

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

C.D., Appellant)	
)	
and)	Docket No. 14-1209
)	Issued: December 16, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Los Angeles, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 30, 2014 appellant, through her attorney, filed a timely appeal from a March 12, 2014 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 OWCP properly determined that appellant received an overpayment in the amount of \$104,646.54 for the period June 6, 2010 through April 6, 2013; and (2) whether OWCP abused its discretion in denying waiver of the overpayment.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, then a 42-year-old distribution clerk, injured her right shoulder on March 26, 2000. She filed a claim for benefits, which OWCP accepted for right the diagnosed conditions including shoulder strain, right arm strain, and

¹ 5 U.S.C. § 8101 *et seq.*

adhesive capsulitis of the right shoulder. Appellant has not returned to work since March 26, 2000. OWCP paid compensation benefits for temporary total disability.

By decision dated February 20, 2008, OWCP terminated appellant's compensation benefits based on Dr. Phillip D. Kiester's impartial medical report, dated September 27, 2007, finding that it represented the weight of the medical evidence.

On October 16, 2008 appellant requested reconsideration.

By decision dated January 9, 2009, OWCP denied appellant's request for modification of the February 20, 2008 termination decision. In the February 23, 2010 decision,² the Board affirmed OWCP's February 20, 2008 termination decision, finding that Dr. Kiester's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that she no longer had any residuals from her accepted March 2000 injury. The Board, however, set aside the January 9, 2009 decision which found that appellant did not have any continuing disability caused by the accepted employment injury following the February 20, 2008 termination decision. The Board remanded the case for additional review. The complete facts of this case are set forth in the Board's February 23, 2010 decision and are herein incorporated by reference.

In an "ACPS" payment record dated June 15, 2010, OWCP stated on the form that it was "[r]einstating compensation benefits as directed on remand by ECAB."

By letter to appellant dated June 17, 2010, OWCP stated, "This letter is to inform you that your medical benefits and entitlement to compensation benefits have been reinstated." It further stated that it had been informed that she was also receiving or might be entitled to receive benefits provided by the Office of Personnel Management (OPM) under the Civil Service Retirement System Act (CSRS) or the Federal Employees' Retirement System (FERS). OWCP advised appellant that annuity benefits paid by OPM and benefits for wage loss paid by OWCP were not payable for the same period of time and that employees entitled to both OWCP and OPM benefits must elect which benefit to receive.

On June 21, 2010 appellant advised OWCP that she was electing to receive its compensation benefits, effective February 20, 2008.

By decision dated July 1, 2010, OWCP denied modification of the February 20, 2008, decision, finding that appellant did not have any continuing disability caused by the accepted employment injury, following the February 20, 2008 termination decision.

In an "ACPS" payment record dated April 24, 2013, OWCP stopped payment of appellant's periodic compensation benefits, effective April 7, 2013. The form indicated that there was an overpayment in the amount of \$102,177.13 and stated, under the heading Comments/Reason, that compensation should not have been reinstated, as the 2010 Board decision only directed further medical development of the January 9, 2010 reconsideration decision. It did not overturn the 2008 termination decision.

² Docket No. 09-1152 (issued February 23, 2010).

On May 2, 2013 OWCP issued a preliminary determination that an overpayment had occurred in the amount of \$104,646.54 for the period June 6, 2010 through April 6, 2013 because she received compensation to which she was not entitled. It found that the February 23, 2010 Board decision set aside the January 9, 2010 reconsideration decision but affirmed the prior termination decision. OWCP found that she should not have been paid from June 6, 2010 to the present and was mistakenly sent an election form. On this basis it found that she was not at fault for the period of overpayment from June 6 to July 1, 2010, the date of its reconsideration decision. Beginning July 1, 2010, however, OWCP found that because it issued its reconsideration decision on that date, a decision which affirmed the prior decisions terminating her compensation benefits, appellant and her attorney were aware that her compensation benefits were being terminated. On this basis OWCP found appellant with fault for the remaining period of overpayment because she knowingly received compensation benefits from July 1, 2010 to April 6, 2013, as the July 1, 2010 decision effectively terminated such entitlement. It reiterated that the February 23, 2010 Board decision only directed OWCP to seek further opinion from the referee examiner regarding continuing disability, not resume paying her disability compensation.

OWCP found that appellant received an overpayment of \$104,646.54 in compensation during that period.³ It advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. OWCP further advised appellant that if it could be shown that recovery would defeat the purpose of the law or would be against equity and good conscience, she could be eligible for a waiver. It informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to OWCP, or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days of the May 2, 2013 letter.

On May 13, 2013 appellant requested a precoupment hearing and completed the Form OWCP-20. She stated that she had a total monthly household income of \$3,290.00 and monthly expenses totaling \$4,220.00, with assets of \$1,327.00. Appellant, however, did not submit documentation supporting these totals. At the precoupment hearing, she stated that she disagreed with the overpayment but that it occurred through no fault of her own; she requested a waiver of the overpayment. Appellant stated that she believed the compensation payments were justified and that she should continue to receive OWCP compensation benefits.

³ OWCP calculated the amount of overpayment by taking her net monthly, 28-day compensation payment from June 6, 2010 to January 15, 2011, \$2,765.74, and multiplying this figure by 8 compensation checks, which amounted to \$22,125.92; taking her net monthly, 28-day compensation payment from January 16 to April 9, 2011, \$2,754.56, and multiplying this figure by 3 checks, which amounted to \$8,263.68, then adding compensation based on Consumer Price Index (CPI) for the period March 1 to April 9, 2011, \$72.86; taking her net monthly, 28-day compensation payment from April 10, 2011 to January 14, 2012, \$2,805.56, and multiplying this figure by 10 checks, which amounted to \$28,055.60; taking her net monthly, 28-day compensation payment from January 15, 2012 to March 10, 2012, \$2,792.02, and multiplying this figure by 2 checks, which amounted to \$5,584.04, then adding compensation based on CPI for the period March 1 to 10, 2012, \$35.00; taking her net monthly, 28-day compensation payment from March 11, 2012 to January 12, 2013, \$2,890.02, and multiplying this figure by 11 checks, which amounted to \$31,790.22; taking her net monthly, 28-day compensation payment from January 13 to March 9, 2013, \$2,882.62, and multiplying this figure by 2 checks, which amounted to \$5765.24, then adding compensation based on CPI for the period March 1 to 9, 2012, \$17.36; and her net monthly, 28-day compensation payment from March 10 to April 6, 2013, \$2,936.62, which created an overpayment of \$104,646.54.

At the hearing appellant's attorney argued that appellant was not overpaid because the decision directed reinstatement of her compensation benefits. Appellant stated that she was told by an OWCP representative on more than one occasion that she was entitled to reinstatement of her compensation benefits. The hearing representative advised her that the record would be held open for a period of 30 days to submit documentation of income and expenses to justify waiver of the overpayment.

In a decision dated March 12, 2014, an OWCP hearing representative finalized the preliminary determination regarding the overpayment of \$104,646.54 for the period June 6, 2010 through April 6, 2013. He, however, modified the decision, finding that appellant was not at fault for the creation of any part of the overpayment. The hearing representative noted that OWCP sent appellant letters dated June 15 and 17, 2010 indicating that her medical benefits and entitlement to compensation benefits had been reinstated based on the Board's February 23, 2010 decision. In addition, he stated that OWCP's July 1, 2010 decision did not clearly advise her that she was not entitled to medical and wage-loss compensation benefits and that OWCP did not discontinue its compensation payments at that time. The hearing representative therefore found that appellant should not have been expected to know that an overpayment had occurred.

OWCP hearing representative found, nonetheless, that appellant was not eligible for waiver of the overpayment, as she had failed to submit the required documentation to support her stated income and expenses. He also stated that the minimum collection guidelines would be followed and the overpayment collected at a rate of \$400.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that compensation shall be paid for disability or death of an employee resulting from personal injury occurring while in the performance of duty.⁴ Compensation for total disability, pursuant to OWCP regulations, is payable when the employee starts to lose pay.⁵ Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,646.54 for the period June 6, 2010 through April 6, 2013. The record shows that appellant received an overpayment during the period in question because, as indicated in its June 15, 2010 letter to appellant, it mistakenly believed that the Board had directed reinstatement in its February 23, 2010 decision and reinstated monthly compensation payments to appellant beginning June 6, 2010. In fact, the Board's February 23, 2010 decision clearly affirmed the termination of appellant's compensation. Appellant continued to receive checks for temporary total disability compensation until OWCP discovered its error and

⁴ 5 U.S.C. § 8102.

⁵ 20 C.F.R. § 10.401(a) (2003).

⁶ *Id.* at § 10.500(a) (2003).

discontinued payments as of April 7, 2013. OWCP calculated the \$104,646.54 overpayment by totaling the amount of temporary total disability compensation appellant received during the period June 6, 2010 through April 6, 2013, \$104,646.54, in accordance with the procedure outlined above. Based on this determination, OWCP properly found that appellant received an overpayment of compensation in the stated amount during that period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁷ provides that when an overpayment has been created because of error of fact or law, it must be recovered 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 good conscience.” Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.⁸ OWCP must then 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 sections 10.436⁹ and 10.437¹⁰ of the implementing federal regulations.

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 denial of waiver and no further request for waiver shall be considered until the requested information is received.¹¹

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in the creation of the overpayment. In the March 12, 2014 decision, the hearing representative explained that since OWCP had mistakenly advised appellant on June 15 and 17, 2010 that her entitlement to compensation benefits had been reinstated, appellant could not have known that she was not entitled to the benefits she received. The fact that she was without fault does not preclude OWCP from recovering all or part of the overpayment.¹² The Board has held that OWCP must rely on a claimant’s current financial situation at the time of the waiver determination.¹³ Past circumstances or assumed future conditions are not a proper basis on which to decide a

⁷ 5 U.S.C. § 8129(a)-(b).

⁸ An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to material fact which she knew or should have known to be incorrect; or (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known was incorrect. 20 C.F.R. § 10.433(a).

⁹ 20 C.F.R. § 10.436.

¹⁰ *Id.* at § 10.437.

¹¹ *Id.* at § 10.438.

¹² *See George A. Rodriguez, 57 ECAB 224 (2005).*

¹³ *L.S., 59 ECAB 350 (2008).*

claimant's eligibility for waiver.¹⁴ Although appellant was not at fault in creating the overpayment, this does not mean that she gets to keep the overpaid amount if she does not meet eligibility requirements for waiver, as noted above. In the instant case, she stated that she had \$4,220.00 in expenses and her total monthly income of \$3,290.00. Appellant, however, did not submit the requested documentation in support of these amounts, as the hearing representative requested at the time of the hearing. This did not allow OWCP to apply established criteria for determining whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,646.54 for the period June 6, 2010 through April 6, 2013. The Board further finds that OWCP properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ 20 C.F.R. § 10.433

¹⁵ See *P.H.*, Docket No. 14-955 (issued August 19, 2014).