

FACTUAL HISTORY

On March 26, 1992 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim alleging injury to his right forearm. OWCP accepted the claim for bilateral cubital tunnel, bilateral shoulder sprain, neck sprain, right closed fracture unspecified part of radius with ulna, right wrist sprain and right shoulder sprain and paid appropriate benefits. OWCP issued a zero percent loss of wage-earning capacity decisions on June 5, 2002 and December 4, 2006. Appellant stopped work March 13, 2010 when the employing establishment no longer had light duty available within his work limitations due to the National Reassessment Process. OWCP vacated his wage-earning determination as of March 13, 2010 based upon a finding that he had been working a make shift job.

Beginning April 20, 2010, OWCP paid appellant at the basic compensation rate as he claimed no dependents. The attached EN1049 form entitled "Other Important Information" informed appellant that, if the status of any dependent changed, he was to notify OWCP of the name of the dependent whose status changed, the effective date of the change and the nature of the status change. Appellant was also informed that, if there was only one dependent, not to cash checks received after the change in status of that dependent as an overpayment of compensation may result.

On August 11, 2010 appellant returned to part-time light-duty work and OWCP paid compensation intermittently. The record reflects that he worked sporadic hours and was paid at the augmented three-fourths compensation rate for the periods August 11 through 12, August 14 through 26, August 28 through September 10 and November 21 through December 18, 2010, December 19, 2010 through January 15, 2011, January 16 through February 12, February 13 through March 12, March 13 through April 9, April 10 through May 7, May 8 through June 4, June 5 through 15 and July 30 through August 12, 2011. On Form CA-7 claims for compensation, appellant indicated that he had no dependents. During the relevant period OWCP also issued payments at the basic two-thirds compensation rate for the periods September 11 through 25, September 26 through October 23, October 24 through November 20, 2010, June 16, 2011, June 18 through 30, 2011, July 2 through 14 and August 13 through 26, 2011. These payments also reflected sporadic hours of work.

In a July 29 and August 2, 2011 memorandum of call as well as an August 2, 2011 letter, OWCP advised appellant that the payment for the period July 2 through 14, 2011, which was originally calculated on the augmented three-fourths compensation rate because of his previously dependent daughter, should have been based on the basic compensation rate as his daughter was no longer eligible as a dependent.

Effective August 28, 2011 and onward OWCP again paid appellant compensation based on the augmented rate of three-fourths of his monthly pay. Appellant was paid by direct deposit. He was placed on the periodic rolls commencing September 25, 2011. In an October 3, 2011 letter, OWCP advised appellant of the augmented three-fourths compensation rate and amount of compensation commencing September 25, 2011 and included form EN1049 entitled "Other Important Information" regarding change in status of dependent(s).

OWCP continued to pay appellant at the augmented rate until June 2, 2012. By letter dated June 11, 2012, it advised him of its preliminary determination that he received an overpayment of \$4,985.09 because he received augmented compensation from August 28, 2010 to June 2, 2012 even though he had no dependents. OWCP calculated the overpayment by subtracting the amount that it should have paid appellant at the 66 2/3 percent rate for claimants without dependents, \$36,950.12, from the augmented rate actually paid of \$41,935.21. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By decision dated July 13, 2012, OWCP finalized its preliminary finding that appellant received an overpayment from August 28, 2010 through June 2, 2012 of \$4,985.09 because it paid him compensation at the augmented rate when he had no dependents. It further found that he was at fault in creating the overpayment as he knew or should have known that the compensation he received was incorrect and that appellant should repay the debt in full or make arrangements with OWCP for repayment.

On appeal, appellant argues that he was not at fault in creating the overpayment as OWCP made a mistake in paying him the incorrect compensation rate.

LEGAL PRECEDENT -- ISSUE 1

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.³ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁴ Where the employee has one or more dependents as defined by FECA, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁵ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$4,985.09 for the period August 28, 2010 to June 2, 2012. Appellant advised OWCP that he had no dependents during this time period. OWCP, however, paid him compensation at the

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

augmented rate of 75 percent of his monthly pay from August 28, 2010 until June 2, 2012. The Board notes that while appellant returned to work on August 11, 2010, and was paid sporadic hours of compensation until August 28, 2010 at the augmented rate, the decision on appeal only determines the overpayment commencing August 28, 2010.

During the relevant time period, appellant reported that he had no dependants. He therefore should have been paid at the basic rate of 66 2/3 percent of his monthly pay. Accordingly, the Board finds that appellant did receive an overpayment of compensation as he received intermittent payments at the augmented compensation rate during this time period.

OWCP paid appellant \$41,935.21 at the augmented rate from August 28, 2010 to June 2, 2012. From this amount it subtracted the amount that it should have paid him at the 66 2/3 percent basic rate, \$36,950.12, to find an overpayment of \$4,985.09. Appellant consequently received an overpayment of \$4,985.09, the difference between the compensation to which he was entitled at the two-thirds rate and the augmented compensation he received at the three-quarters rate.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁸ provides that 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. Section 10.433 of OWCP's implementing regulations⁹ provide that, in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

- (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.¹⁰

Whether 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

⁷ *Id.*

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

¹⁰ *Id.*

realize that he or she is being overpaid.¹¹ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect. The Board finds, however, that it failed to establish that up until July 29, 2011, the date that OWCP informed appellant that he was receiving payments at the incorrect rate, that appellant should have known that he was being paid an improper rate.

With respect to whether an individual is with fault, section 10.433(b) provides that the issue of 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 was being overpaid.¹³ The Board has also noted that in applying the tests to determine fault, OWCP should apply a "reasonable person" test.¹⁴

The record establishes that appellant was receiving compensation for 40 hours of disability a week until July 31, 2010. These periodic rolls payments were in the net amount of \$2,479.08, at the basic 2/3 compensation rate. However, after appellant returned to part-time work on August 1, 2010 he received payments for sporadic hours of disability. He received a payment for \$863.47 for the period August 28 through September 10, 2010, at the 3/4 compensation rate, but then received a payment of \$889.82 for the period September 11 through 25, 2010 at the 2/3 compensation rate. Thereafter appellant received payments for sporadic hours of lost pay and which were also intermittently paid at the 2/3 rate and the 3/4 rate. He did not receive compensation for the same amount of hours each pay period, and OWCP did not consistently pay him at the 2/3 or 3/4 compensation rate. The record does not establish that a "reasonable person" would have been able to discern the exact amount of compensation due at the 2/3 rate for any of these periods. Since appellant had properly reported that he did not have dependents, and in the past he had properly been paid at the 2/3 rate, through July 31, 2010, the evidence does not establish that a "reasonable person" would have known that he was now receiving compensation at an incorrect augmented rate.

OWCP however advised appellant by telephone call on July 29 and August 2, 2011 letter that he was being compensated at an incorrect rate. The Board has held that a claimant is at fault in the creation of an overpayment, if compensation is accepted after OWCP informs the claimant by telephone call and letter that an incorrect payment has been made.¹⁵ The Board therefore finds that appellant was at fault for accepting compensation that he knew or should have known

¹¹ *Id.* at § 10.433(b).

¹² *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹³ *Supra* note 11.

¹⁴ *L.C.*, 59 ECAB 569 (2008).

¹⁵ *Judith A. Cariddo*, 55 ECAB 348 (2004).

was incorrect after August 2, 2011. Even if part of the overpayment resulted from negligence by OWCP, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.¹⁶ Therefore, the Board finds that appellant was with fault for the remaining period of the overpayment.

On appeal, appellant argues that he should not be found at fault as he never claimed a dependent and it was OWCP's mistake. However, as OWCP had advised appellant by telephone call and letter that it had issued an erroneous payment based on the augmented rate, a reasonable person should have been put on notice to monitor OWCP's payments to insure the accuracy. Appellant signed the EN1032 forms which notified him that he was not entitled to compensation at the augmented rate if he did not have a dependent. While OWCP may have been in error in continuing to issue him checks for disability at the three-quarter's rate after he advised he was no longer claiming a dependent, this did not excuse his acceptance of such checks which he knew or should have been expected to know should have been returned to OWCP.¹⁷ The Board therefore finds that, except as noted, OWCP had sufficient grounds to find that he accepted payments which he should have known was incorrect.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the overpayment payment for the period August 28, 2010 through August 2, 2011. The Board will set aside the May 7, 2012 decision regarding the issue of waiver for this period and will remand the case for further consideration of appellant's current financial circumstances.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period August 28, 2010 to June 2, 2012. The July 13, 2012 decision is set aside in part and remanded to OWCP regarding the issue of waiver of the overpayment.

¹⁶ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁷ *See Larry D. Strickland*, 48 ECAB 669 (1997); *Russell E. Wageneck*, 46 ECAB 653 (1995).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: August 2, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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