

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

P.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Durham, NC, Employer

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**Docket No. 14-227
Issued: January 9, 2015**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument July 22, 2014

DECISION AND ORDER

Before:

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

JURISDICTION

On November 12, 2013 appellant filed a timely appeal from a May 30, 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$276,526.36 because she received dual Department of Veterans Affairs (VA) and FECA benefits for the same condition (manic depression); (2) whether OWCP properly found her at fault for the period December 16, 2003 to August 25, 2012, with an overpayment of \$237,356.56, and thus she was not entitled to waiver for this period; and (3) whether OWCP properly denied waiver for the period June 16, 2002 to December 15, 2003, with an overpayment of \$39,169.90, when she was found not at fault.

¹ 5 U.S.C. §§ 8101-8193.

On appeal and at oral argument appellant asserted that the condition accepted by OWCP was different than that accepted by VA and that, as she had elected VA compensation, she was not at fault when OWCP continued to pay wage-loss compensation. She further testified that she had timely submitted financial information to OWCP.

FACTUAL HISTORY

On June 8, 2000 appellant, a 35-year-old postal window clerk, filed an occupational disease claim alleging that working in a stressful environment aggravated preexisting anxiety and panic attacks. On April 12, 2001 OWCP accepted that she sustained temporary aggravation of preexisting manic depression. Appellant stopped work on June 1, 2001 and was placed on the periodic compensation rolls at the augmented 3/4 rate.

In correspondence dated September 4, 2001, the VA informed appellant that her rating for major depression and anxiety with panic attacks had been increased from 70 percent to 100 percent effective May 3, 2001.

By letter dated November 17, 2003, OWCP informed appellant that, as she was receiving VA and FECA benefits for the same condition, she would have to elect between VA and FECA. Appellant was informed that an overpayment of compensation had been created and it would continue to grow until she made her election. In a December 16, 2003 letter, she indicated that she was electing VA benefits.

OWCP however did not terminate appellant's FECA benefits in 2003 and in October 2008 appellant began receiving compensation at the nonaugmented 2/3 rate as she no longer had dependents. She reported receiving VA benefits on multiple EN1032 forms. Appellant's wage-loss compensation was finally terminated on August 25, 2012, as she had elected VA benefits.

On September 12, 2012 OWCP issued a preliminary finding that an overpayment in compensation in the amount of \$276,526.36 had been created because appellant had received dual VA and FECA benefits for the same condition. It found her without fault for the period June 16, 2002 to December 15, 2003 with an overpayment amount of \$39,169.80, and with fault for the period December 16, 2003 to August 25, 2012, with an overpayment in the amount of \$237,356.56. A September 12, 2012 overpayment worksheet and computer printouts indicated that appellant received FECA compensation totaling \$276,526.36 for the period June 16, 2002 to August 25, 2012, which included net compensation of \$237,356.56 from December 16, 2003 to August 25, 2012.

On October 11, 2012 appellant requested a prerecoupment hearing and submitted an overpayment questionnaire in which she indicated that she had monthly income of \$4,345.00 and monthly expenses of \$3,895.00. At the hearing, held on February 19, 2013, she maintained that the employment injury was due to harassment at work and was therefore a separate injury. Appellant testified with regard to her expenses and indicated that she had filed for bankruptcy. The hearing representative asked her to submit additional financial information documenting her claimed expenses.

In a May 30, 2013 decision, an OWCP hearing representative finalized that appellant received an overpayment of compensation in the amount of \$276,526.36 for the period June 12, 2001 to August 26, 2012. She noted that appellant had not submitted further financial information. The hearing representative found that appellant was without fault for the period June 16, 2002 to December 15, 2003, when she received compensation totaling \$39,169.80, and with fault for the period December 16, 2003 to August 25, 2012, when she received compensation of \$237,356.56,² because she accepted a payment she knew or should have known to be incorrect. She found that appellant was not entitled to waiver, noting that she reported monthly income of \$4,345.00 on the overpayment questionnaire, which exceeded the reported monthly expenses of \$3,995.00. The hearing representative set recovery at \$500.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.³ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁴ Section 8116(a) provides that while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return 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.⁵

ANALYSIS -- ISSUE 1

Appellant's occupational disease claim was accepted by OWCP for aggravation of preexisting chronic depression. She was paid wage-loss compensation under FECA. On September 4, 2001 VA informed appellant that her rating for manic depression and anxiety with panic attacks had been increased from 70 to 100 percent, effective May 3, 2001. Appellant also continued to receive FECA benefits for the accepted aggravation of preexisting chronic depression until August 25, 2012.

There is a prohibition against an employee receiving benefits both under FECA and from VA for the same injury, including any increase in a service-connected disability where the increase is brought about by an injury sustained while in civilian employment.⁶ Thus, when VA raised appellant's disability rating from 70 to 100 percent for manic depression, shortly after her FECA claim was accepted as having aggravated her preexisting condition, this increase was due

² The May 30, 2013 decision contains a typographical error concerning the amount of the overpayment for the period December 16, 2003 to August 25, 2012, indicating that it was \$236,491.81. The September 12, 2012 overpayment worksheet documents that the amount of the overpayment for this period was \$237,356.56.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116.

⁵ *Id.* at § 8116(a).

⁶ *Kelvin L. Davis*, 56 ECAB 404 (2005).

to the same condition that formed the basis for entitlement under FECA.⁷ An overpayment worksheet and computer printouts indicate that appellant received FECA compensation totaling \$276,526.36 for the period June 16, 2002 to August 25, 2012.

As appellant received \$276,526.36 in FECA compensation while concurrently receiving VA benefits for the same condition, an overpayment of compensation in that amount was created.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.”⁹

Section 10.433(a) of OWCP regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁰

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹¹

ANALYSIS -- ISSUE 2

OWCP found appellant not at fault for the period June 16, 2002 to December 15, 2003, and at fault for the period December 16, 2003 to August 25, 2012. The Board agrees with this

⁷ 5 U.S.C. § 8116(a); *see id.*

⁸ *See R.P.*, Docket No. 13-1415 (issued December 13, 2013).

⁹ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁰ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹¹ 20 C.F.R. § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

determination as she had not been advised about her dual benefits nor offered an opportunity to elect.

OWCP found appellant at fault in creating the overpayment for the period December 16, 2003 to August 25, 2012 because she accepted payment that she knew or should have known was incorrect. The record indicates that she was advised on November 17, 2003 that, because she was receiving VA and FECA benefits for the same condition, she would have to elect between VA and FECA. Appellant was informed that an overpayment of compensation had been created and it would continue to grow until she made her election. In a December 16, 2003 letter, she indicated that she was electing VA benefits. Thus, she knew or should have known after this election that she was no longer entitled to FECA benefits. As appellant continued to receive both VA and FECA compensation until August 25, 2012, the Board finds that she was at fault in the creation of the overpayment for the period December 16, 2003 to August 25, 2012 and is not entitled to waiver for this period.¹²

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.”¹³ Section 10.438 of OWCP 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 on 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.¹⁴

Section 10.436 of the implementing regulations 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 plus \$960.00 for each additional dependent.¹⁵ 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).¹⁶

¹² *L.L.*, Docket No. 12-1724 (issued March 26, 2013).

¹³ 5 U.S.C. § 8129; *see Linda E. Padilla, supra* note 9.

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.a.1 (June 2009).

¹⁶ *Id.*

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.¹⁷ 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.¹⁸

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.¹⁹

ANALYSIS -- ISSUE 3

As appellant was without fault for the period June 16, 2002 to December 15, 2003, waiver of the overpayment of compensation for that period, in the amount of \$39,169.90, must be considered. The Board finds that appellant is not entitled to waiver of the overpayment.

Appellant submitted an overpayment questionnaire in which she indicated that she had monthly income of \$4,345.00 and monthly expenses of \$3,895.00, yielding a difference between current income and household living expenses of \$450.00. The Board thus finds that, as appellant’s monthly income exceeds her documented reasonable monthly expenses by \$450.00, she is not entitled to waiver as she does not need substantially all of her income to meet current ordinary and necessary expenses.²⁰

While appellant asserted on appeal and at oral argument that she submitted additional financial information to OWCP in support of a hardship claim, the record before the Board does not include any additional financial information submitted prior to the May 30, 2013 decision. The Board’s jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision.²¹

The Board therefore finds that OWCP properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of FECA. Moreover, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, OWCP properly determined that recovery would not be against equity and good conscience. OWCP properly denied waiver of the overpayment.

¹⁷ 20 C.F.R. § 10.437.

¹⁸ Federal (FECA) Procedure Manual, *supra* note 15 at Chapter 6.200.6.b.3 (June 2009).

¹⁹ *R.J.*, Docket No. 10-1756 (issued May 3, 2011).

²⁰ *See R.M.*, Docket No. 07-1066 (issued February 6, 2009).

²¹ *J.T.*, 59 ECAB 293 (2008); 20 C.F.R. § 501.2(c)(1). The Board also notes that appellant submitted financial evidence with her appeal to the Board. As noted, the Board cannot consider this evidence as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision.

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²² As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²³

CONCLUSION

The Board finds that appellant received a \$276,526.36 overpayment of compensation for the period June 16, 2002 to August 25, 2012. The Board also finds that OWCP properly found her at fault for the period December 16, 2003 to August 25, 2012, with an overpayment of \$237,356.56, and thus she was not entitled to waiver for this period. Lastly, the Board finds that OWCP properly denied waiver for the period June 16, 2002 to December 15, 2003, with an overpayment of \$39,169.90, when she was found not at fault.

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2015
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

²² *Cheryl Thomas*, 55 ECAB 610 (2004).

²³ *Id.*