

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

G.H., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS, Camp Lejeune, NC, Employer**

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**Docket No. 14-2077
Issued: February 12, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 30, 2014 appellant filed a timely appeal from the September 2, 2014 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 \$80,537.26 overpayment of compensation; and (2) whether it properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on June 22, 2010 appellant, then a 49-year-old supervisory equal employment specialist, sustained aggravation of disc protrusions at L4-5 and L5-S1 without myelopathy due to climbing stairs at work on that date.

Appellant stopped work on June 22, 2010 and returned to limited-duty work for four hours per day on July 8, 2010. She stopped work on November 10, 2010 and began to receive disability compensation on the daily rolls. Appellant later received disability compensation on the periodic rolls.

In a July 29, 2011 report, Dr. Robert M. Moore, a Board-certified orthopedic surgeon serving as an OWCP referral physician, indicated that appellant could work for eight hours per day with restrictions of no bending or climbing, no lifting more than 10 pounds, and no sitting for more than four hours per workday.

On August 9, 2011 appellant returned to work for four hours per day as an equal employment specialist supervisor. In an August 17, 2011 letter, OWCP advised her that it was reducing her disability compensation effective August 9, 2011 based on her actual earnings of \$860.10 per week (for work of four hours per day). It stated, "If you receive an increase in pay over the amount cited above, you should notify us of the increase immediately. Failure to do so could cause an overpayment of compensation."²

On September 12, 2011 appellant signed a Form EN1032 in which she certified that she understood that she had to immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally assisted disability or benefit programs.

By letter dated September 14, 2011, OWCP advised appellant that her periodic payment of partial disability compensation would begin effective August 15, 2011 and stated:

"To minimize the possibility of an overpayment of compensation, notify this office immediately when you go back to work. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working."

Appellant resigned her position as a supervisory equal employment specialist at Camp Lejeune and on January 15, 2012 she started working on a full-time basis for the employing establishment as an equal employment manager at Robins Air Force Base.³ OWCP did not stop paying appellant partial disability compensation for four hours per day at that time. In

² OWCP did not issue a formal wage-earning capacity determination.

³ In early 2012 appellant requested that her mailing address of record be changed from her address in Jacksonville, NC, to an address in Warner Robins, GA. After this point, OWCP sent its communications to appellant's address in Warner Robins, GA.

April 2014 OWCP received documents concerning the change in appellant's job on January 15, 2012 and it stopped paying her disability compensation effective May 3, 2014.

The record contains evidence (including a Standard Form 50) showing that when appellant started working as an equal employment manager at Robins Air Force Base effective January 15, 2012 she began to receive pay of \$95,459.00 per year. The evidence also shows that, at the time of her June 22, 2010 work injury, appellant was earning \$89,450.00 as a supervisory equal employment specialist at Camp Lejeune. Payment records and OWCP worksheets show that appellant received \$80,537.26 in disability compensation for the period January 15, 2012 to May 3, 2014.

In a July 30, 2014 notice, OWCP advised appellant of its preliminary determination that she received an \$80,537.26 overpayment of compensation because she received partial disability compensation payments (for four hours per day) for the period January 15, 2012 to May 3, 2014 after she returned to full-time work without wage loss on January 15, 2012. It also made a preliminary determination that she was at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed appellant that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days. In an accompanying memorandum, it provided a calculation showing that appellant received \$80,537.26 in disability compensation for the period January 15, 2012 to May 3, 2014. OWCP indicated that various OWCP documents, including a September 14, 2011 wage-loss document and a Form EN1032 provided in September 2011 advised appellant that she could not accept payments after a return to work without wage loss. It stated:

“On January 15, 2012 the claimant accepted a full-time position with the United States Air Force, [Robins Air Force Base], GA, as an [e]qual [e]mployment [m]anager.

“Per SF-50 with an effective date of January 15, 2012, it supports that the position accepted was for full time at an annual rate of \$95,459[.00]. The claimant's annual and effective rate was based at \$89,450.[00] at the time of the injury. In calculating the claimant's wage-earning capacity, ... it was noted a 105 percent [wage-earning capacity] indicating that the claimant was not entitled to any compensation on or after January 15, 201[2].”

Appellant did not respond within the allotted time. On August 27, 2014 she called OWCP advising that she had just received its July 30, 2014 letter and to ask for an extension to submit materials. Appellant was told that there was no indication in the record that the letter was not properly sent to her in a timely manner.

In a September 2, 2014 decision, OWCP determined that appellant received an \$80,537.26 overpayment of compensation. It also determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP indicated that appellant did not respond to the July 30, 2014 preliminary determination within 30

days⁴ and indicated that it was proper to find appellant at fault in the creation of the overpayment because she accepted payments which she knew or reasonably should have known were incorrect. It indicated that it would request payment of the full amount of the overpayment within 30 days.⁵

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.⁶

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁷ OWCP's regulations state in pertinent part: compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an \$80,537.26 overpayment of compensation for the period January 15, 2012 to May 3, 2014. OWCP accepted that on June 22, 2010 she sustained aggravation of disc protrusions at L4-5 and L5-S1 without myelopathy due to climbing stairs at work on that date. After a period of total disability, appellant returned to work in August 2011 for four hours per day as a supervisory equal employment specialist and she began to receive partial disability compensation. She resigned her position as a supervisory equal employment specialist at Camp Lejeune and on January 15, 2012 she started working on a full-time basis for the employing establishment as an equal employment manager at Robins Air Force Base. OWCP did not stop paying appellant partial disability compensation for four hours per day at that time. The record contains evidence showing that when appellant started working as an equal employment manager at Robins Air Force Base effective January 15, 2012 she began to receive pay of \$95,459.00 per year. The evidence also shows that, at the time of her June 22, 2010 work injury, appellant was earning \$89,450.00 as a supervisory equal employment specialist at Camp Lejeune. OWCP did not stop paying appellant partial disability compensation

⁴ OWCP stated, "Although we received a call asking for an extension, it is irrelevant as she did not complete and return the [Form OWCP-20]."

⁵ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁶ 5 U.S.C. § 8102.

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.500.

until May 3, 2014 and payment records and OWCP worksheets show that she received \$80,537.26 in disability compensation for the period January 15, 2012 to May 3, 2014. Appellant was not entitled to receive both a salary and partial disability wage-loss compensation for the same period. Therefore, the \$80,537.26 in compensation constituted an overpayment.⁹

On appeal, appellant alleged that she was unable to adequately challenge the overpayment because she received OWCP's July 30, 2014 preliminary overpayment notice at too late a date to adequately respond. However, there is no evidence that OWCP's July 30, 2014 preliminary overpayment notice was not sent to appellant's address of record in a timely manner.¹⁰ On August 27, 2014 appellant requested an extension to submit additional materials. She has no right to such an extension and there is no evidence that OWCP acted improperly in denying this request. For the above-noted reasons, the evidence shows that appellant received an \$80,537.26 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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."¹² No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹³

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

⁹ *See id.*

¹⁰ In early 2012 appellant requested that her mailing address of record be changed from her address in Jacksonville, NC, to an address in Warner Robins, GA. After this point, OWCP sent all its communications to appellant's current and correct address of record in Warner Robins, GA. In the absence of evidence to the contrary, a letter properly addressed and mailed in the course of due business is presumed to have arrived at the mailing address in due course if not returned. This is known as the mailbox rule. *See, e.g., Kenneth E. Harris*, 54 ECAB 502 (2003).

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ *L.J.*, 59 ECAB 264 (2007).

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect....”¹⁴

Section 10.433(b) of OWCP’s regulations provide:

“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.”¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant was at fault in the creation of the \$80,537.26 overpayment of compensation under the third prong of the above-detailed test, thereby precluding waiver of recovery of the overpayment.¹⁶ For the period January 15, 2012 to May 3, 2014, appellant accepted payments which she knew or reasonably should have known were incorrect.

The Board notes that appellant had ample notice that she could not receive partial disability beginning January 15, 2012 after she returned to work on January 15, 2012 without wage loss. In an August 17, 2011 letter, OWCP advised appellant that, if she received an increase in pay over the amount cited in the letter, she should notify it of the increase immediately and that “failure to do so could cause an overpayment of compensation.” On September 12, 2011 appellant signed a Form EN1032 in which she certified that she understood that she had to immediately report to OWCP any change in monies or income from federally assisted disability or benefit programs. By letter dated September 14, 2011, OWCP advised appellant that to minimize the possibility of an overpayment of compensation, she should notify it immediately when she went back to work. It stated, “Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working.”

Despite being aware that she could not receive partial disability compensation and full pay at the same time, appellant accepted compensation to which she was not entitled for the period January 15, 2012 to May 3, 2014. Therefore, she accepted \$80,537.26 in payments she knew or should have known that she could not receive during this period. In addition to the above-noted notice regarding the need to return checks for compensation to which she was not

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.433(b).

¹⁶ *See supra* note 14.

entitled, the extended length that appellant received improper compensation payments would also have reasonably led her to believe that the payments were improper.¹⁷

On appeal, appellant argued that she was not at fault in the creation of the overpayment because she never hid information from OWCP about her return to work. The Board notes that, although appellant advised OWCP of her change of address in early 2012, there is no evidence that she advised OWCP at that time of her change to a new job without wage loss. Moreover, even if OWCP is negligent in continuing to issue a claimant checks for temporary total disability after it was informed he or she had returned to work without wage loss, this does not excuse a claimant's acceptance of checks which he or she knew or should have been expected to know should have been returned to OWCP.¹⁸ For these reasons, OWCP properly found that appellant was at fault in the creation of the \$80,537.26 overpayment, thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$80,537.26 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation thereby precluding waiver of recovery of the overpayment.

¹⁷ See *Claude T. Green*, 42 ECAB 274, 281 (1990).

¹⁸ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2014 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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