

FACTUAL HISTORY

On December 28, 2004 appellant, then a 44-year-old corrections officer, was injured when she fell from a top bunk she was searching. OWCP accepted left shoulder contusion; right ankle contusion; herniated disc at L4-5; major depression, single episode; post-traumatic stress disorder and brachial plexus lesions as employment related. Appellant stopped work on the date of injury and did not return. She received compensation beginning on February 12, 2005 at the statutory rate of 66 2/3 percent. On April 18, 2005 appellant was placed on the periodic compensation rolls at that rate. On April 26, 2006 she informed OWCP that she had dependents that had been living in her home since November 19, 1997. Appellant stated that the “adoption process” took place in New Orleans, Louisiana, for five dependents, four of whom were still living with her. She attached a December 9, 1999 statement regarding three of the claimed dependents. The statement indicated that five of the children were placed with H.K., who moved to Georgia to live with her daughter, appellant. The children were in the process of being adopted by H.K. The Office increased appellant’s compensation to the 75 percent augmented rate effective June 12, 2005.

On July 6, 2006, February 26, 2007, March 4, 2008, February 26, 2009 and February 8, 2010, appellant submitted OWCP EN1032 forms on which she claimed her siblings and a great-niece as dependents.² A conference was held on February 25, 2010 between OWCP’s claims examiner and appellant. The claims examiner noted that appellant claimed two brothers as dependents. When asked if they had been legally adopted, appellant stated that her mother passed away several years previously, and the court left her brothers in her care. Appellant was advised to send the court documentation. Her compensation was reduced to the basic 2/3 rate effective June 6, 2010.

By letter dated July 22, 2010, OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$24,078.93 for the period June 12, 2005 to June 5, 2010 based on receipt of augmented compensation. It found that her siblings did not qualify as dependents, explained the calculation of the overpayment and found appellant not at fault in its creation. Appellant was provided an overpayment action request form and an overpayment questionnaire. The overpayment worksheet and computer printouts of record document that from June 12, 2005 to June 5, 2010 appellant received augmented compensation totaling \$216,485.00, when she should have received compensation at the unaugmented rate totaling \$192,406.07, the difference representing an overpayment in compensation of \$24,078.93.

On July 27, 2010 OWCP’s claims examiner advised appellant that documentation regarding legal custody of her claimed dependents had not been received. She was advised to resend the requested documentation. In correspondence dated August 9, 2010, appellant maintained that she had sent the requested information by priority mail on February 25, 2010 and attached a postal receipt. She did not resend the requested documentation or otherwise respond to the preliminary overpayment notice.

² Appellant claimed as dependents a sister, two brothers and a great-niece.

On August 25, 2010 OWCP finalized the overpayment decision. It noted that FECA does not provide for siblings as qualified dependents. OWCP found that appellant was not at fault in the creation of the overpayment but was not entitled to waiver because she did not respond to the preliminary finding. It informed her that \$300.00 would be deducted from each continuing compensation payment in order to recover 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.³ The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in FECA, the employee 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.⁴ Section 8110(a)(3) of FECA provides that a child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student, as defined under section 8101(17).⁵

Sections 8101(9) and 8110 of FECA state that only individuals specifically defined as a child under section 8110 entitle an employee to augmented compensation for such a dependent. The term child in section 8101(9) of FECA provides for three specific relationships in addition to the biological relation between a parent and his or her natural child: stepchildren, adopted children and posthumous children.⁶

If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation to which he or she was entitled at the two thirds compensation rate and the augmented compensation received at the three fourths rate constitutes an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic compensation rolls at the augmented three-fourths rate on June 12, 2005. She received compensation at the augmented rate until June 6, 2010. Appellant submitted EN1032 forms from July 6, 2006 to February 6, 2010 and claimed several siblings and a great-niece as her dependents. Although she asserted that she was the legal

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8110(b).

⁵ *Id.* at § 8110(a)(3).

⁶ 5 U.S.C. §§ 8101(9) and 8110; *see Louis L. Jackson, Sr.*, 39 ECAB 423 (1988), citing *Aretha Hudson*, 28 ECAB 169, 170 (1977) (where the Board held that appellant's legal guardianship and support of her two minor nephews did not qualify the children as dependents pursuant to the Act, because appellant had not adopted the children). Both of these cases note the principle of statutory construction known as *expressio unis est exclusio alterius*, whereby the expression of specific persons or things in a statute implies an intent to exclude all others.

⁷ 5 U.S.C. § 8110(a)(3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

guardian of the claimed dependents, she submitted no court records or other documentation to support that the individuals were ever adopted as her children. The issue is whether the claimed dependents qualify as a child as defined under section 8110 of FECA. FECA provides that a child means one who is 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children and posthumous children, but does not include married children.⁸ In *Aretha Hudson*,⁹ the Board held that a nephew is not a child under section 8101(9), finding that the guardian of the nephew was not entitled to augmented compensation under FECA. Similarly, sisters and brothers are not among the categories of individuals included in the term “child” for purposes of FECA. The definition of a child covers three specific relationships in addition to the biological one between a person and his or her natural child.¹⁰

The record supports that appellant received compensation at the augmented three-fourths rate from June 12, 2005 to June 5, 2010, when she had no eligible dependents. Appellant received augmented compensation at the three-fourths rate totaling \$216,485.00, when she should have received compensation at the statutory two thirds rate of \$192,406.07. The \$24,078.93 difference constitutes an overpayment in compensation.¹¹ The Board finds that OWCP properly determined the fact and amount of compensation overpaid in this case.¹²

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.”¹³ Section 10.438 of OWCP regulations provides that [t]he 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

⁸ 5 U.S.C. § 8101(9).

⁹ *Aretha Hudson*, *supra* note 6; *see also Katie E. Hall*, 50 ECAB 177 (1998).

¹⁰ *Supra* note 8.

¹¹ 5 U.S.C. §§ 8101(17), 8110.

¹² *See Ralph P. Beachum, Sr.*, *supra* note 7.

¹³ 5 U.S.C. § 8129.

conscience.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

ANALYSIS -- ISSUE 2

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.¹⁶ Appellant, however, had the responsibility to provide financial information to OWCP for consideration.¹⁷ She failed to do so.

In its preliminary determination dated July 22, 2010, 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. Appellant did not submit any completed overpayment questionnaire or submit financial information supporting her income and expenses. 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. As appellant did not submit the financial information required under section 10.438 of the implementing regulations, OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$24,078.93.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account 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 hardship.¹⁹

¹⁴ 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. 20 C.F.R. § 10.437.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Supra* note 13.

¹⁷ 20 C.F.R. § 10.438.

¹⁸ *Id.*

¹⁹ *Id.* at § 10.441; see *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

ANALYSIS -- ISSUE 3

As noted, appellant did not submit an overpayment recovery questionnaire or other financial information to OWCP prior to the final August 25, 2010 overpayment decision. The overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.²⁰ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²¹ As appellant did not submit any financial information as requested, the Board finds that OWCP did not abuse its discretion in directing recovery at a rate of \$300.00 from her continuing compensation.

CONCLUSION

The Board finds that an overpayment of compensation in the amount of \$24,078.93 was received by appellant's that OWCP properly denied waiver of the overpayment, and OWCP properly required repayment by deducting \$300.00 each period from appellant's continuing compensation payments.

²⁰ *Id.* at § 10.438.

²¹ *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 August 25, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 6, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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