

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

T.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Poplar Bluff, MO, Employer**

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**Docket No. 15-1871
Issued: January 13, 2016**

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 September 15, 2015 appellant filed a timely appeal from an August 17, 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,060.53 because she received FECA benefits for the period November 13 through 29, 2014, a period for which she received compensation in the form of sick and annual leave from the employing establishment; and (2) whether OWCP properly found her at fault and thus not entitled to waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant generally asserts that the overpayment is in error.²

FACTUAL HISTORY

On October 6, 2014 appellant, then a 39-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 28, 2014 she injured her lower back and hips while assisting a patient to stand. She stopped work on the date of injury. On November 13, 2014 appellant filed a Form CA-7, claim for compensation, for the period November 13 to 29, 2014. On December 15, 2014 she filed a claim for compensation for the period December 3 to 13, 2014.

In correspondence dated December 15, 2014, the employing establishment informed OWCP that for the period November 13 through 29, 2014 appellant received regular pay. A leave summary was attached that indicated that appellant had used sick and annual leave for this period.

On December 29, 2014 appellant accepted a modified position and returned to work.

On February 27, 2015 OWCP accepted lumbar radiculopathy at L4-5 and L5-S1.³ The record indicates that on February 27, 2015 OWCP issued a check in the amount of \$1,060.53 for a supplemental rolls payment and noted that the compensation coverage dates were from November 13 through 29, 2014.

In telephone calls and e-mail correspondence dated April 29 through May 7, 2015, the employing establishment informed OWCP that appellant was on paid leave for the period November 13 to 29, 2014.⁴

On June 5, 2015 OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$1,060.53 had been created. It explained that the overpayment occurred because appellant was paid by the employing establishment for sick and annual leave at the same time receiving FECA compensation for the same period November 13 to 29, 2014. The preliminary determination explained the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire (OWCP Form 20). She was informed of the actions she could take and was afforded 30 days to respond. An overpayment worksheet indicated that, for the period November 13 through 29, 2014, appellant

² In her appeal, appellant maintains that she had not received any type of premium pay since her return to light duty on December 29, 2014, after the period of overpayment in this case. In its August 17, 2015 decision, OWCP discussed her receipt of premium pay with regard to her reported income. As neither waiver nor repayment is before the Board in this appeal, appellant's allegations in this regard need not be addressed. The Board's jurisdiction is limited to reviewing final decisions of OWCP. 20 C.F.R. § 501.2(c); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

³ Appellant was treated by Dr. Sonjay Joseph Fonn, an osteopath, who practices neurosurgery. Magnetic resonance imaging (MRI) scans of the lumbar spine on July 16, 2005 and October 24, 2014 demonstrated mild disc bulge changes with no disc herniations.

⁴ The record indicates that appellant was also paid compensation for the period November 30 to December 27, 2014.

received FECA compensation totaling \$1,060.53 and also received from the employing establishment for sick and annual leave for the same period.

On July 6, 2015 appellant submitted an overpayment action request and overpayment questionnaire. She indicated that she disagreed with the fault determination because compensation was delayed and she believed the payment was for the later period in which she claimed a right to compensation. Appellant advised that she was having nonwork-related surgery which increased her expenses, and listed monthly income of \$983.75 and monthly expenses of \$2,408.79.

By decision dated August 17, 2015, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$1,060.53. The decision further found that she was at fault because she accepted a payment that she knew or should have known was incorrect. OWCP determined that the monthly income appellant listed was incorrect and requested repayment of the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁵ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁶ Section 10.500 of OWCP's regulations provide that "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."⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,060.53. The record supports that she was paid by the employing establishment for annual and sick leave for the period November 3 through 29, 2014 and also received wage-loss compensation for this period.

As noted, both FECA and implementing regulations of OWCP provide that a claimant may not receive wage-loss compensation concurrently with a federal salary or other remuneration.⁸ An overpayment worksheet indicated that appellant received compensation of \$1,060.53 for the period November 3 through 29, 2014 and the record establishes appellant was

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.500.

⁸ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

in a paid leave status at the same time. OWCP properly determined an overpayment in the amount of \$1,060.53.⁹

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.”¹⁰

Section 10.433(a) of OWCP regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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 (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. (This provision applies only to the overpaid individual).”¹¹

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹²

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to receive FECA wage-loss compensation concurrently with pay for sick and annual leave from the employing establishment. On February 27, 2015 the day it accepted her claim, OWCP paid her compensation for the period in question, November 13 through 29, 2014. Prior to that time, appellant had filed a Form CA-7, claim for compensation, for the period November 13 to 29, 2014.

⁹ See *L.C.*, 59 ECAB 569 (2008).

¹⁰ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹¹ 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹² *Id.* at § 10.433(b); see *Neill D. Dewald*, 57 ECAB 451 (2006).

In response to the preliminary overpayment determination, appellant indicated that she thought the compensation was for the next period and noted the delay from the filing of her claim in October 2014 to the acceptance of her claim and payment of compensation in February 2015.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper,¹³ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁴ On February 27, 2015 OWCP notified appellant that her claim had been accepted. It clearly advised that she was to immediately inform OWCP upon her return to work to avoid an overpayment of compensation and that, if she worked during any period covered by a compensation payment, she had to return the payment to OWCP.

When appellant received the check for FECA compensation for the same period she was on paid leave from the employing establishment, she knew or should have known that she had received an incorrect payment. OWCP had clearly explained that she could not receive actual wages and compensation concurrently.

On several occasions beginning on December 15, 2014, the employing establishment informed OWCP that appellant had received pay, in the form of annual and sick leave, for the period November 13 through 29, 2013. Because appellant accepted payment that she should have known to be incorrect, the Board finds her at fault in the creation of the overpayment. The Board will affirm OWCP's decision with regard to fault.¹⁵

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁶ 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.¹⁷

¹³ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁴ *Sinclair L. Taylor*, *supra* note 11.

¹⁵ *G.V.*, Docket No. 11-1580 (issued April 9, 2012).

¹⁶ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁷ *Id.*

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation in the amount of \$1,060.53 was created because appellant received compensation from the employing establishment for sick and annual leave and simultaneous FECA compensation for the period November 13 through 29, 2014. The Board further finds that OWCP properly found her at fault and thus, she is not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 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