

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

L.J., Appellant	)	
	)	
and	)	<b>Docket No. 10-2322</b>
	)	<b>Issued: August 3, 2011</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 16, 2010 appellant filed a timely appeal from a May 18, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. She also appeals a July 12, 2010 nonmerit decision denying her request for a hearing. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$8,594.27 because she received compensation at the augmented rate from January 15, 2008 through February 13, 2010 when she had no dependents; (2) whether she was at fault in the creation of the overpayment; (3) whether OWCP properly set the rate of recovery from continuing compensation payments; and (4) whether OWCP properly denied appellant's request for a hearing following its overpayment determination.

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

## **FACTUAL HISTORY**

In 1996 OWCP accepted that appellant, then a 51-year-old clerk, sustained bilateral wrist tendinitis and depressive disorder due to factors of her federal employment. It also accepted that she sustained a left elbow contusion and left elbow tendinitis due to an August 24, 1984 work injury and lumbosacral strain due to a June 2, 1998 work injury. Appellant worked as a modified clerk from October 1998 to May 30, 2001, when she stopped work and did not return. OWCP paid her compensation for total disability at the augmented rate of three-fourths applicable to claimants with dependents.

On December 31, 2007 appellant advised OWCP by telephone that her health benefits and name had changed due to her divorce in July 2007. OWCP requested a copy of the divorce decree and informed her that she was no longer entitled to augmented compensation. Appellant responded that she was unsure if the divorce was final as some issues were contested.

By letter dated January 10, 2008, OWCP requested updated information regarding appellant's financial and personal status. It enclosed an affidavit of earnings and employment (Form EN1032) which advised that a claimant who has one or more dependents is paid compensation at 75 percent of the applicable rate and that she might claim augmented compensation for a dependent spouse who lived with her, or to whom she paid regular support if she did not live with him. OWCP instructed appellant to immediately report any change in the status of her dependents. On January 30, 2008 appellant completed the EN1032 form. She noted that she was "no longer entitled to compensation for [a] spouse" beginning January 15, 2008 due to a divorce. Appellant further provided that she did not make regular support payments. She also completed EN1032 forms on January 19, 2009 and January 21, 2010 in which she noted that she was not married and did not make spousal support payments.<sup>2</sup>

In a February 3, 2009 telephone call, appellant informed OWCP that her divorce was not yet final as some issues remained contested. By letter dated February 19, 2010, OWCP informed her that it had adjusted her compensation to the statutory two-thirds rate applicable for claimants without dependents. It requested that appellant submit a copy of her divorce decree to determine the amount of overpayment of compensation.

On April 12, 2010 OWCP advised appellant of its preliminary finding that she received an overpayment of \$8,594.27 as she received augmented compensation for the period January 15, 2008 through February 13, 2010 even though she did not have any eligible dependents. It noted that she had not responded to its letter requesting a copy of her divorce decree but that the date of the divorce appeared to be January 15, 2008. OWCP calculated the overpayment by determining the amount to which appellant was entitled from January 15, 2008 through February 13, 2010 without dependents, \$68,563.75, which it added to the amount that she was entitled to from December 23, 2007 through January 14, 2008, \$2,241.68, to find a total of \$70,805.43. OWCP subtracted this amount from what it had paid her from December 23, 2007 through February 13, 2010, \$79,399.70 to find an overpayment of \$8,594.27. It advised appellant of its preliminary determination that she was at fault in the creation of the overpayment. OWCP requested that she complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified appellant that, within 30

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<sup>2</sup> Appellant misdated the January 21, 2010 Form EN1032 as January 21, 2009.

days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing. Appellant did not respond.

By decision dated May 18, 2010, OWCP found that appellant received an overpayment of \$8,594.27 as she received augmented compensation during a period in which she did not have dependents. It found that she was not without fault in the creation of the overpayment. OWCP determined that it would recover the overpayment by withholding \$368.52, or 15 percent, from appellant's continuing compensation payments. It noted that she had not responded to the preliminary determination of overpayment.

By form dated May 5, 2010, received by OWCP on June 7, 2010, appellant requested a prerecoupment hearing. The form was sent with a facsimile cover sheet dated June 3, 2010. In a letter dated May 7, 2010, received by OWCP on June 10, 2010, she challenged OWCP's finding of fault and submitted an overpayment recovery questionnaire. In an undated letter, received by OWCP on June 10, 2010, appellant related that she was resending the May 7, 2010 letter because OWCP informed her that they did not receive it.

In a decision dated July 12, 2010, OWCP denied appellant's request for a prerecoupment hearing as it was made after the issuance of the final overpayment decision.

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

FECA<sup>3</sup> 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.<sup>4</sup> 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 or her monthly pay, which is known as the basic compensation for total disability.<sup>5</sup> Where the employee has one or more dependents as defined in the Act, 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.<sup>6</sup> A husband may be a dependent if he is a member of the same household as the employee or receives regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.<sup>7</sup> If a claimant receives augmented compensation during a period where 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-quarters rate constitutes an overpayment of compensation.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Id.* at § 8102(a).

<sup>5</sup> *Id.* at § 8105(a).

<sup>6</sup> *Id.* at § 8110(b).

<sup>7</sup> *Id.* at § 8110(a)(2).

<sup>8</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

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

The Board finds that appellant received an overpayment of compensation. Appellant received compensation at the augmented rate from January 15, 2008 through February 13, 2010 even though she had no eligible dependents. She notified OWCP on December 31, 2007 that she was divorced in July 2007. Appellant signed a January 30, 2008 EN1032 form indicating that she was no longer entitled to augmented compensation due to a January 15, 2008 divorce. She also signed EN1032 forms on January 19, 2009 and January 21, 2010 that provided that she was not married and did not have dependents. While appellant related on February 3, 2009 that her divorce was not yet final, her statement on the January 30, 2008 Form EN1032 that she was divorced as of January 15, 2008 and did not have dependents is found by the Board to be most probative. As she had no dependents beginning January 15, 2008 but continued to be paid compensation at the augmented rate, an overpayment of compensation was created. OWCP calculated the overpayment by subtracting the amount of compensation that appellant should have received December 23, 2007 through January 14, 2008, \$70,805.43, from the amount that it paid her of \$79,399.70, to find an overpayment of \$8,594.27. The Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$8,594.27 as she was paid compensation at the augmented rate for the period January 15, 2008 through February 13, 2010 when she had no dependents.

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

Section 8129(b) of FECA<sup>9</sup> provides that “[a]djustment 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 regulations<sup>10</sup> provide that in determining whether a claimant is at fault, OWCP 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.”

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

OWCP found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. In order for it to establish that she was at fault in creating the overpayment of compensation, it must show that, at the time she received the compensation in question, she knew or should have known that the payment was incorrect.<sup>11</sup> With respect to whether an individual is with fault, section 10.433(b)

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<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> 20 C.F.R. § 10.433.

<sup>11</sup> *Franklin L. Bryan*, 56 ECAB 310 (2005).

of OWCP's regulations provide that whether or not OWCP determines that an individual was with fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>12</sup>

The Board finds that appellant was at fault in creating the overpayment from January 15, 2008 through February 13, 2010. Appellant completed EN1032 forms on January 30, 2008, January 19, 2009 and January 21, 2010 which provided her with the definition of a dependent and explained that she was not entitled to receive compensation at the augmented rate if she did not have dependents. By signing the EN1032 forms, appellant had notice that she was not entitled to compensation at the augmented rate if she did not have a dependent. She did not claim dependents on the EN1032 forms beginning January 30, 2008 and noted on the January 30, 2008 form that she was no longer entitled to compensation for a spouse. Appellant thus knew or should have known that the compensation she received at the augmented rate after January 15, 2008 was incorrect. Even if an 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.<sup>13</sup> As appellant is not without fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>15</sup> Section 10.441(a) of the regulations provide:

“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 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 any hardship.”<sup>16</sup>

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<sup>12</sup> 20 C.F.R. § 10.433(b); *F.A.*, Docket No. 08-1519 (issued December 18, 2008); *see also Otha J. Brown*, 56 ECAB 228 (2004) (each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she receives from the Office are proper).

<sup>13</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>14</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

<sup>15</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>16</sup> 20 C.F.R. § 10.441(a).

### **ANALYSIS -- ISSUE 3**

OWCP found that appellant could repay the overpayment by withholding \$368.52 from her continuing compensation payments beginning June 5, 2010. Appellant did not submit any financial information prior to the final overpayment decision. OWCP's procedure manual provides that, when an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>17</sup> Furthermore, without the appropriate financial documentation or overpayment questionnaire as required by section 10.441, OWCP is unable to consider her financial circumstances. The Board thus finds that OWCP did not abuse its discretion by deducting \$368.52 from appellant's continuing compensation payments to repay the overpayment.

### **LEGAL PRECEDENT -- ISSUE 4**

OWCP's regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault, and the right to request waiver of the overpayment.<sup>18</sup> OWCP's regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>19</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>20</sup> The only right to a review of a final overpayment decision is to the Board.<sup>21</sup> The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.<sup>22</sup>

### **ANALYSIS -- ISSUE 4**

OWCP's April 21, 2010 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing. When the final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a request. The only right to

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<sup>17</sup> *Frederick Arters*, 53 ECAB 397 (2002). OWCP's procedure manual provides that, if a claimant is being paid compensation or is due accrued benefits from OWCP and does not submit evidence to support a waiver within the allotted time period, the debt should be recovered from such benefits as quickly as possible. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2), 6.22.4d(1)(b) (May 2004). In all cases where an overpayment is due for recovery, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *See id.* at Chapter 6.200.4d(1)(b); *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>18</sup> 20 C.F.R. § 10.431.

<sup>19</sup> *Id.* at § 10.432.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at § 10.440(b).

<sup>22</sup> *Id.*; *see also Philip G. Feland*, 48 ECAB 485 (1997).

appeal is to the Board.<sup>23</sup> Appellant requested a prerecoupment hearing in correspondence dated May 5, 2010 but faxed to OWCP on June 3, 2010, more than 30 days after the preliminary overpayment finding and after the issuance of the final overpayment decision. Once OWCP issued the final overpayment decision on May 15, 2010, appellant's only right of appeal was to the Board. The Board finds that OWCP properly denied her request for a hearing as she was not entitled to a hearing with respect to a final overpayment decision.<sup>24</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of \$8,594.27 because she received compensation at the augmented rate from January 15, 2008 through February 13, 2010 when she had no dependents. The Board further finds that she was at fault in the creation of the overpayment, that OWCP properly set the rate of recovery from continuing compensation payments and that OWCP properly denied her request for a hearing following its overpayment determination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 12 and May 18, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 3, 2011  
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>23</sup> *Id.* at § 10.440(b)

<sup>24</sup> *Id.*