

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

L.M., Appellant)
)
and) **Docket No. 16-0144**
) **Issued: March 22, 2016**
U.S. POSTAL SERVICE, POST OFFICE,)
Crystal City, MO, Employer)
)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2015 appellant filed a timely appeal from an October 20, 2015 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$327.64 for the periods February 7 through 12, 2015 and June 10 through 26, 2015; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant asserts that she did not receive the preliminary overpayment notification.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 11, 2015 appellant, then a 40-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2014 she twisted her right foot while delivering mail. The record indicates that she first missed work due to the injury on August 22, 2014. Appellant stopped work on February 6, 2015 and returned on February 13, 2015.

On March 10, 2015 OWCP accepted a right ankle sprain. On April 15, 2015 it expanded the claim to include right enthesopathy of ankle and tarsus, right stress fracture of metatarsals, and osteoarthritis of the right ankle and foot.

Appellant underwent right foot surgery on June 10, 2015. She thereafter filed claims for compensation (Form CA-7's) for the period February 5 through 12, 2015, and beginning on June 10, 2015 and thereafter. The employing establishment reported that appellant had worked a fixed 40-hour week schedule and that her base pay was \$17.53 per hour. OWCP paid compensation for the period February 7 through 12, 2015, and for the period June 10 to 26, 2015, based on an hourly rate of \$17.53 or a weekly rate of \$701.20.

OWCP sought additional pay rate information from the employing establishment. The employing establishment informed OWCP that appellant's gross earnings for the period August 22, 2013 to August 21, 2014 were \$29,789.46.

A July 16, 2015 overpayment memorandum indicated that appellant's pay rate had been incorrectly based on a \$701.20 weekly earnings history. OWCP explained that the pay rate should have been calculated by obtaining appellant's gross earnings for the year prior and dividing by 52 to obtain the base pay rate, noting that \$29,789.46, her prior year earnings, when divided by 52 yielded a weekly pay rate of \$572.87. It noted that for the period February 7 through June 26, 2015 appellant received compensation of \$1,717.85 when she should have received compensation based on a \$572.87 weekly rate, or \$1,390.21, which yielded an overpayment of compensation in the amount of \$327.64. Appellant thereafter was paid compensation based on a weekly pay rate of \$572.87.

On July 29, 2015 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$327.64 had been created because appellant was compensated at an incorrect pay rate for the periods February 7 through 12, 2015 and June 10 through 26, 2015. The preliminary notification was mailed to appellant's address of record. The attached memorandum explained how the overpayment was calculated and explained the actions she could take. It found appellant not at fault in its creation, and she was provided an overpayment action request form and an overpayment questionnaire. Appellant was given 30 days to submit a response.

Appellant returned to limited duty for 40 hours a week on September 14, 2015.

Appellant did not reply to the preliminary determination. By decision dated October 20, 2015, OWCP finalized the preliminary overpayment determination, finding that she received an overpayment of compensation in the amount of \$327.64 and, while she was not at fault, she was

not entitled to waiver of recovery of the overpayment because she failed to provide the requested information. The overpayment was to be repaid in full within 30 days or, if appellant continued to file for wage loss, OWCP would deduct the \$327.64 from compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.² Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”³

Section 8105(a) of FECA provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁴ Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...”⁵ OWCP’s regulations define “disability” as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁶

With respect to the calculation of appellant’s pay rate for compensation purposes, FECA provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he or she was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.⁷ Section 8114(d)(1) of FECA provides:

“Average annual earnings are determined as follows:

- (1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three-fourths of an employee’s monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

⁵ 5 U.S.C. § 8101(4).

⁶ 20 C.F.R. § 10.5(f).

⁷ 5 U.S.C. § 8114(d)(1), (2).

preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week....”⁸

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹ The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under FECA and to OWCP when it is established that the mailing was in the ordinary course of the sender’s business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. It is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$327.64. OWCP correctly determined that she was paid at an improper higher pay rate for the periods February 7 through 12, 2015 and June 10 through 26, 2015. In determining that appellant received a \$327.64 overpayment, OWCP’s calculation of her proper amount of compensation for the periods above was in accordance with the documentation of earnings provided by the employing establishment. It properly noted that because appellant worked the entire year prior to her August 9, 2014 employment injury, her pay rate should have been calculated under section 8114(d) of FECA.¹¹ Dividing appellant’s \$29,789.46 gross earnings in the year prior to August 9, 2014 by 52 yielded a pay rate of \$572.87 per week. However, during the periods February 7 through 12, 2015 and June 10 through 26, 2015, appellant actually received compensation at a higher pay rate, based on an hourly wage of \$17.63 or a weekly rate of \$701.20.

⁸ *Id.* at § 8114(d)(1).

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000).

¹⁰ *M.U.*, Docket No. 09-526 (issued September 14, 2009).

¹¹ *Supra* notes 4 through 8.

Appellant, who did not respond to the preliminary overpayment determination,¹² has not provided evidence or argument disputing the \$327.64 amount of overpayment. OWCP correctly determined that she received \$1,717.85 in compensation for the periods February 7 through 12, 2015 and June 10 through 26, 2015 when she was only entitled to receive compensation of \$1,390.21. Therefore, it properly found that appellant received an overpayment of compensation in the amount of \$327.64.

Appellant argues on appeal that she did not receive the July 29, 2015 preliminary overpayment determination. As noted above, the mailbox rule provides that the appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee.¹³ The record contains a properly addressed copy of the July 29, 2015 preliminary overpayment determination which was sent to appellant's address of record. There is no evidence of record that the July 29, 2015 notice was not deliverable. Appellant's has not presented evidence to rebut a presumption of receipt. As such, the Board finds that the mailbox rule raises the presumption that the preliminary determination was received by appellant, and no evidence exists to rebut the presumption.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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."¹⁴ 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.¹⁵ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁶

¹² See discussion *infra*.

¹³ *Supra* note 9.

¹⁴ 5 U.S.C. § 8129.

¹⁵ Recovery of an overpayment will defeat the purpose of FECA 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 or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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 worse. *Id.* at § 10.437.

¹⁶ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 2

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.¹⁷ Appellant, however, had the responsibility to provide financial information to OWCP,¹⁸ and did not do so.

In its preliminary determination dated July 29, 2015, OWCP clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. As discussed above, the mailbox rule raised the presumption that the preliminary determination was received by appellant. Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting her income and expenses at any time. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in compensation in the amount of \$327.64.

With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$327.64, and that OWCP properly denied waiver of recovery of the overpayment.

¹⁷ *Supra* note 15.

¹⁸ 20 C.F.R. § 10.438.

¹⁹ *Cheryl Thomas*, 55 ECAB 610 (2004).

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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