

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

P.M., Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Washington, DC, Employer**

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**Docket No. 20-1262
Issued: October 15, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 5, 2020 appellant filed a timely appeal from a May 29, 2020 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 wage-loss compensation in the amount of \$3,357.72 for the period January 27 through November 11, 2017 for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior order and decision are incorporated herein by reference. The relevant facts are as follows.

On September 14, 1983 appellant, then a 36-year-old editor, filed an occupational disease claim (Form CA-2) alleging that she sustained allergic contact dermatitis causally related to factors of her federal employment. OWCP accepted the claim for allergic contact dermatitis and vaginitis/vulvovaginitis. It placed appellant on the periodic rolls as of March 20, 1986 using a recurrent pay rate date of October 13, 1985. Appellant returned to modified work as a clerk on March 16, 1987 but stopped work on March 20, 1987.

On August 14, 2018 OWCP advised appellant of its preliminary determination that she received an overpayment of compensation \$3,562.97 because her spouse passed away on January 26, 2017, but she continued to receive wage-loss compensation at the augmented rate of 75 percent through November 11, 2017. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment questionnaire and submit supporting financial documents.

In a Form OWCP-20 dated September 5, 2018, appellant advised that she had monthly income of \$4,000.00 and total monthly expenses of \$2,175.00. She related that she had no assets. Appellant did not provide any supporting financial documentation.

By decision dated November 26, 2018, OWCP finalized the preliminary findings regarding fact and amount of overpayment of compensation, but found that appellant was without fault in the creation of the overpayment. It denied waiver of recovery of the overpayment as her income exceeded her expenses by more than the allowed amount.

On April 22, 2019 appellant appealed to the Board. By decision dated January 9, 2020, the Board found that the case was not in posture for a decision regarding whether OWCP properly determined her pay rate for compensation purposes. The Board set aside the November 26, 2018 decision and remanded the case to OWCP for further development of the evidence to determine appellant's pay rate for compensation purposes.

On remand, OWCP requested clarification from the employing establishment regarding appellant's pay rate and recurrent pay rate dates.

In a letter dated March 2, 2020, the employing establishment responded to OWCP's request for clarification regarding appellant's pay rate for compensation purposes and attached Form SF-50s. It advised that her pay rate for compensation as of March 23, 1987, the date she stopped work was \$26,203.00 per year.

² *Order Remanding Case*, Docket No. 03-0318 (issued June 4, 2004); Docket No. 05-0536 (issued October 24, 2006), *petition for recon., denied*, Docket No. 05-0536 (issued April 17, 2007); Docket No. 19-1150 (issued January 9, 2020).

By decision dated May 29, 2020, OWCP found that appellant received an overpayment of compensation in the amount of \$3,357.72 for the period January 27 through November 11, 2017, because she received compensation at the augmented rate instead of the basic rate when she had no dependents. It noted that she had received a total of \$32,017.43 for wage-loss compensation at the augmented rate based on an eligible dependent and pay rate date of October 13, 1985 from January 27 through November 11, 2017. Appellant, however, was only entitled to receive \$28,695.71 in compensation based on the appropriate two-thirds rate for lack of an eligible dependent and pay rate date of March 23, 1987, resulting in a \$3,357.72 overpayment. OWCP found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, noting that the OWCP-20 form submitted previously established that her income exceed her expenses by more than the allowed amount. Lastly, it noted that appellant was due a refund of \$206.25 as she had paid in full the amount of \$3,562.97.

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.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 percent of his or 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.⁴

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 or her support; or (c) the employee has been ordered by a court to contribute spousal support.⁵

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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,357.72 for the period January 27 through November 11, 2017.

Appellant initially received compensation payments at the augmented rate of 75 percent based on a pay rate date of October 13, 1985 as she was married and lived in the same household as her husband. Her husband passed away on January 26, 2017. Appellant, however, continued

³ 5 U.S.C. § 8102(a).

⁴ *E.B.*, Docket No. 19-1571 (issued December 31, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432 (2008); *id.* at §§ 8105(a) and 8110(b).

⁵ 5 U.S.C. § 8110(a)(2); *see also O.B.*, Docket No. 19-0034 (issued April 22, 2019); *K.S.*, Docket No. 15-0940 (issued September 9, 2015).

⁶ *B.W.*, Docket No. 18-1412 (issued February 8, 2019); *see Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

to receive compensation at the augmented rate after his death when she had no eligible dependents. Fact of overpayment is, therefore, established.

Regarding the amount of the overpayment, the record supports that OWCP erroneously paid appellant compensation based on the augmented rate of 75 percent based on a pay rate date of October 13, 1985 for the period January 27 through November 11, 2017. Appellant was paid \$32,017.43 in FECA compensation for that period at the augmented rate of 75 percent and pay rate date of October 13, 1985, but was entitled to only \$28,695.71 at the 66 2/3 basic rate and pay rate date of March 23, 1987. OWCP properly determined that the difference yielded an overpayment of compensation in the amount of \$3,357.72. The Board, thus, finds that OWCP properly determined the fact and amount of the overpayment in this case.⁷

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.⁸ Section 8129 of FECA⁹ provides that an overpayment must be recovered 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery 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.¹⁰

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, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. 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, furnishings/supplies,

⁷ *O.B.*, *supra* note 5; *W.A.*, Docket No. 18-0070 (issued May 14, 2018); *see D.S.*, Docket No. 17-1224 (issued August 28, 2017).

⁸ *See T.D.*, Docket No. 20-0972 (issued January 28, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁹ 5 U.S.C. § 8129(1)-(b); *T.D.*, *id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁰ *T.D.*, *id.*; *A.C.*, *id.*; *see V.T.*, Docket No. 18-0628 (issued October 25, 2018).

¹¹ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹²

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 worse¹³ 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.¹⁴

Section 10.438 of OWCP's 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 of 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 of recovery of the overpayment.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for 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.¹⁶

Appellant reported that she had income totaling \$4,000.00 and she listed total monthly expenses of \$2,176.00. As her monthly income exceeded her monthly expenses by \$1,824.00, OWCP properly found that she did not need substantially all of her monthly income to meet current and ordinary living expenses.

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance

¹² *Id.* at Chapter 6.400.4b(3)(a), (b).

¹³ 20 C.F.R. § 10.437(a), (b).

¹⁴ *Id.* at § 10.437(b)(1).

¹⁵ *Id.* at § 10.438.

¹⁶ 5 U.S.C. § 8129.

on the payment, which created the overpayment.¹⁷ Therefore, OWCP properly denied waiver of recovery of the overpayment.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by denying waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,357.72 for the period January 27 through November 11, 2017 and properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *J.K.*, Docket No. 20-1190 (issued January 8, 2021); *L.D.*, *supra* note 8; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).