

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

L.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 14-101
Issued: March 20, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant filed a timely appeal from the September 16, 2013 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 \$1,113.85 overpayment of compensation; and (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

In May 2007, OWCP accepted that appellant, then a 37-year-old mail clerk, sustained a lumbosacral sprain due to her repetitive work duties, including throwing mail parcels and lifting

¹ 5 U.S.C. §§ 8101-8193.

and pulling heavy objects. She initially worked in a limited-duty position for the employing establishment, but she stopped work in March 2012 and was placed on the total disability rolls.²

On January 2, 2013 appellant returned to full-time work for the employing establishment without wage loss. She continued to receive total disability compensation through January 12, 2013.

In a January 16, 2013 notice, OWCP advised appellant of its preliminary determination that she received a \$1,113.85 overpayment of compensation because she returned to work on a full-time basis without wage loss on January 2, 2013, but continued to receive compensation for wage loss due to temporary total disability through January 12, 2013.³ It also made a preliminary determination that she was not at fault in the creation of the overpayment as she received her electronic payment automatically and that there was no evidence that she knew or should have known the payment was incorrect when she received it. OWCP advised appellant that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed her that she 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 within 30 days even if she was not requesting waiver of the overpayment.

Appellant submitted a financial information questionnaire, which she completed on February 7, 2013. She did not list any monthly income, but she listed \$2,737.00 in monthly expenses, comprised of \$615.00 for rent or mortgage, \$600.00 for food, \$438.00 for utilities, \$835.00 for loan payments to the Postal Credit Union and \$249.00 for unspecified miscellaneous expenses. Appellant listed \$140.00 in total assets comprised of her checking account balance.

Appellant asked for waiver of recovery of the overpayment and requested a precoupment hearing with an OWCP hearing representative. At the July 16, 2013 hearing, she stated that she did not realize that she had been overpaid when she continued to receive total disability compensation after returning to work on January 2, 2013. Appellant testified that she had a net monthly income of \$3,273.12 in salary from the employing establishment.⁴ She asserted that she had monthly expenses of \$3,106.55, comprised of \$615.00 for a mortgage; \$600.00 for food; \$324.00 for utilities (natural gas, electric and water); \$108.00 for a cell phone; \$46.27 for cable television; \$46.00 for internet; \$129.00 for unreimbursed dental expenses;

² Appellant was placed on the daily rolls effective March 31, 2012 and on the periodic rolls effective July 29, 2012.

³ OWCP provided documents regarding appellant's compensation payments in early 2013 and calculations showing that she received \$1,113.85 in total disability compensation during the 11 days (January 2 to 12, 2013) that she was not entitled to receive such compensation. On January 12, 2013 appellant received an electronic \$2,835.25 payment covering the period December 16, 2012 to January 12, 2013 and the calculations showed that the portion of this payment covering the period January 2 to 12, 2013 equaled \$1,113.85.

⁴ Appellant received a \$1,510.67 payment 26 times per year. Dividing the multiplied product of these two figures (\$39,277.42) by 12 yields the monthly income figure of \$3,273.12.

\$122.00 for car insurance; \$120.00 for gasoline; \$942.50 for a car loan; and \$53.78 for union dues.⁵ Appellant testified that she had about \$2.00 in assets in the bank.⁶

In a September 16, 2013 decision, the hearing representative determined that appellant received a \$1,113.85 overpayment of compensation. She found that appellant was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The hearing representative found that recovery of the overpayment would not defeat the purpose of FECA because appellant's monthly income (\$3,273.12) exceeded her monthly expenses (\$3,106.55) by more than \$50.00. She directed appellant to forward \$50.00 to OWCP each month to repay the \$166.57 overpayment.⁷

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 or her duty.⁸ 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 prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁹

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he or she 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$1,113.85 overpayment of compensation. In the present case, appellant received total disability compensation for the period January 2 to 12, 2013 despite the fact that she had returned to work on January 2, 2013 without wage loss and

⁵ The monthly figures for the car loan and union dues payments were derived from biweekly payment amounts provided by appellant.

⁶ Appellant indicated that she was unmarried and supported her 17-year-old son and noted that she was the only person in the household who had an income.

⁷ As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441(a).

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(a).

was not entitled to compensation for this period. The record contains evidence which shows that appellant received \$1,113.85 in total disability compensation for the period January 2 to 12, 2013 to which she was not entitled.¹¹ Therefore, OWCP properly determined that appellant received a \$1,113.85 overpayment.

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.¹² 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."¹³ 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 or her 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.¹⁴ 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 or her position for the worse.¹⁵ 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.¹⁶

¹¹ The record contains pay documents and calculations showing that appellant received a \$2,835.25 payment covering the period December 16, 2012 to January 12, 2013 and that the portion of this payment covering the period January 2 to 12, 2013 equaled \$1,113.85.

¹² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. 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. *B.F.*, Docket No. 13-785 (issued September 20, 2013); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁵ 20 C.F.R. § 10.437(a), (b).

¹⁶ *Id.* at § 10.437(b)(1).

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The record reflects that she has monthly income of \$3,273.12, which exceeds her monthly expenses of \$3,106.55 by \$166.57.¹⁷ As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁸ Because she 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 her assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁹

In connection with her appeal, appellant submitted additional information about her monthly expenses, but the Board cannot consider such evidence for the first time on appeal.²⁰ Because she has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, appellant has failed to show that OWCP abused its discretion by refusing to waive the \$1,113.85 overpayment.

CONCLUSION

The Board finds that appellant received a \$1,113.85 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

¹⁷ As a July 16, 2013 prerecolement hearing, appellant testified in detail about her monthly income, monthly expenses and assets. Her monthly income came solely from her salary at the employing establishment. Appellant's monthly expenses were comprised of \$615.00 for a mortgage; \$600.00 for food; \$324.00 for utilities; \$108.00 for a cell phone; \$46.27 for cable television; \$46.00 for internet; \$129.00 for unreimbursed dental expenses; \$122.00 for car insurance; \$120.00 for gasoline; \$942.50 for a car loan; and \$53.78 for union dues.

¹⁸ See *supra* note 14.

¹⁹ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁰ See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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