

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Philadelphia, PA, Employer**

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**Docket No. 10-1919
Issued: June 20, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 19, 2010 appellant filed a timely appeal from the June 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied waiver of an overpayment. 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.

ISSUE

The issue is whether OWCP properly denied waiver of the recovery of an \$8,788.39 overpayment of workers' compensation benefits from October 27, 2007 to January 19, 2008.

FACTUAL HISTORY

On August 3, 1985 appellant, a 34-year-old mail handler, sustained a low back injury in the performance of duty while lifting and unloading 30-pound boxes. He was diagnosed with a herniated lumbar disc and left sciatica with back spasm, though radiology on August 13, 1985

¹ 5 U.S.C. § 8101 *et seq.*

was negative except for a slightly diminished stature of T12 and L1, probably the result of an old childhood osteochondritis. OWCP accepted appellant's claim for low back strain.

An orthopedic surgeon noted on September 4, 1985 that x-rays were within normal limits except for what appeared to be a preexisting unilateral spondylolysis at L5-S1. Nonetheless, he found that appellant probably had a herniated disc, "the level of which I [a]m not sure." A computerized axial tomography scan obtained on October 1, 1985 revealed no evidence of disc herniation from L3 and below. There was a minimal bulge at L5-S1. A dozen years later, on January 29, 1998, a magnetic resonance imaging scan demonstrated a mildly bulging disc at L3-4 and a small central protrusion at L4-5 with mild bilateral facet degenerative change and a small right foraminal disc protrusion, which did not appear to contact the exiting nerve root. At L5-S1 there was a small central disc protrusion.

On August 27, 2007 Dr. Bong S. Lee, an orthopedic surgeon, reported that appellant sustained disc injuries at L4-5 and L5-S1 as a result of his August 3, 1985 employment injury. Appellant complained of intermittent pain radiating to the left leg with pins and needle feelings in both feet, left greater than right. Dr. Lee found that appellant had reached maximum medical improvement from his injuries with a very stable condition, although appellant still had a minimal sensory deficit of the left foot and weakness of the lower extremities. On the basis of those findings, he determined that appellant had "about" a 15 percent impairment of the lower extremities.

OWCP's medical adviser noted that Dr. Lee did not properly apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). Using the grading scheme and procedure set forth in Table 15-15, page 424, he determined that appellant had a 1.5 percent left lower extremity impairment due to an L5 sensory loss and a 1.5 percent impairment due to an S1 sensory loss, for a total impairment of 3 percent.

On June 25, 2008 OWCP issued a schedule award for a three percent impairment of appellant's left lower extremity. This entitled appellant to 8.64 weeks of compensation. The period of the award ran from August 27 to October 26, 2007.

OWCP's hearing representative found that neither Dr. Lee nor OWCP's medical adviser provided rationale to support that appellant's impairment was causally related to the 1985 work injury, which was accepted only for low back strain. There was no rationale to support that the herniated disc noted at L4-5 in 1998 and 2003 had any relationship to the 1985 work injury.

OWCP's medical adviser agreed that the accepted condition was lumbar strain and not a herniated disc. Nonetheless, he did not recommend any change in his previous impairment rating because "the extremity is taken the way it is presented."

In a decision dated March 6, 2009, OWCP denied an increased award.

On April 29, 2010 OWCP issued a preliminary determination that appellant received an overpayment of \$8,788.39 because it continued to pay appellant schedule award benefits after the period of the award expired. It explained how it calculated the amount of the overpayment. OWCP found appellant without fault in creating the overpayment.

Appellant completed an overpayment recovery questionnaire on May 3, 2010. He listed no monthly income. Appellant listed \$4,257.00 in monthly household expenses plus \$4,375.00 in monthly debt payments. He listed no other valuable property or real estate, no cash on hand, no checking account balance, no savings account balance, no stocks or bonds and no personal property or other funds.

On May 11, 2010 OWCP asked appellant to complete each item on the questionnaire and itemize “other expenses” and utilities. It also asked for documentation of utilities and mortgage payments.

Appellant responded on May 18, 2010. He listed \$9,395.00 in monthly income. Appellant listed his son as a dependent.² He listed \$4,757.00 in monthly household expenses plus \$2,175.00 in monthly debt payments or a total of \$6,932.00 in monthly expenses. Appellant listed \$200.00 cash on hand, an \$8,000.00 checking account balance, a \$1,000.00 savings account balance, \$600,000.00 held in individual retirement accounts, for a total of \$609,200.00 in assets.

In a decision dated June 15, 2010, OWCP finalized its preliminary determination. It found that appellant received an \$8,788.39 overpayment of compensation when OWCP continued to pay schedule award benefits after the period of the award expired on October 26, 2007. OWCP denied waiver on the grounds that appellant’s \$2,463.00 in discretionary monthly income and his assets established that he would not suffer severe financial hardship in trying to repay the debt. Further, there was no evidence that he gave up a valuable right or suffered a financial loss as a result of receiving the overpayment. OWCP asked appellant to forward a check in the amount of \$8,788.39.³

On appeal, appellant argues that Dr. Lee reported a 15 percent disability “and they paid me.” He stated that years later OWCP found that he had only three percent impairment. Dr. Lee argued that it was no fault of his if OWCP made a mistake.

LEGAL PRECEDENT

Section 8129(a) of FECA provide that when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴ OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery

² The record indicates that appellant was married.

³ Appellant was not in receipt of continuing compensation payments.

⁴ 5 U.S.C. § 8129(a).

⁵ 20 C.F.R. § 10.433(a).

of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

Recovery of an overpayment will defeat the purpose of OWCP if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent.⁷

An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).⁸

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.⁹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.¹⁰

ANALYSIS

OWCP accepted that appellant sustained only a low back strain in the performance of duty on August 3, 1985. Nonetheless, it issued a schedule award for a three percent impairment of his left lower extremity. Section 8107 of FECA provides 288 weeks of compensation of the total loss of a leg, as with amputation at the hip.¹¹ Partial losses or impairments are compensated proportionately.¹² So the June 25, 2008 schedule award provided appellant 8.64 weeks of compensation for the three percent impairment of his left lower extremity (0.03 times 288 equals 8.64).

The period of the award was thus limited. As the June 25, 2008 award stated, the period of the award ran from August 27, 2007 (which was the date Dr. Lee advised that appellant had

⁶ *Id.* at § 10.434.

⁷ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

⁸ Federal (FECA) Procedure Manual, *id.*

⁹ 20 C.F.R. § 10.437(b).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7, Chapter 6.200.6.b(3) (October 2004).

¹¹ 5 U.S.C. § 8107(c)(2).

¹² *Id.* at § 8107(19).

reached maximum medical improvement, thus making his impairment permanent) to October 26, 2007. But OWCP mistakenly continued to pay appellant to January 19, 2008, thus creating an overpayment of compensation.

In its preliminary determination, OWCP explained how it calculated the amount of the overpayment. Appellant received \$15,041.59 in schedule award benefits from August 27, 2007 to January 19, 2008. He was entitled to \$6,253.20 for the period August 27 to October 27, 2007: a weekly pay rate of \$534.77 times a compensation rate of 75 percent, the product of which was increased to \$723.75 after cost-of-living increases, times 8.64 weeks of compensation for the 3 percent impairment of his left lower extremity. The difference, \$8,788.39, was the overpayment.

The Board will affirm OWCP's June 15, 2010 decision on the issues of fact and amount of the overpayment.

OWCP found that appellant was not at fault in creating the overpayment. Indeed, it appears that the fault lay with OWCP. But that does not mean he is entitled to keep money that does not belong to him. Indeed, the law requires OWCP to recover the overpayment if recovery would not defeat the purpose of FECA and would not be against equity and good conscience, as those clauses are defined.

Recovery is not established to be against equity and good conscience, as there is no allegation and no evidence to support that appellant gave up a valuable right or changed his position for the worse in reliance on the overpaid amount. So whether OWCP must recover the overpayment depends on whether recovery would defeat the purpose of FECA.

Appellant's amended overpayment recovery questionnaire shows that his monthly income exceeds monthly expenses by \$2,463.00. Such an amount, far more than the \$50.00 specified by OWCP procedures, establishes that appellant does not need substantially all of his current income to meet current ordinary and necessary living expenses. It establishes that he has sufficient monthly funds available for debt repayment that recovery of the overpayment will not cause hardship and therefore will not defeat the purpose of FECA.¹³

Accordingly, the Board finds that OWCP properly denied waiver of the recovery of the overpayment. The Board will affirm OWCP's June 15, 2010 decision on the issue of waiver. Appellant must repay the debt.

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.¹⁴ Because collection of the overpayment in this case cannot be made by adjusting later payments, as appellant is not in receipt of continuing workers' compensation payments, but must be recovered by other means, the Board lacks jurisdiction to review the issue.

¹³ Further, the assets appellant listed on his amended overpayment recovery questionnaire exceed the minimum resource base specified, another indication that recovery will not cause hardship.

¹⁴ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

Appellant argues that Dr. Lee reported a 15 percent disability “and they paid me.” No, they did not. OWCP paid a schedule award for only a three percent impairment of appellant’s left lower extremity. This is clearly indicated on the June 25, 2008 award. Appellant may disagree with the percentage awarded, but Dr. Lee did not properly apply the A.M.A., *Guides*. OWCP’s medical adviser properly applied the A.M.A., *Guides*.

Indeed, as appellant argues, it was no fault of his that OWCP made a mistake. But it was a mistake, not a gift. Appellant is not entitled to a windfall. He must repay the money that does not belong to him. Equity and the law, demand it.

CONCLUSION

The Board finds that OWCP properly denied waiver of recovery of an \$8,788.39 overpayment of workers’ compensation benefits from October 27, 2007 to January 19, 2008.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2010 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: June 20, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees’ Compensation Appeals Board

Alec J. Koromilas, Judge
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board