paid compensation incorrectly. OWCP advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

Appellant requested a precoupment hearing and waiver of the overpayment on July 16, 2011, noting that he believed the overpayment occurred through no fault of his own and that repayment would place him in financial hardship. He submitted the OWCP-20 form, completed on July 16, 2011, in which he listed his monthly income, monthly expenses and assets.

At the November 17, 2011 precoupment hearing, appellant confirmed that the income and expenses reported on the OWCP-20 form were still accurate. He indicated that his compensation benefits decreased substantially after the errors were corrected. Appellant noted that the figures he provided on the OWCP-20 form for rent, food and clothes had not changed, but indicated that he also paid renter's insurance of about \$40.00 a month. He stated that he still paid \$280.00 a month to the Internal Revenue Service for tax liens. OWCP's hearing representative asked appellant to provide an itemized list of his claimed monthly expense of \$1,775.00 in utilities and explained that only the minimum amount due for credit card debt could be considered. The record was to remain open for 30 days to allow appellant an opportunity to submit a more detailed itemized breakdown of his monthly income, monthly expenses and assets as well as documentation to support the claimed figures. Appellant indicated that he hoped that

the overpayment could be waived as it was not his mistake and he believed that the calculation of his compensation had been correct when he received the payments.

After the precoupment hearing, appellant submitted a much more detailed account of his monthly income and monthly expenses. He also submitted numerous documents, such as account and billing statements, in support of his claimed monthly expenses. Appellant listed household monthly income of \$5,435.00² and monthly expenses of \$5,033.00. He itemized his monthly expenses and included figures for such claimed expenses as credit card payments, college tuition, tobacco and miscellaneous items.

In a February 6, 2012 decision, OWCP's hearing representative determined that appellant received a \$13,354.51 overpayment of compensation as OWCP had clearly documented the method through which the overpayment had occurred as well as the actual amount of the overpayment. She found that he was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The hearing representative found that appellant's household received \$5,435.00 in income a month. She noted that the monthly expenses he claimed were mostly verified with copies of billing and account statements. The hearing representative stated that most of the amounts listed for expenses such as rent, food, clothing, fuel and utilities were reasonable, but noted that items such as tobacco and television service beyond basic service were not considered ordinary and necessary living expenses. She indicated that miscellaneous expenses were only authorized for \$50.00 per household member and that there was no documentation to support the amount of college tuition or credit card payments claimed. After deducting for these claimed amounts, appellant had monthly expenses of about \$4,237.00, a figure which was about \$1,198.00 less than his monthly income. The hearing representative determined that, because his monthly income exceeded his monthly expenses by this amount, he had not shown that recovery of the overpayment would defeat the purpose of FECA. She also found that appellant had not shown that recovery of the overpayment would cause severe financial hardship or that he detrimentally relied on the overpayment monies and concluded that waiver of recovery of the overpayment was not warranted. The hearing representative further found that the financial circumstances dictated that the overpayment be recovered by deducting \$375.00 from his OWCP benefits every 28 days.

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:

“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

² This figure would be obtained after converting appellant's OWCP compensation payment every 28 days to a monthly figure.

³ 5 U.S.C. § 8102(a).

prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁴

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he 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.⁵

An employee entitled to disability compensation may continue his health benefits under the Federal Employee Health Benefits (FEHB) program. The regulations of the Office of Personnel Management, which administers the FEHB program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$13,354.51 overpayment of compensation. The record reflects that he received an overpayment of compensation for the period November 16, 2010 to May 7, 2011 due to an improper rate of night differential and an incorrect deduction for health benefits. The documents indicated that appellant was being overpaid night differential in the amount of \$764.74 a week for 35 hours of night differential rather than for 10.6 percent of 35 days. Appellant received \$855.40 a week but should have received only \$90.66. The documents also show that due to an incorrect health benefit code of 642, insufficient withholding was made for health benefits from January 15 to May 12, 2011. These errors resulted in appellant receiving an overpayment of compensation of \$13,354.51. Appellant has not submitted any evidence disputing the fact and amount of the overpayment and the Board finds that he received a \$13,354.51 overpayment.

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(a).

⁶ 5 C.F.R. § 890.502(b)(1). In computing pay rate, section 8114(e) of FECA provides for the inclusion of certain premium pay received, and where the evidence indicates additional amounts received in Sunday or night differential pay fluctuated or may have fluctuated, OWCP determines the amount of additional pay received during the one-year period prior to injury. 5 U.S.C. § 8114(e)(1); *Calvin E. King*, 51 ECAB 394 (2000).

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.⁷ 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 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."⁸ 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 his 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.⁹ 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 his position for the worse.¹⁰ 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 the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹¹

ANALYSIS -- ISSUE 2

In the present case, OWCP's hearing representative properly considered the monthly income and monthly expenses reported by appellant along with the documentation he submitted in support thereof and properly concluded that he had \$5,435.00 in monthly income and \$4,237.00 in monthly expenses. With respect to monthly expenses, she correctly subtracted some claimed expenses because they were not necessary and ordinary (such as expenses for tobacco and television service beyond basic service) or because they were not supported by documentation (such as certain claimed college tuition and credit card payments). Therefore, it

⁷ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his 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 procedures provide 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).

¹⁰ *Id.* at § 10.437(a), (b).

¹¹ *Id.* at § 10.437(b)(1).

was determined that appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately \$1,198.00.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. As noted above, his monthly income exceeds his monthly ordinary and necessary expenses by approximately \$1,198.00. As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.¹² Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹³

The Board finds that appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience and thus OWCP has not abused its discretion by refusing to waive the overpayment.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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 the 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 factors, so as to minimize any hardship.”¹⁵

¹² See *supra* note 11 and accompanying text.

¹³ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁴ On appeal, appellant alleged that his financial circumstances had changed for the worse, but OWCP's overpayment determination which respect to waiver was based on his financial circumstances at the time of its February 6, 2012 decision. The Board's consideration of this matter is limited to the sufficiency of OWCP's actions at the time it issued its February 6, 2012 decision.

¹⁵ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$375.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP did not abuse its discretion by requiring repayment of the overpayment by deducting \$375.00 from his compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received a \$13,354.51 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment and by deducting \$375.00 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board