

FACTUAL HISTORY

On February 6, 1973 appellant, a 38-year-old letter carrier, sustained an injury in the performance of duty while carrying heavy boxes. As he put one down, his back went out. OWCP accepted his claim for a degenerative fifth lumbar disc and resolving right sciatic radiculitis involving the S1 nerve root.²

On October 7, 1978 appellant sustained another injury in the performance of duty when he stepped off a curb and twisted his ankle. OWCP accepted his claim for a permanent aggravation of lumbar degenerative disc disease. Appellant received compensation for temporary total disability at the augmented rate for dependents.

On September 22, 2009 appellant completed a Form EN1032, a form he had completed many times in the past. In Part C, the section on dependents, the form explains how having a wife living with him entitled him to greater compensation:

“A claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate. A claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. You must answer the questions below to ensure your compensation is paid at the correct rate.”

Appellant advised that he was married and that his wife lived with him. He claimed no other dependents. At the end of the form, he certified: “I understand that I must immediately report to OWCP ... any change in the status of claimed dependents....”

On August 8, 2010 appellant notified OWCP that he had just experienced a great loss: his wife of 40 years had passed away unexpectedly. OWCP continued to pay and appellant continued to accept, augmented compensation for dependents through September 25, 2010. It later received a death certificate confirming that appellant’s wife had passed away on April 30, 2010.

On October 26, 2010 OWCP made a preliminary determination that appellant received an \$811.47 overpayment from May 1 to September 25, 2010, because he received compensation at the augmented rate for dependents when he was actually entitled to compensation at the regular rate. It notified him that it appeared that he was at fault in creating the overpayment because he accepted a payment that he knew or should have known was incorrect. OWCP gave appellant 30 days to contest the preliminary finding and to submit an overpayment recovery questionnaire to help determine the issues of waiver and, if necessary, a fair repayment method.

In a decision dated January 11, 2011, OWCP finalized its preliminary determination that appellant was at fault in the creation of the \$811.47 overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. As it received no response to its preliminary finding, OWCP considered that he was receiving \$2,282.70 in continuing

² OWCP File No. xxxxxx902.

compensation every 28 days and determined that the debt should be recovered at the rate of \$75.00 from future payments.

On appeal, appellant argues that he is 76 years old and suffers from a form of amnesia: “I do not remember well.” He explained that he went into shock when his wife died and had no one to remind him to notify OWCP. Appellant did not realize four months had passed since her death when he notified OWCP, but he did notify OWCP and “was not trying to pull a fast one on OWCP.” He added that the overpayment occurred through no fault of his own. Appellant requested waiver, as repayment would create a hardship. He stated that he did not respond to the preliminary determination because he was not aware that charges were being made against him.

LEGAL PRECEDENT -- ISSUE 1

FECA pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ A disabled employee with one or more dependents is entitled to have his basic compensation augmented from two-thirds to three-fourths of his monthly pay.⁴ A dependent” means a wife if: (a) she is a member of the same household as the employee; (b) she is receiving regular contributions from the employee for her support; or (c) the employee has been ordered by a court to contribute to her support.⁵

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶ 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 received 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect.⁷

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8110(b).

⁵ *Id.* at § 8110(a)(1).

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.433(a).

vary with the complexity of those circumstances and the individual's capacity to realize that he is being overpaid.⁸

The 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 the individual is entitled to waiver. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁹

ANALYSIS -- ISSUE 1

Appellant does not contest the fact or the amount of the overpayment, which are well established. Prior to April 30, 2010, he was receiving augmented compensation because his wife was an eligible dependent. After appellant's wife passed away and he was no longer entitled to the augmented compensation, he continued to receive compensation at the augmented rate. The Board finds that this created an overpayment. In its October 26, 2010 preliminary determination, OWCP explained its calculation of the amount of the overpayment, which was the compensation appellant actually received minus the compensation he should have received.¹⁰ The Board will therefore affirm OWCP's January 11, 2011 decision on the issues of fact and amount of overpayment.

On the issue of fault, appellant knew or should have known that he was receiving augmented compensation because of his wife. He completed numerous forms that explained how a claimant with an eligible dependent is paid compensation at 75 percent of the applicable pay rate, while a claimant with no eligible dependent is paid at 66 $\frac{2}{3}$ percent. As appellant certified on each of these forms, he understood that he had to report to OWCP any change in the status of his claimed dependents and had to report that change immediately. He most recently certified his understanding of this matter on September 22, 2009. The Board finds that appellant knew or should have known that having an eligible dependent such as his wife determined the amount of compensation to which he was entitled.

No one expects a person to report the sudden passing of his wife immediately, in the strict sense of the word. The incorrect payments appellant received continued for months. He should have known what was being deposited into his checking account and he should have known that it was too much. The amount of appellant's periodic compensation checks did not decrease automatically after April 30, 2010. A reasonable person should have realized that the compensation being deposited into his checking account on a regular basis was incorrect.

⁸ *Id.* at § 10.433(b).

⁹ *Id.* at § 10.438.

¹⁰ The Board will correct one sentence in OWCP's preliminary determination. After explaining that appellant actually received a net payment of \$12,877.17 for the period and should have received only \$12,065.70, OWCP stated: "The difference between the net amounts of \$12,627.57 and \$12,065.70 is \$811.47." OWCP meant the difference between \$12,877.17 and \$12,065.70.

Appellant nonetheless accepted these incorrect payments for a period of nearly five months. The Board therefore finds that OWCP had sufficient grounds to find that he accepted a payment which he should have known was incorrect. The Board will affirm OWCP's January 11, 2011 decision on the issue of fault.¹¹

Appellant argues on appeal that he should not be found at fault for several reasons: he is 76 years old, he suffers from a form of amnesia, he does not remember well, he went into shock when his wife passed and he had no one to remind him to notify OWCP. The Board cannot consider these arguments for the first time on appeal.

Appellant also argues that he was not trying "to pull a fast one on OWCP." To be clear, OWCP did not accuse him of trying to pull a fast one. OWCP did not make charges against him or accuse him of doing anything untoward. A finding on "fault" is a mechanism that tells OWCP whether it needs to consider waiver of the overpayment or whether it must, instead, recover the debt from the overpaid individual. It is how OWCP decides whether the overpaid individual should be responsible for paying back the money that does not belong to him. It is much more a matter of administrative procedure than it is any kind of judgment on the individual's character. It should be pointed out that OWCP shares some responsibility in this matter because it made an additional incorrect payment after receiving notice from appellant. The fact that OWCP may have erred in making the overpayment, however, does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also responsible in some way.¹²

Even if appellant was found to be without fault in the creation of this overpayment, he would still be responsible for repaying the debt. OWCP asked him to submit an overpayment recovery questionnaire to help determine the issues of waiver and, if necessary, a fair repayment method. Appellant did not respond. Regulations provide that if an overpaid individual fails to submit the requested information about income, expenses and assets within 30 days of the request, waiver shall be denied. Appellant would find himself in very much the same position regardless of the fault finding.¹³

LEGAL PRECEDENT -- ISSUE 2

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the

¹¹ Even if appellant could be found without fault with respect to the very first direct deposit after his wife's passing, he would still be required to repay the overpaid amount. Failure to submit information about income, expenses and assets within 30 days of OWCP's request shall result in denial of waiver. *See* note 9.

¹² *See id.* § 10.435(a).

¹³ A finding of fault prevents an individual from making further requests for waiver, so when an overpayment is large enough to require a lengthy period of recovery, a change for the worse in the individual's financial circumstances will not relieve his liability for repayment.

financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹⁴

ANALYSIS -- ISSUE 2

Because the evidence supports one of the grounds for “fault,” appellant is not entitled to consideration of waiver. FECA requires OWCP to recover the debt from his future payments of compensation. Normally, as noted earlier, OWCP would use the overpayment recovery questionnaire to determine a fair repayment schedule, but as appellant did not complete and submit the questionnaire, OWCP had to give due regard to other factors. It well understood the probable extent of his future compensation payments and it knew that he would continue to receive \$2,282.70 in compensation every 28 days. OWCP determined that recovering the debt at the rate of \$75.00 from each compensation payment -- a reduction of 3.3 percent -- would minimize the hardship on appellant while still allowing a reasonably prompt recovery of the debt. As it gave due regard to relevant factors in setting the rate of recovery, the Board will affirm OWCP’s January 11, 2011 decision on that issue.

CONCLUSION

The Board finds that appellant was at fault in the creation of an \$811.47 overpayment that occurred from May 1 to September 25, 2010 and that OWCP properly set the rate of recovery.

¹⁴ *Id.* § 10.321(a).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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