

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

_____)	
W.A., Appellant)	
)	
and)	Docket No. 18-0070
)	Issued: May 14, 2018
DEPARTMENT OF AGRICULTURE,)	
Beltsville, MD, Employer)	
_____)	

Appearances:
Renata Atkinson, for the appellant¹
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 October 11, 2017 appellant, through his representative, filed a timely appeal from an April 17, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 \$41,888.49 because he continued to receive

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

augmented FECA compensation for the period July 13, 2007 to February 4, 2017 after the death of his spouse, his only qualifying dependent; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$425.00 every 28 days from appellant's continuing compensation.

On appeal appellant's representative asserts that recovery of the overpayment is against good conscience because appellant's reduction in compensation would likely result in the loss of his home. His representative further asserts that appellant timely forwarded requested information following the preliminary overpayment determination and asks that the Board review these materials based on the postmark.

FACTUAL HISTORY

Appellant, then a 45-year-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 1986 he fell from a roof at work. OWCP accepted the claim for sprain of neck, sprain of back, thoracic region, and bilateral sprains of shoulder and upper arm. Appellant underwent bilateral shoulder surgery, first in May 1987 and then in August 1987. He has been on the periodic compensation rolls since that time.

On July 24, 2007 appellant telephoned OWCP to inform them that his wife had died on July 12, 2007. EN1032 forms he had signed from January 22, 2008 to February 1, 2017 indicated that he was not married and had no dependents.

By letter dated September 29, 2016, OWCP informed appellant that his case had been transferred from the Washington, DC district office to that in Philadelphia, PA.

On February 5, 2017 OWCP reduced appellant's compensation to the basic (66 2/3 percent) compensation rate. It called him on February 16, 2017 to inform him that the change was made following an audit which found that, as his wife had died on July 12, 2007, he was no longer entitled to compensation at the 75 percent augmented rate.

On March 13, 2017 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$41,888.49 had been created. It explained that the overpayment occurred because appellant's spouse died on July 12, 2007 and he had no other dependents, but continued to receive compensation at the augmented 3/4 (75 percent) rate. OWCP found him not at fault and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It informed appellant that, in order for it to consider the question of waiver or to determine a reasonable method for collection, he must provide a completed Form OWCP-20 and attach supporting financial documentation, including copies of income tax returns, bank statements, bills, canceled checks, pay slips, and any other records to support claimed income and expenses. OWCP notified him that failure to submit the requested information within 30 days would result in the denial of waiver of recovery of the overpayment.

The record includes OWCP computer print-outs of an overpayment worksheet containing calculations showing that from July 13, 2007 to February 4, 2017 appellant received \$373,857.41 in compensation at the 75 percent augmented rate, when he was entitled to only \$331,968.92 at

the 66 2/3 percent basic rate. This yielded an overpayment of compensation in the amount of \$41,888.49.

No information was received from appellant in response to the preliminary overpayment determination.

By decision dated April 17, 2017, OWCP finalized the preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$41,888.49 had occurred because appellant continued to receive compensation at the augmented 3/4 (75 percent) rate following the death of his spouse, his only dependent. OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, noting that he had not responded to the March 13, 2017 preliminary overpayment determination. It set recovery at \$425.00, to be deducted every 28 days from his continuing FECA compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.³ 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 of his monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁴

Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of 3/4 of his or her weekly pay if he or she has one or more dependents.⁵ A dependent includes a husband or wife if: (a) he or she is a member of the same household as the employee; (b) the spouse is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute spousal support.⁶

ANALYSIS -- ISSUE 1

The Board finds an overpayment of compensation in the amount of \$41,888.49 was created.

Appellant initially received compensation payments at the augmented rate of 75 percent as he was married and lived in the same household as his wife. His wife died on July 12, 2007. Appellant, however, continued to receive compensation at the augmented rate after her death when he had no eligible dependents.

The record supports that appellant was erroneously paid compensation based on the augmented rate of 75 percent for a person with a dependent for the period July 13, 2007 to

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

⁶ *Id.* at 8110(a)(2).

February 4, 2017. He was paid \$373,857.41 in FECA compensation at the augmented rate of 75 percent, but was entitled to only \$331,968.92 at the 66 2/3 basic rate. The Board finds that OWCP properly determined that the difference of \$41,888.49 yielded an overpayment of compensation and thus properly determined the fact and amount of the overpayment in this case.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of 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.”⁸

Section 10.438 of OWCP regulations provides 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 and no further request for waiver shall be considered until the requested information is furnished.⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁰ Appellant, however, had the responsibility to timely provide financial information to OWCP,¹¹ but did not do so.

In its preliminary determination dated March 13, 2017, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire and supporting financial information. It advised appellant that waiver would be denied if he failed to furnish the requested financial information within 30 days. Appellant did not respond to the preliminary determination before OWCP issued its final overpayment determination on April 17, 2017. As a result, OWCP did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and

⁷ See *D.S.*, Docket No. 17-1224 (issued August 28, 2017).

⁸ 5 U.S.C. § 8129.

⁹ 20 C.F.R. § 10.438.

¹⁰ *Id.*, see also *R.H.*, Docket No. 15-0392 (issued February 3, 2016).

¹¹ *Supra* note 9.

good conscience. Because appellant failed to submit the requested information within 30 days, OWCP had no discretion in the matter; the law required a denial of waiver.¹²

Appellant's representative asserts on appeal that denial of waiver was against good conscience and maintains that supportive documentation had been timely mailed to OWCP. The record does not indicate that anything was received by OWCP prior to April 17, 2017 when it issued its final overpayment decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision.¹³

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$41,888.49.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides 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 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 financial circumstances of the individual and any other relevant factors, so as to minimize hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$425.00 every 28 days from appellant's continuing compensation.

Although OWCP provided appellant an overpayment recovery questionnaire with the March 13, 2017 preliminary overpayment determination, as noted, he did not submit a completed questionnaire or other financial information prior to the April 17, 2017 final overpayment decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁶ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁷ As appellant did not submit any financial information to OWCP as

¹² *Supra* note 10.

¹³ 20 C.F.R. § 501.2(c)(1); *O.W.*, Docket No. 09-2110 (issued April 22, 2010).

¹⁴ *Id.*; *see S.A.*, Docket No. 15-0592 (issued April 9, 2015).

¹⁵ 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁶ *Id.* at § 10.438.

¹⁷ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Chapter 6.200.4(c)(2) (May 2004).

requested, the Board finds that OWCP properly directed recovery of the \$41,888.49 overpayment of compensation at the rate of \$425.00 every 28 days from his continuing compensation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$44,888.49. The Board further finds that OWCP properly denied waiver of recovery of the overpayment, and required recovery by deducting \$425.00 every 28 days from his continuing compensation payments.¹⁸

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2018
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

¹⁸ See A.S., Docket No. 17-0606 (issued December 21, 2017).