

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

C.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Minneapolis, MN, Employer)

Docket No. 16-1150
Issued: February 3, 2017

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 6, 2016 appellant filed a timely appeal from a March 31, 2016 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 an overpayment of compensation in the amount of \$5,820.50; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$230.00 from appellant's compensation payments every 28 days.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In October 2013, OWCP accepted that appellant, then a 37-year-old nurse, sustained a small disc herniation at C6-7 due to performing her work duties on April 29, 2013. It later updated the accepted conditions to include central disc herniation with instability at C4-5.² Appellant stopped work on April 30, 2013 and received disability compensation on the daily rolls beginning June 13, 2013 and on the periodic rolls beginning September 21, 2014. She received compensation at the augmented rate of 75 percent because she had a dependent within the meaning of FECA.³

In an August 23, 2013 letter received by OWCP on the same date, appellant advised that effective June 13, 2013 her spouse and child were no longer living with her. She noted, "There is no child support or alimony orders on my part."

In a February 24, 2015 notice, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$5,820.50 because she was paid at the augmented rate from June 13, 2013 to October 18, 2014 despite not having a qualifying dependent within the meaning of FECA for this period.⁴ It also made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact and amount of the overpayment, as well as request waiver of the overpayment. It requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.⁵

Appellant submitted a copy of the Form OWCP-20 financial information questionnaire which she completed on March 16, 2015 along with supporting documentation. She listed figures for monthly income and monthly expenses, and indicated that she had \$11,900.00 in assets comprised of \$3,900.00 in checking account monies and \$8,000.00 in saving account monies. Appellant checked a box requesting a telephone conference with OWCP and requested waiver of recovery of the overpayment.

On April 23, 2015 appellant participated in a telephone conference with an OWCP claims examiner during which she further discussed her financial situation, including her monthly income and monthly expenses. She reported that she had assets of \$11,900.00 (\$3,900.00 in her checking account and \$8,000.00 in her savings account), but that she was saving this money for when she needed new hearing aids. Appellant indicated that her insurance company covered hearing aids but that she did not know the extent of the coverage.

² OWCP previously accepted that appellant sustained work injuries on August 30, 2011 and April 7, 2012.

³ See *infra* notes 6 through 10.

⁴ The record contains OWCP documentation showing that appellant received \$61,515.10 in compensation for the period June 13, 2013 to October 18, 2014, but that she should have received only \$55,694.60 based on the applicable basic rate of 66 2/3 percent.

⁵ In a March 23, 2015 letter, OWCP advised appellant that it had made a preliminary determination that she received an \$845.74 overpayment of compensation. The evidence of record reveals that appellant repaid this overpayment in full in mid-2015. The record does not contain a final decision of OWCP concerning this preliminary overpayment determination and the matter is not presently before the Board. See 20 C.F.R. § 501.2(c).

In a March 31, 2016 decision, OWCP determined that appellant received an overpayment in the amount of \$5,820.50. It found that she was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver because her assets of \$11,900.00 exceeded the applicable resource base. OWCP required repayment of the overpayment by deducting \$230.00 from appellant's compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.⁶ If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 percent of her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁷

A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.⁸ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university, or training program.⁹

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,820.50. In the present case, appellant received compensation at the augmented rate of 75 percent for the period June 13, 2013 to October 18, 2014 despite that fact that she did not have any qualifying dependents under FECA. The record contains evidence which shows that she received \$61,515.10 in compensation for the period June 13, 2013 to October 18, 2014 at the improper augmented rate. OWCP calculated that appellant was only entitled to receive \$55,694.60 at the basic rate of 66 2/3 percent during this period. Therefore, the record establishes that appellant received a \$5,820.50 overpayment of compensation.

⁶ 5 U.S.C. § 8102(a).

⁷ See *O.R.*, 59 ECAB 432, 436 (2008). See also 5 U.S.C. §§ 8105(a) and 8110(b).

⁸ 5 U.S.C. § 8110(a).

⁹ See *E.G.*, 59 ECAB 599, 603 (2008).

¹⁰ See *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

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.¹¹ 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."¹² 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 has 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.¹³ 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.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

ANALYSIS -- ISSUE 2

In its March 31, 2016 final overpayment decision, OWCP determined that recovery of the overpayment was proper under FECA because appellant had not shown both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets did not exceed the allowable resource base. It noted that appellant's assets of \$11,900.00 (checking and savings account monies) exceeded the allowable resource base of \$4,800.00 for an individual, like appellant, who did not have a qualifying dependent.

¹¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹² 5 U.S.C. § 8129(b).

¹³ 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. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹⁴ *Id.* at § 10.437(a), (b).

¹⁵ *Id.* at § 10.437(b)(1).

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA. As noted above, appellant's assets of \$11,900.00 exceeded the allowable resource base of \$4,800.00 for an individual, like appellant, who did not have a qualifying dependent.¹⁶ Because she has not met the second 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 first prong of the test, *i.e.*, whether appellant has shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁷

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience. Appellant 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.¹⁸

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP properly refused to waive recovery of the overpayment.

On appeal appellant argues that the assets in her savings and checking account she reported in March 2015 were a "snapshot of that day, that time" and that the amount reported does not constitute what is currently available to her. As explained above, the evidence of record at the time of OWCP's March 31, 2016 decision was insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The financial information appellant provided in March 2015 did not show that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets did not exceed the allowable resource base. The financial information provided also did not show that she would experience severe financial hardship in attempting to repay the debt or that she had relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment. Other than to argue that her financial situation had changed, appellant provided no evidence to establish that allegation. Thus, OWCP's decision to deny her request for waiver of recovery of the overpayment was proper.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provides 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

¹⁶ See *supra* note 13.

¹⁷ See *id.*

¹⁸ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹⁹

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$230.00 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.²⁰ Therefore, OWCP properly required recovery of the overpayment by deducting \$230.00 from appellant’s compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received a \$5,820.50 overpayment of compensation and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by deducting \$230.00 from appellant’s compensation payments every 28 days.

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

²⁰ At the time OWCP issued its final overpayment determination, appellant was receiving \$694.00 in wage-loss compensation benefits every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board