

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 9, 2003 appellant, then a 43-year-old letter carrier, filed a Form CA-2 occupational disease claim for a right knee condition sustained in the performance of duty. OWCP accepted the claim for right medial meniscal tear. Appellant underwent arthroscopic surgery on May 20, 2003 and returned intermittently to limited duty beginning July 21, 2003. She thereafter sustained recurrences of disability on August 6 and 21, 2003, October 3 and 23 and December 24, 2003; September 18, 2004; and March 8, 2007, each accepted by OWCP as compensable. Appellant received wage-loss compensation at an augmented rate of 75 percent of her weekly pay.<sup>2</sup>

Form CA-7 compensation claims filed since August 22, 2003 identified appellant's son as a dependent and listed October 17, 1990 as his date of birth. In addition, appellant filed Form EN1032 affidavits of earnings and employment on May 14, 2005; May 23, 2006; May 19, 2008; and July 10, 2009. "Part C -- Dependents" of the form reads:

"A claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate. A claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate....

"You may claim compensation for a dependent if you have one or more of the following: (b) an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; and (d) an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level....

"If you are receiving compensation for a dependent and are no longer entitled to receive that compensation, state ... [the] date the person stopped being a dependent [and the] reason the person stopped being a dependent."

In each affidavit, she claimed that her son was an eligible dependent and acknowledged by signature her responsibility pursuant to "Part H -- Certification" to "immediately report to OWCP ... any change in the status of claimed dependents."

OWCP informed appellant in an October 20, 2009 letter that the augmented compensation rate would be reduced to the basic rate of 66 2/3 percent effective October 25, 2009 because her son reached 18 years of age on October 17, 2008. It advised her to provide

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<sup>2</sup> In a November 15, 2007 letter, OWCP asked the employing establishment whether it could offer appellant modified duties that accommodated her physical restrictions. After the employing establishment failed to submit a written response, OWCP referred her for vocational rehabilitation services in 2008. By decision dated March 20, 2010, appellant's wage-loss compensation was reduced on the grounds that she had the capacity to earn wages as a personnel clerk. In a May 14, 2010 letter, she informed OWCP that she obtained work as an administrative assistant. On June 14, 2010 the hiring company contacted the vocational rehabilitation counselor to rescind the job offer due to budget constraints. Appellant subsequently elected to receive disability retirement benefits effective July 1, 2010. The case record indicates that she has returned to full-time employment.

evidence demonstrating that he was unmarried and either incapable of self-support or a full-time student. Appellant did not respond.

On September 22, 2010 OWCP made preliminary findings that appellant received an overpayment of \$2,601.31 for the period October 17, 2008 to October 24, 2009 and was at fault in its creation. It pointed out that she was aware that a claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate and must immediately report any change in the status of a claimed dependent. Appellant was informed of her options if she wished to contest the fact or amount of overpayment or request a waiver of recovery.

Appellant requested a prerecoument hearing on October 13, 2010 asserting that her son was a full-time student from August 24, 2008 to September 29, 2009, she was unaware that she failed to provide updated information to OWCP and she assumed that the compensation payments were in the correct amount.

OWCP received additional evidence. In a September 27, 2010 letter, Linda Matrafailo, a registration services secretary at Sullivan Community College, verified that appellant's son was a student for the period August 26 to December 17, 2008. A March 23, 2009 letter from Patricia Mead, a certification assistant at Kingsborough Community College, confirmed that he was enrolled as a full-time student from March 2 to June 11, 2009. In a subsequent October 12, 2010 letter, Ms. Mead noted that appellant's son officially withdrew from his classes effective May 11, 2009.<sup>3</sup>

During the telephonic prerecoument hearing held on February 9, 2011 appellant testified that her son was a full-time college student between August and December 2008. He later transferred to another school, but decided to withdraw and enlist in the United States Navy. Appellant acknowledged that her son was not enrolled for the period May 11 to October 24, 2009.

In a February 10, 2011 letter, Ms. Matrafailo clarified that appellant's son was a part-time student at Sullivan Community College for the period August 26 to December 17, 2008. She explained that he withdrew from two classes, changing his status to part time effective September 25, 2008.

Appellant detailed in a February 21, 2011 statement that she was not aware that her son was registered as a part-time student at Sullivan Community College. She maintained that she did not deliberately mislead OWCP regarding his dependency status.

By decision dated March 31, 2011, an OWCP hearing representative determined that appellant was entitled to disability compensation at the augmented rate of 75 percent for the period March 2 to May 10, 2009, when her son was enrolled as a full-time college student. Otherwise, he found that she erroneously received \$29,434.60 based on the augmented rate for the periods October 17, 2008 to March 1, 2009 and May 11 to October 24, 2009. The hearing representative calculated that appellant should have received \$27,223.71 based on the basic rate

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<sup>3</sup> An October 12, 2010 billing statement from Kingsborough Community College indicated that appellant's son was dropped for the Fall 2009 semester.

of 66 2/3 percent and finalized an overpayment of \$2,210.89. He also held that she was at fault in the creation of the overpayment because she was reasonably aware of her responsibility to report any change in her son's dependency status to OWCP. Appellant was advised to either pay the balance in full or arrange an installment plan with OWCP.

### **LEGAL PRECEDENT -- ISSUE 1**

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.<sup>4</sup> If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 percent of his or her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.<sup>5</sup>

A "dependent" includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.<sup>6</sup> A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.<sup>7</sup>

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

Appellant's son, who was born October 17, 1990, was claimed as a dependent and OWCP accordingly paid wage-loss compensation at the augmented rate of 75 percent. Although he reached the age of 18 on October 17, 2008 she asserted that he was still an eligible dependent through October 24, 2009 because he was registered as a full-time college student.<sup>9</sup>

The evidence of record established that appellant's son was an eligible dependent for a limited duration. In March 23 and May 11, 2009 letters, Ms. Mead confirmed that he was originally enrolled on a full-time basis at Kingsborough Community College from March 2 to

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *O.R.*, 59 ECAB 432, 436 (2008). *See also* 5 U.S.C. §§ 8105(a) and 8110(b).

<sup>6</sup> 5 U.S.C. § 8110(a).

<sup>7</sup> *E.G.*, 59 ECAB 599, 603 n.10 (2008).

<sup>8</sup> *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

<sup>9</sup> The Board notes that the case record does not indicate whether appellant's son married.

June 11, 2009. However, because appellant's son withdrew, effective May 11, 2009, this status only applied to the period March 2 to May 10, 2009. In addition, September 27, 2010 and February 10, 2011 letters from Ms. Matrafailo related that he was registered as a part-time student at Sullivan Community College for the period August 26 to December 17, 2008 because he did not carry sufficient units.

Because appellant's son was not pursuing a full-time course of study at a qualifying college from October 17, 2008 to March 1, 2009 and from May 11 to October 24, 2009, he was not an eligible dependent and appellant was entitled to compensation at the basic rate during these periods.<sup>10</sup> OWCP's hearing representative calculated the difference between \$29,434.60, the compensation that was disbursed at the 75 percent augmented rate and \$27,223.71, the compensation that should have been disbursed at the 66 2/3 percent basic rate, which equaled \$2,210.89. The hearing representative explained his calculation and appellant has not disputed the calculation. The Board finds that OWCP properly determined the fact and amount of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>11</sup> Conversely, a waiver of recovery is not possible if the claimant is at fault in creating the overpayment.<sup>12</sup>

A claimant 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; (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. Whether or not an individual was at fault 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.<sup>13</sup> In applying the tests to determine fault, OWCP applies a "reasonable person" standard.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment.

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<sup>10</sup> *Beachum*, *supra* note 8, at 446.

<sup>11</sup> 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>12</sup> *Donald L. Overstreet*, 54 ECAB 678 (2003); *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>13</sup> 20 C.F.R. § 10.433.

<sup>14</sup> *Beachum*, *supra* note 8, at 447.

Appellant made incorrect statements as to a material fact that she should have known to be incorrect. The case record contains four copies of the Form EN1032 affidavit of earnings and employment, each of which was filed on May 14, 2005, May 23, 2006, May 19, 2008 and July 10, 2009, respectively. As noted, express language in this document provides that a claimant with at least one eligible dependent is entitled to disability compensation at the augmented rate of 75 percent. Otherwise, the claimant is entitled to compensation at the basic rate of 66 2/3 percent. Form EN1032 states that a “dependent” includes an unmarried child under the age of 18 who lives with the claimant and an unmarried child under the age of 23 who is a full-time student and has not completed four years of school beyond the high school level. It cautions that a claimant who receives augmented compensation to which he or she is not entitled must report the date and the reason why the child stopped being a dependent.

Here, appellant indicated in each EN1032 form that her son was a qualified dependent. She signed each affidavit, acknowledging both the criteria for receiving augmented compensation on account of dependency and her obligation to promptly report any change in the status of a claimed dependent. Appellant also maintained before and during the February 9, 2011 prerecoupment hearing that her son was a full-time student from August 24, 2008 to May 10, 2009. Yet, evidence received by OWCP in 2010 and 2011 showed that appellant’s son was registered as a full-time student only for the period March 2 to May 10, 2009 at Kingsborough Community College.<sup>15</sup> Given that more than eight months elapsed from October 17, 2008, the date of her son’s 18<sup>th</sup> birthday, to July 10, 2009, the date of the most recent EN1032 form filing, appellant had ample opportunity to verify his enrollment, recognize that he was not in fact a full-time student for most of the period in dispute and report her findings to OWCP. Moreover, in view of the totality of the circumstances, appellant should have known that the compensation payments she continued to receive at the augmented rate were incorrect. Because she was at fault in creating the overpayment, she was not eligible for waiver of recovery.

Appellant raises several contentions on appeal. First, she argues that she could not obtain academic records from either Sullivan Community College or Kingsborough Community College pertaining to her son’s enrollment status without his consent.<sup>16</sup> The case record, however, does contain letters from the registrars of these institutions, which altogether established that he was a full-time student only for the period March 2 to May 10, 2009. Second, appellant asserts that she did not actually know that her son was on a part-time schedule at Sullivan Community College or that she made an inaccurate statement on the EN1032 form. As noted, based on a “reasonable person” standard for testing fault, she should have been aware of both facts. Third, appellant claims that OWCP did not adequately notify her about her

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<sup>15</sup> The Board points out that OWCP asked appellant in an October 29, 2009 letter to submit evidence demonstrating that her son was a full-time student. Appellant initially failed to provide enrollment verification forms, class schedules, transcripts or any other academic records corroborating his status. OWCP received letters from Ms. Matrafailo and Ms. Mead after it made preliminary findings of overpayment and fault in its September 22, 2010 decision.

<sup>16</sup> Appellant adds that she notified OWCP via a vocational rehabilitation counselor that her son was in college. Taking into consideration the letters from Ms. Matrafailo and Ms. Mead, the Board acknowledges that he was enrolled in college. The pertinent issue, however, was whether appellant’s son was registered as a full-time student and for what duration.

responsibility to report a change in her son's dependency status. This contention is contradicted by the case record, which shows that she received four separate Form EN1032 affidavits, three of which she signed and filed before her son reached 18 years of age. Finally, appellant emphasizes that recovery of the overpayment would pose a severe financial hardship. Since she was at fault in the creation of the overpayment, she cannot request a waiver of recovery.<sup>17</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$2,210.89 for the periods October 17, 2008 to March 1, 2009 and May 11 to October 24, 2009. The Board also finds that OWCP properly determined that she was at fault in the creation of the overpayment and therefore not entitled to a waiver.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> The Board has no jurisdiction over recovery of the overpayment as appellant is no longer in receipt of monetary compensation from OWCP. *See Cheryl Thomas*, 55 ECAB 610 (2004) (with respect to the recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).