

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

_____)	
J.N., Appellant)	
)	
and)	Docket No. 17-1043
)	Issued: November 28, 2017
DEPARTMENT OF THE ARMY, MEDICAL)	
COMMAND, Fort Sam Houston, TX, Employer)	
_____)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 12, 2017 appellant filed a timely appeal from a January 18, 2017 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 of compensation in the amount of \$25,000.00 due to receipt of a voluntary separation incentive payment (VSIP); (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$150.00 from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 3, 2014 appellant, then a 58-year-old training technician, filed an occupational disease claim (Form CA-2) alleging carpal tunnel syndrome and cervical disc displacement due to factors of her employment. She did not initially stop work. On September 22, 2014 OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and displacement of the cervical intervertebral disc without myelopathy. Appellant stopped work on March 16, 2015 and filed a claim for compensation (Form CA7). She received wage-loss compensation on the supplemental rolls as of March 16, 2015 and medical benefits.

On March 18, 2015 appellant registered for electronic direct deposit of her compensation benefits. She was placed on the periodic rolls beginning May 31, 2015.

By letter dated August 4, 2015, OWCP notified appellant that she was being placed on the periodic rolls for compensation and emphasized that annuity benefits paid by the Office of Personnel Management and benefits for wage loss were not payable for the same period of time. Appellant's weekly compensation was listed as \$2,395.95.

By letter dated October 9, 2015, the employing establishment advised OWCP that appellant had taken a VSIP lump-sum payment of \$25,000.00. It noted that the VSIP could constitute a dual benefit, and that it was making OWCP aware so that appellant did not incur an overpayment.

In a record of a telephone conversation with an OWCP representative dated October 20, 2015, appellant informed OWCP that she had received \$25,000.00 as her VSIP on September 30, 2015.

As appellant was on the periodic rolls, OWCP sent her a Form EN1032 that requested information, *inter alia*, regarding other Federal Government benefits or payments that she had received. The form covered a 15-month period. On October 27, 2015 appellant completed the Form EN1032 and reported that she had not received any other Federal Government benefits or payment.

On January 26, 2016 appellant elected FECA benefits in preference to retirement benefits, effective January 27, 2016.

By letter dated November 17, 2016, OWCP informed appellant of a preliminary determination of an overpayment of compensation in the amount of \$25,000.00 from September 30, 2015 through July 18, 2016. It determined the amount of overpayment equivalent to the VSIP by dividing the net monthly payment of FECA benefits of \$2,395.95 by 28 days, then multiplying by 293 days the number of days from September 30, 2015 to July 18, 2016, and subtracting \$71.90. This equaled \$25,000.00. OWCP noted that an offset was required when receiving an incentive payment simultaneously with temporary total disability payments under FECA, and that because compensation was not suspended effective the date of the incentive payment, there was an overpayment.

On December 5, 2016 appellant requested a telephonic conference and contested the overpayment, because she believed that it occurred through no fault of her own, and she

requested a waiver. She explained that an OWCP liaison had assured her that, because she was no longer on the active rolls, she did not need to worry about receipt of dual benefits.

In a record of a telephone conversation with an OWCP representative dated December 29, 2016, the representative explained to appellant that her compensation should have been suspended for the period of time that she received the \$25,000.00 separation incentive. He noted that appellant agreed to pay \$150.00 per month to repay the debt.

By decision dated January 18, 2017, OWCP finalized the preliminary determination and found that appellant received an overpayment in the amount of \$25,000.00. It found that appellant was at fault in the creation of the overpayment, and directed recovery by deducting \$150.00 per cycle from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. OWCP procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay.² Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.³ Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation. The evidence of record supports that appellant received a VSIP of \$25,000.00. Appellant also received contemporaneous compensation for temporary total disability. Under 5 U.S.C. § 8116 and 20 C.F.R. § 10.421(c), appellant is not entitled to receive both compensation and separation pay concurrently.⁵ Therefore an overpayment of compensation was created. A claimant in receipt of compensation benefits may not concurrently receive separation pay and payment of wage loss

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17c.(1) (June 2009).

³ See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005).

⁴ The Board notes that OWCP's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17 (April 1996) originally provided that separation pay could be offset by either a dollar-for-dollar amount or based on the period of weeks salary the payment represented. Following the Board's decisions in *Schaack, id.* and *L.J.*, 59 ECAB 264 (issued December 11, 2007), OWCP revised this section of the procedure manual in FECA Transmittal No. 09-05 (issued June 1, 2009). Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of weeks' worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. See *R.H.*, Docket No. 08-2025 (issued July 20, 2009).

⁵ See *R.H.*, *supra* note 4.

for total disability.⁶ As such, the record establishes that an overpayment of compensation was created.

The Board further finds that OWCP correctly calculated the amount of overpayment. OWCP determined the amount of overpayment equivalent to the VSIP by dividing the net monthly payment of FECA benefits of \$2,395.95 by 28 days, then multiplying by 293 days (the number of days from September 30, 2015 to July 13, 2016), and subtracted \$71.90. This amount equaled \$25,000.00.⁷ Appellant has submitted no evidence to the contrary. As such, the Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that adjustment or recovery 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.⁸ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁹

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁰

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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

⁶ See *Robert B. Hutchins*, 52 ECAB 344 (2001); *Michael A. Grossman*, 51 ECAB 673 (2000).

⁷ See *supra* note 4. The Board notes that while OWCP's calculation utilized days instead of weeks, if the amount of \$2,395.95, appellant's net compensation every 28-day cycle is divided into \$25,000.00 to determine the number of weeks of compensation to be offset, the number of weeks to be offset is 41.737. The number of weeks in the period September 30, 2015 through July 18, 2016 equals 41.737. Therefore OWCP's calculation of the period of the overpayment was correct.

⁸ 5 U.S.C. § 8129(b).

⁹ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹⁰ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

¹¹ *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 2

OWCP applied the third standard in this case, finding that appellant accepted compensation payments that she knew or should have known were incorrect. Appellant accepted a prohibited dual benefit of a VSIP which was equal to the period September 30, 2015 through July 18, 2016. In this regard appellant completed the Form EN1032 on October 27, 2015 failing to report the separation incentive payment she had received from the employing establishment. On December 5, 2016 appellant contested the overpayment, because she believed that it occurred through no fault of her own, and she requested a waiver. She explained that an OWCP liaison had assured her that because she was no longer on the active rolls, she did not need to worry about receipt of dual benefits. In a record of a telephone conversation with an OWCP representative dated December 29, 2016, the representative explained to appellant that her compensation should have been suspended for the period of time that she received the \$25,000.00 separation incentive. He noted that appellant agreed to pay \$150.00 per month to repay the debt.

The Board finds that OWCP properly found appellant at fault in the creation of the \$25,000.00 overpayment, because she should have known that the \$25,000.00 voluntary separation pay constituted a prohibited dual benefit while contemporaneously receiving temporary total disability from OWCP. A reasonable person should have known that she was not entitled to a VSIP and receipt of OWCP temporary total disability benefits at the same time.¹²

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of OWCP's regulations provide that 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 same.¹³ 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 financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.¹⁴

ANALYSIS -- ISSUE 3

OWCP reduced appellant's future compensation payments by \$150.00 every 28 days, taking into account the factors set forth in section 10.441 of OWCP's regulations. The case record indicates that appellant agreed to these terms in a telephone conversation with an OWCP representative on December 29, 2016. The Board finds that OWCP properly required repayment of the overpayment of compensation by deducting \$150.00 from each continuing compensation payment.

¹² See *supra* note 10.

¹³ *Id.* at § 10.441.

¹⁴ *Id.*

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$25,000.00. The Board further finds that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery and that OWCP properly required repayment of the overpayment by deducting \$150.00 from appellant's future compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2017 is affirmed.

Issued: November 28, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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