

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 12, 2010 appellant, then a 52-year-old clerk, sustained injuries to her neck and shoulder while moving heavy boxes. OWCP accepted her claim for left trapezius shoulder strain; left shoulder impingement syndrome; and post-traumatic left shoulder strain.²

Appellant filed periodic claims for compensation. The record reflects that OWCP paid appellant compensation for temporary total disability for the period May 28 through December 31, 2010 at the augmented rate of 75 percent, on the basis that she lived with her dependent husband. The record also reflects that appellant and her husband lived separate and apart from the end of May through the end of December 2010 and that she so informed OWCP.

On January 31, 2011 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,942.74 because she was paid compensation at the augmented 75 percent rate from May 28 through December 31, 2010, when she should have been paid at a 66 2/3 percent rate. It determined that she was paid a total of \$27,440.60 for the entire period, whereas she should have received compensation in the amount of \$24,497.86, resulting in an overpayment of \$2,942.74.

OWCP provided evidence of payments made to appellant and worksheets explaining how it calculated the overpayment amount. The record reflects that from May 28 to July 2, 2010, appellant was paid at an incorrect weekly pay rate of \$1,149.24 at the 75 percent compensation rate, less a Basic Life Insurance premium of \$21.60, for a total net compensation of \$4,460.43.³ For this period, she should have been paid \$4,104.78 based on the correct pay rate of \$1,184.07 and the 66 2/3 percent compensation rate, resulting in an overpayment for this period in the amount of \$355.65. For the period July 3 to December 31, 2010, appellant was paid at the correct weekly pay rate of \$1,184.07 at a 75 percent compensation rate, less Basic Life Insurance of \$109.20, for a total net of \$22,980.17. For this period, she should have been paid \$20,393.08 based on the 66 2/3 percent compensation rate for no eligible dependents, resulting in an overpayment for this period in the amount of \$2,587.09. Thus, the record shows the total amount paid to appellant for the period May 28 to December 31, 2010 was \$27,440.60 (\$4,460.43 + \$22,980.17); the total amount of the overpayment for this period was \$2,942.74 (\$355.65 + \$2,587.09).

OWCP made a recommendation that appellant be found without fault in the creation of the overpayment because she could not reasonably have been expected to know that she had been paid compensation incorrectly. Appellant was provided with an overpayment recovery questionnaire and was advised of actions she could take if she disagreed with the fact or amount of the overpayment or wished to request a waiver of recovery of the overpayment. She was

² Appellant's March 3, 2007 traumatic injury claim was accepted for sprains of the left wrist, left shoulder and neck (File No. xxxxxx346).

³ OWCP explained that appellant was underpaid compensation for the period May 28 to July 2, 2010, as the weekly pay rate used of \$1,149.24 reflected an inaccurate night differential (\$25.92 rather than \$60.75 a week). The correct weekly pay rate for this period should have \$1,184.07; however, the correct compensation rate should have been 66 2/3 percent at the nondependent rate. After applying the correct weekly pay rate, at the proper compensation rate of 66 2/3 percent, an overpayment did occur for this period in the amount of \$355.65.

informed that in order for OWCP to consider waiver or a reasonable method of collection, she was required to complete the overpayment recovery questionnaire and provide supporting documents within 30 days.

On February 4, 2011 appellant submitted an appeal request form requesting a decision based on the written record on the issue of fault and possible waiver. She stated her belief that the overpayment occurred through no fault of her own, noting that she advised OWCP of her separation from her husband and was unaware of the overpayment. Appellant indicated that she was enclosing (Form OWCP-20) and supporting documentation.⁴

By decision dated March 7, 2010, OWCP finalized its January 31, 2011 preliminary determination that appellant received an overpayment of \$2,942.74. It further found that, although she was without fault in the creation of the overpayment, she had not demonstrated that recovery would defeat the purpose of FECA or be against equity and good conscience, as she had not submitted any evidence to support her request for waiver. OWCP determined that the entire overpayment amount would be collected by deducting \$370.00 from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of FECA provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by OWCP by decreasing later payments to which the individual is entitled.⁵

FECA provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ If the disability is total, the United States shall pay the employee monthly monetary compensation for total disability.⁷ Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependants.⁸

A husband is considered an employee's dependent if he is a member of the same household, is receiving regular contributions from the employee for her support or if the employee has been ordered by a court to contribute to his support.⁹ In determining dependency under FECA, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the

⁴ The Board notes that the record does not contain a completed Form OWCP-20 or any supporting financial documentation.

⁵ 5 U.S.C. § 8129.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁸ *Id.* at § 8110.

⁹ *Id.* at § 8110(a)(2)

contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.¹⁰

If a claimant receives augmented compensation during a period when he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP correctly determined that appellant received an overpayment from May 28 through December 31, 2010 in the amount of \$2,942.74. The record shows that appellant received wage-loss compensation from OWCP at the augmented rate of three-fourths for employees with dependents in the amount of \$27,440.60 during that time period. The evidence of record, however, reflects that appellant lived separate and apart from her husband from the end of May through the end of December 2010. There is also no evidence of record that appellant's husband received regular contributions from her for his support during this time period, or that appellant had been ordered by a court to contribute to his support. Because appellant was separated during the above-referenced time period, she was not entitled to receive wage-loss compensation at the augmented rate between the end of May and the end of December 2010. Therefore, she received an overpayment of compensation.

In calculating the amount of overpayment, OWCP offset the amount due by an underpayment of compensation based on an incorrect pay rate for the period May 28 to July 3, 2010. The record reflects that from May 28 to July 2, 2010, appellant was paid at an incorrect weekly pay rate of \$1,149.24 at the 75 percent compensation rate, less a Basic Life Insurance premium of \$21.60, for a total net compensation of \$4,460.43. For this period, she should have been paid \$4,104.78 based on the correct pay rate of \$1,184.07 and the 66 2/3 percent compensation rate, resulting in an overpayment for this period in the amount of \$355.65. For the period July 3 to December 31, 2010, appellant was paid at the correct weekly pay rate of \$1,184.07 at a 75 percent compensation rate, less Basic Life Insurance of \$109.20, for a total net of \$22,980.17. For this period, she should have been paid \$20,393.08 based on the 66 2/3 percent compensation rate for no eligible dependents, resulting in an overpayment for this period in the amount of \$2,587.09. Thus, the record reflects that appellant was paid a total of \$27,440.60 for the entire period, when she should have received compensation in the amount of \$24,497.86. The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$2,942.74 for the period May 28 to December 31, 2010 (\$355.65 + \$2,587.09).

¹⁰ See *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

¹¹ See *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment of because she received compensation at the augmented rate during a period when she had no dependents following her divorce).

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made because of an error of factor law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹² OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating an overpayment.¹³

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is necessary to determine whether an overpayment should be waived. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

When OWCP issued its preliminary determination with regards to overpayment on January 31, 2011, it advised appellant to complete an overpayment recovery questionnaire and attach supporting financial documentation, if she wished to request waiver and explained the consequences of failing to do so. Because appellant failed to submit the requested information within 30 days, OWCP had no discretion in the matter; the law required a denial of waiver. The Board will therefore affirm the decision on the issue of waiver.

Appellant argues that as she was not at fault in the creation of the overpayment, she should not have to make repayment. OWCP's finding that she was not at fault does not in itself entitle her to retain money that does not belong to her.¹⁵ As appellant failed to submit the necessary financial information, it was unable to determine whether her financial circumstances qualified her for waiver.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹⁶

¹² 5 U.S.C. § 8129(a).

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.* at § 10.438.

¹⁵ *P.R.*, Docket No. 10-1244 (issued January 4, 2011).

¹⁶ 20 C.F.R. § 10.441(a); *see Steven R. Cofrancesco*, 57 ECAB 62 (2006).

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$370.00 every 28 days from appellant's continuing compensation.

As noted, appellant failed to submit an overpayment recovery questionnaire, or any other financial information in support of her request for waiver, prior to the final overpayment decision. An overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁷ When an individual fails to provide requested financial information, it should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁸ Because appellant did not submit the requested financial information there is no evidence of record to establish that OWCP erred by directing recovery of \$370.00 from future compensation payments until the overpayment amount was repaid.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment in the amount of \$2,942.74. The Board further finds that it properly denied waiver of recovery of the overpayments and properly set forth the terms for collecting these overpayments from appellant's continuing compensation payments.

¹⁷ *Id.*

¹⁸ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2011 is affirmed.

Issued: November 9, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board