

On appeal, appellant's representative contends appellant's incorrect filing of his Form EN1032 was unintentional and he should not be considered at fault in the creation of the overpayment.

FACTUAL HISTORY

On December 8, 1983 appellant, then a 44-year-old painter, filed a traumatic injury claim alleging that on November 28, 1983 he fractured his left leg when he fell into an open man hole. OWCP accepted the claim for fractured left leg and paid wage-loss compensation for total disability.²

In a January 29, 1987 letter, OWCP advised appellant that he was being placed on the periodic compensation rolls for temporary total disability and was instructed to inform OWCP immediately of any change in the status of any dependents claimed to establish entitlement to additional compensation.

In a February 3, 1987 notification letter, OWCP included the following statement: "I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for resulting overpayments. I am also aware that any falsification or willful omission may result in criminal prosecution." On February 6, 1987 appellant signed the above-noted statement and returned it to OWCP.

Over the years, appellant claimed his wife as a dependent, as well as a son born on October 17, 1968. Because he had at least one eligible dependent, OWCP paid him wage-loss compensation at the augmented rate of 75 percent.

Appellant's wife died on October 22, 2006. In EN1032 forms dated October 27, 2007, October 10, 2008 and October 16, 2009, appellant claimed his wife as a dependent. Part C of Form EN1032, entitled Dependents, describes the applicable compensation rates for an individual with dependents (75 percent) and without dependents (66 2/3 percent). A description of who and under what circumstances a person can be claimed as a dependent was provided. This section inquired about appellant's marital status, whether he claimed compensation on account of other dependents, such as children and whether there had been any changes in dependent status that might effect entitlement. Appellant indicated that he was married and his spouse lived with him. Part H of the form reads in part: "I understand that I must immediately report to OWCP ... any change in the status of claimed dependents...." Appellant signed the forms certifying that the information he provided was correct.

During a November 4, 2009 telephone conversation appellant informed OWCP that his wife was deceased since October 22, 2006. Subsequently, he submitted a copy of his wife's death certificate.

² The employing establishment terminated appellant's employment effective May 19, 1986 and his disability retirement was approved on May 21, 1986. By letter dated January 29, 1987, OWCP placed him on the periodic rolls for temporary total disability.

The record contains a November 5, 2009 computer printout showing that appellant's compensation was paid at the statutory two-thirds rate for the period October 25 to November 21, 2009. The effective date was noted as November 4, 2009.

On April 8, 2010 OWCP made a preliminary finding that appellant was overpaid wage-loss benefits in the amount of \$5,610.33. It noted that the overpayment occurred because his wife died on October 22, 2006 and he was without dependents since October 23, 2006; however, he received augmented compensation at the three-fourths rate instead of the statutory two-thirds rate from October 23, 2006 to October 24, 2009. OWCP noted that appellant received net compensation for this period in the amount of \$111,549.71 when he was entitled to \$105,939.38, the difference representing an overpayment of compensation. It found him at fault in the creation of the overpayment because he accepted payments he knew or should have known that he was not entitled. OWCP noted that appellant had the right to submit evidence or arguments which would affect the preliminary findings. No evidence, financial information or overpayment questionnaire was submitted.

In a transcript of a May 3, 2010 telephone call, appellant's representative related that appellant insisted that he had submitted a copy of his wife's death certificate. OWCP informed the representative that no death certificate had been received and he advised that he remained married on the EN1032 forms submitted.

In a May 12, 2010 decision, OWCP finalized the overpayment determination.

LEGAL PRECEDENT -- ISSUE 1

The basic rate of compensation under FECA is 66 2/3 percent of the injured employee's monthly pay.³ Where the employee has one or more dependents as defined by FECA, he or she is entitled to have the basic compensation augmented at the rate of 75 percent of monthly pay.⁴ A wife is considered the employee's dependent if she is a member of the same household; or if she is receiving regular contributions from the employee for her support; or if the employee has been ordered by a court to contribute to her support.⁵ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation she was entitled to receive at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁶

³ 5 U.S.C. § 8105(a), 20 C.F.R. §§ 10.401(b), *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.5(a) (December 1995).

⁴ 5 U.S.C. § 8105(a), 8110(a); 20 C.F.R. § 10.401(b); *see also* Federal (FECA) Procedure Manual, *id.*, Chapter 2.901.20 (July 2010).

⁵ *Id.* at § 8110(a)(1). *See also D.F.*, 58 ECAB 550 (2007); *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

⁶ *Jenny M. Drost*, 56 ECAB 587 (2005); *Ralph P. Beachum*, 55 ECAB 442 (2004).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,610.33. The record supports that he continued to receive compensation at the augmented three-fourths rate after his wife's death on October 22, 2006 until October 24, 2009 and he had no other dependents.⁷ Appellant received total augmented compensation in the amount of \$111,549.71. As he was not entitled to compensation at the augmented rate after the death of his wife, he should have received compensation in the amount of \$105,939.38. The Board finds that OWCP properly found that an overpayment in compensation in the amount of \$5,610.33 had been created.⁸

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.⁹

Section 10.433(a) of OWCP's regulations provide:

“[OWCP] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [OWCP] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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. (This provision applies only to the overpaid individual).”¹⁰

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$5,610.33 overpayment, OWCP found that he accepted payments he knew or should have known to be incorrect. Payment from October 23, 2006 through October 24, 2009 was not proper because they were made at the

⁷ The record supports that appellant stopped claiming his son as a dependent by 2000.

⁸ 5 U.S.C. §§ 8101, 8110.

⁹ *Id.* at § 8129. See also *Terry A. Keister*, 56 ECAB 559 (2005); *Ralph P. Beachum*, *supra* note 6.

¹⁰ 20 C.F.R. § 10.433; see also 20 C.F.R. § 10.430; *Joan Ross*, 57 ECAB 694 (2006); *Sinclair L. Taylor*, 52 ECAB 227 (2001).

augmented three-fourths rate. As appellant had no dependents following his wife's death on October 22, 2006, he was only entitled to compensation at the statutory two-thirds rate.

As early as February 3 1987, appellant was made aware of the fact that he was being compensated at the 75 percent rate because of one or more dependents. When he was first placed on the periodic compensation rolls, he was instructed to inform OWCP immediately of any change in the status of any dependents claimed to establish entitlement to additional compensation. The February 3, 1987 notification also included the following statement: "I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for resulting overpayments. I am also aware that any falsification or willful omission may result in criminal prosecution." On February 6, 1987 appellant signed the above-noted statement and returned it to OWCP.

The Board finds that appellant repeatedly accepted payments he knew or should have known to be incorrect. Not only did the initial award notification advise him of his responsibility to correctly identify his eligible dependents, but he was also reminded of this obligation on an almost annual basis. The record includes multiple financial disclosure statements that appellant submitted over the years. Part C of Form EN1032, entitled Dependents, describes the applicable compensation rates for an individual with dependents (75 percent) and without dependents (66 2/3 percent). The form also describes 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 inquires about one's marital status, 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 he signed the above-noted certification.

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

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.¹¹

¹¹ *Id.* at § 10.441; see *Steven R. Cofrancesco, supra* note 5.

ANALYSIS -- ISSUE 3

OWCP determined that \$400.00 a month would be withheld from appellant's continuing compensation until the overpayment was recovered. Because appellant failed to submit the requested financial documentation, OWCP did not abuse its discretion in determining to withhold \$400.00 a month from his continuing compensation. The Board will affirm OWCP's May 12, 2010 decision on the issue of rate of recovery.¹²

CONCLUSION

The Board finds that appellant received an overpayment of \$5,610.33 for the period October 23, 2006 through October 24, 2009. The Board further finds that he was at fault in creating the overpayment. Lastly, the Board finds that OWCP did not abuse its discretion in directing OWCP to recover the overpayment by withholding \$400.00 a month from appellant's continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2010 is affirmed.

Issued: July 11, 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

¹² 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).