

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

C.B., Appellant)	
)	
and)	Docket No. 15-1333
)	Issued: September 1, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL, El Paso, TX,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 27, 2015 appellant filed a timely appeal from a May 12, 2015 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.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$749.14 for the period February 2 through 7, 2015 because OWCP paid her disability compensation after she returned to work; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence with her appeal. The Board, however, has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On January 10, 2011 appellant, then a 30-year-old border patrol agent, filed a traumatic injury claim alleging that on January 5, 2011 she experienced pain in her right pelvic area and right shoulder after adjusting a divider in a file cabinet. OWCP accepted the claim for an unspecified contusion of the trunk, lumbar sprain, and a sprain of the shoulder, upper arm, and right acromioclavicular joint.³

On September 3, 2014 appellant underwent a subacromial decompression and acromioplasty of the right shoulder. OWCP paid her compensation on the periodic rolls by direct deposit beginning that date.

On February 2, 2015 appellant returned to her regular employment. On February 7, 2015 OWCP paid her net disability compensation by direct deposit of \$3,495.98 covering the period January 11 to February 7, 2015.

By letter dated February 17, 2015, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$749.14 for the period February 2 to 7, 2015 because she returned to work, but continued to receive compensation for total disability. It calculated the overpayment by dividing the net payment of \$3,495.98 for the period January 11 to February 7, 2015 by 28 and multiplying by 6, the number of days that she was overpaid, to find a total overpayment of \$749.14. OWCP further informed appellant of its preliminary determination that she was without fault in creating the overpayment as she received the amount by direct deposit in a single payment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents so that it could consider whether she was entitled to waiver of recovery of the overpayment. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On February 28, 2015 appellant requested a decision on the written evidence.⁴

By decision dated May 12, 2015, OWCP determined that appellant received an overpayment of compensation in the amount of \$749.15 for the period February 2 through 7, 2015 because she received disability compensation after she returned to employment. It denied waiver of recovery of the overpayment as she did not submit a completed overpayment recovery questionnaire or financial information. OWCP requested that appellant repay the full amount of the overpayment within 30 days.

On appeal appellant argues that she does not have the money to repay the overpayment and that her expenses exceed her income. She asserts that OWCP did not inform her that she had

³ By decisions dated April 24 and August 18, 2011, OWCP denied appellant's claim for compensation for disability beginning February 24, 2011 as the medical evidence was insufficient to show that she was disabled from employment due to her accepted injury.

⁴ Appellant mailed the request to OWCP's Branch of Hearings and Review. On April 16, 2015 OWCP noted that it had contacted her to see if she wanted a hearing or decision on the written evidence and that she chose a decision on the written evidence.

to submit an overpayment recovery questionnaire for waiver and that it would cause undue hardship to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the FECA⁵ 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.⁶

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, she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁷ OWCP regulations state in pertinent part: “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents her from earning the wages earned before the work-related injury.”⁸ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$749.14 for the period February 2 to 7, 2015 because she continued to receive disability compensation after she returned to full-time employment. OWCP placed her on the periodic rolls in September 2014. Appellant returned to her usual employment on February 2, 2015, but received compensation for disability until February 7, 2015. As she was not entitled to receive compensation for total disability after she returned to work, the Board finds that she received an overpayment of compensation.¹⁰

OWCP explained that it calculated the overpayment by dividing the net payment of \$3,495.98 by 28 and then multiplying by 6, the number of days appellant was overpaid, to find an overpayment of \$749.14. Appellant does not dispute fact or amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁵ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault *and* when adjustment or

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *Id.* at § 8102.

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.500.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004); *see also B.H.*, Docket No. 09-0292 (issued September 1, 2009).

¹⁰ *See supra* notes 7 and 8; *see also M.A.*, Docket No. 13-2137 (issued March 11, 2014).

recovery would defeat the purpose of FECA or would be against equity and good conscience.” (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. 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.

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.¹¹ An individual’s liquid assets include but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹² Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home, and furnishings and supplies.¹³

Section 10.437 provides that 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.¹⁴ 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.¹⁵

Section 10.438 of OWCP’s regulations provide:

“(a) 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 the FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

¹¹ 20 C.F.R. § 10.436. 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).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at § 10.436.

¹⁵ *Id.* at § 10.437(b)(1).

“(b) 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 furnished.”¹⁶

ANALYSIS -- ISSUE 2

OWCP properly found that appellant was not at fault in the creation of the \$749.14 overpayment because she could not have known, given that she received the amount by a single electronic transmission, that she had accepted an improper payment.¹⁷ OWCP, in its preliminary notification of the existence of the overpayment, informed her that she needed to explain her reasons for seeking waiver, complete the recovery questionnaire form, and submit financial documents to support her claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of FECA. Appellant did not return the overpayment recovery questionnaire provided by OWCP and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of FECA. Neither did she submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the creation of the overpayment, she nevertheless bears responsibility for providing the financial information necessary to support her request to waive recovery of the overpayment.¹⁸ As discussed, 20 C.F.R. § 10.438 of the regulations state that a claimant who received an overpayment is responsible for providing information about income, expenses, and assets to OWCP so that it may determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from OWCP will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.²⁰ As appellant failed to comply with section 10.438 of OWCP’s regulations, OWCP properly found that she was not entitled to waiver of recovery of the \$749.14 overpayment of compensation.

On appeal appellant asserts that OWCP did not advise her that she had to complete an overpayment recovery questionnaire to show entitlement to waiver. The February 17, 2015 preliminary overpayment determination, however, clearly informed her that she must complete an enclosed overpayment recovery questionnaire and submit supporting financial information in order for OWCP to consider the possibility of waiver. The record indicates that an overpayment recovery questionnaire accompanied the February 17, 2015 preliminary overpayment notification. The Board has found that a notice properly addressed and duly mailed to an

¹⁶ *Id.* at § 10.438.

¹⁷ *See E.C.*, Docket No. 14-1467 (issued July 2, 2015); *Tammy Craven*, 57 ECAB 689 (2006).

¹⁸ *See S.S.*, Docket No. 15-0958 (issued July 13, 2015); *N.G.*, Docket No. 15-0048 (issued May 22, 2015).

¹⁹ 20 C.F.R. § 10.438(a).

²⁰ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

individual in the ordinary course of business is presumed to have been received by that individual.²¹

Appellant additionally contends that she would experience hardship repaying the overpayment as her expenses exceed her income. As discussed, however, OWCP properly denied waiver of recovery of the overpayment as she failed in her duty to submit the requisite financial information.²²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$749.14 for the period February 2 to 7, 2015 because she continued to receive disability compensation after she returned to work and that OWCP properly denied waiver of recovery of the overpayment.²³

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²¹ See *M.M.*, Docket No. 13-1932 (issued February 6, 2014); *Newton D. Lashmett*, 45 ECAB 181 (1993).

²² See *M.D.*, Docket No. 14-1637 (issued February 19, 2015).

²³ With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. 20 C.F.R. § 10.411; *Lorenzo Rodriguez*, 51 ECAB 295 (2000).