

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, DAVIE BRANCH,
Davie, FL, Employer**

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**Docket No. 11-744
Issued: December 28, 2011**

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 February 2, 2011 appellant filed a timely appeal of the January 10, 2011 overpayment decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment case.

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$357.65 from October 29 through December 7, 2007 because she received augmented compensation but had no dependents; (2) whether she was at fault in the creation of the \$357.65 overpayment and, therefore, ineligible for waiver of the recovery; and (3) whether OWCP properly required repayment of the overpayment by a one-time deduction of \$357.65 from her continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she was not at fault in creating the overpayment because she presumed that her daughter and grandchildren were dependents since they lived with her and her daughter was unemployed. She further contends that she is unable to repay the overpayment due to financial hardship.

FACTUAL HISTORY

OWCP accepted that on December 13, 2000 appellant, then a 40-year-old clerk, sustained cervical, thoracic and lumbar strains and aggravation of cervical disc and lumbar degeneration as a result of lifting a 36-pound parcel into a crab cage while working at the employing establishment. Appellant stopped work.

In a February 19, 2002 letter, OWCP advised appellant that she was being placed on the periodic compensation rolls for temporary total disability at the augmented rate of 75 percent of her monthly pay.² Appellant was instructed to inform OWCP of any change in the status of her claimed dependents. OWCP specifically advised her as follows: “If you claimed only one dependent, DO NOT CASH CHECKS RECEIVED AFTER THE CHANGE IN STATUS of this dependent. Otherwise, an overpayment of compensation may result. Return the checks promptly to this office.”

In EN1032 forms covering the 15 months prior to their completion on December 29, 2003, October 25, 2004 and September 26, 2009, appellant listed “no” in response to a question regarding whether she was receiving compensation for a dependent. In the December 29, 2003 Form EN1032, she asked for the definition of a dependent in response to the question of whether she was entitled to receive compensation for that dependent. Appellant stated that her unemployed daughter lived with her. In the October 25, 2004 Form EN1032, she indicated that her daughter, who was born on December 4, 1982, had withdrawn from continuing education in June 2004. In the September 26, 2009 Form EN1032, appellant indicated not applicable in response to a question regarding whether she was entitled to receive compensation for the claimed dependent. Part C of Form EN1032, entitled Dependents, described the applicable compensation rates for an individual with dependents (75 percent) and without dependents (66 2/3 percent). The form also described who and under what circumstances a person can be claimed as a dependent. After providing general information about compensation rates and eligible dependents, Form EN1032 specifically inquired about whether appellant was claiming compensation on account of dependents, such as children and whether there had been any changes in dependent status that might effect entitlement. Part H of the form included a certification that reads in part: “I understand that I must immediately report to OWCP ... any change in the status of claimed dependents....”

In a May 6, 2010 health benefits election form, appellant indicated that her daughter reached age 22 on December 4, 2004. A May 7, 2010 OWCP memorandum noted that she had not advised it about her daughter’s age. Federal health benefits did not provide coverage for a dependent commencing on the dependent’s 22nd birthday. The health benefits code was changed

² In a February 27, 2006 decision, OWCP reduced appellant’s compensation to zero on the grounds that her actual earnings in a modified window service technician position fairly and reasonably represented her wage-earning capacity.

to 104 commencing January 17, 2010. A refund was due for various periods including, October 29 through December 7, 2007. An overpayment of compensation determination was recommended for the same period due to a change in the compensation rate from 75 percent to 66 2/3 percent.

On September 30, 2010 OWCP notified appellant of its preliminary determination that she received an overpayment of \$357.65 because she received compensation at the augmented rate from October 29 to December 7, 2007 even though she did not have a dependent. It calculated the overpayment by subtracting the amount of compensation she actually received from the amount to which she was entitled had it used the proper payrate and health benefit deductions. In an attached worksheet, OWCP noted that appellant received \$4,363.20 in compensation from which \$217.66 was deducted for health benefits, totaling \$4,145.54. She should have received \$3,878.40 in compensation and \$90.51 for health benefits. She should have been paid at the 66 2/3 percent statutory rate for claimants without dependents; or a total of \$3,787.89. The difference of \$357.65 represented the overpayment. OWCP found that appellant was at fault in the creation of the overpayment because she knew or should have known that the amount of the compensation she received was incorrect. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing. Appellant did not respond.

In a January 10, 2011 decision, OWCP finalized the overpayment determination in the amount of \$357.65. It found that appellant did not submit any evidence refuting the amount of the overpayment or finding of fault and directed recovery of the overpayment by making a one-time deduction of \$357.65 from appellant's continuing compensation benefits.³

LEGAL PRECEDENT -- ISSUE 1

FECA⁴ 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.⁵ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of her monthly pay, which is known as the basic statutory rate for total disability.⁶ Where the employee has one or more dependents as defined in 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.⁷ A dependent includes a student, which under 5 U.S.C.

³ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before OWCP at the time of the final decision. See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8105(a).

⁷ *Id.* at § 8110(b).

§ 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.⁸ If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$357.65 for the period October 29 through December 7, 2007. On May 6, 2010 appellant advised OWCP that her daughter was 22 years old as of December 4, 2004. OWCP paid her compensation at the augmented rate of 75 percent of her monthly pay from October 29 through December 7, 2007 instead of at the 66 2/3 percent rate for employees with no qualifying dependents. Accordingly, appellant received an overpayment of compensation.

OWCP paid appellant \$4,363.20 at the augmented rate for the period October 29 through December 7, 2007. Appellant should have been paid \$3,878.40. OWCP also deducted \$217.66 in health benefits at the augmented rate for the same period. It should have deducted \$90.51. Appellant consequently received an overpayment of \$357.65, the difference between the compensation and health benefits deductions to which she was entitled at the 2/3 rate and the augmented compensation she received and the health benefits deductions at the 3/4 rate.¹⁰ The Board will affirm the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ 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 [FECA] or would be against equity and good conscience.” Section 10.433 of OWCP’s implementing regulations¹² 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

⁸ *Id.* at § 8110(a).

⁹ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

Whether or not 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 realize that he or she is being overpaid.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known to be incorrect. Payment from October 29 through December 7, 2007 was not proper because they were made at the augmented three-fourths rate. As appellant had no dependents after her daughter turned 22 years old on December 4, 2004, she was only entitled to compensation at the statutory two-thirds rate.

As early as February 19, 2002, appellant was made aware of the fact that she was being compensated at the 75 percent rate because of one or more dependents. When she was first placed on the periodic compensation rolls, she was instructed to inform OWCP of any change in the status of any dependents claimed to avoid an overpayment of compensation. In several EN1032 forms, including those completed by appellant on December 29, 2003, October 25, 2004 and September 26, 2009, OWCP specifically advised her of the standards under FECA for claiming a dependent. Appellant presumably read Form EN1032 on multiple occasions when she signed the above-noted certification.

The Board finds that appellant accepted payments she knew or should have known to be incorrect. Not only did the initial award notification advise her of her responsibility to correctly identify her eligible dependents, but she was also reminded of this obligation on the EN1032 forms she signed on December 29, 2003, October 25, 2004 and September 26, 2009. Part C of Form EN1032, entitled Dependents, described the applicable compensation rates for an individual with dependents (75 percent) and without dependents (66 2/3 percent). The form also described who and under what circumstances a person can be claimed as a dependent. After providing general information about compensation rates and eligible dependents, Form EN1032 specifically inquired about whether one is claiming compensation on account of other dependents, such as children and whether there have been any changes in dependent status that might effect entitlement. Part H of the form includes a certification that reads in part: “I understand that I must immediately report to OWCP ... any change in the status of claimed dependents....” Appellant presumably read Form EN1032 on multiple occasions when she signed the above-noted certification.

Given the specificity of Form EN1032, the Board finds that appellant knew or should have known that she was not entitled to claim her daughter as a dependent. The Board, therefore, finds that she was at fault in creating the overpayment of compensation benefits, as she accepted payments she knew or should have known to be incorrect. Because appellant was at fault, she is not eligible for a waiver of recovery of the overpayment.

¹³ *Id.* at § 10.433(b).

On appeal, appellant contested the finding that she was not at fault in creating the overpayment as she presumed that her daughter and grandchildren were eligible dependents since they lived with her and her daughter was unemployed. As a recipient of compensation, appellant had the responsibility to promptly notify OWCP as to status of any claimed dependents.¹⁴

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.¹⁵

ANALYSIS -- ISSUE 3

OWCP determined that the \$357.65 overpayment would be recovered from continuing compensation. Because appellant failed to submit the requested financial documentation, OWCP did not abuse its discretion in determining to make a one-time payment of \$357.65 from her continuing compensation. The Board will affirm OWCP's January 10, 2011 decision on the issue of rate of recovery.¹⁶

On appeal, appellant contended that recovery of the overpayment would cause an undue financial hardship. However, this argument was not raised before OWCP and the Board may not consider it for the first time on appeal.¹⁷

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of \$357.65 from October 29 through December 7, 2007. The Board further finds that OWCP properly found that she was at fault in creating the overpayment and, therefore, ineligible for waiver of the recovery. Lastly, the Board finds that OWCP did not abuse its discretion in directing recovery of the overpayment by making a one-time deduction of \$357.65 from appellant's continuing compensation benefits.

¹⁴ *Id.* at § 501.2(c)(1).

¹⁵ *Id.* at § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁶ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004).

¹⁷ *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 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