



## **FACTUAL HISTORY**

On January 9, 1988 appellant, then a 44-year-old nursing assistant, sustained injury to her right leg when she slipped and fell on ice in the parking lot. OWCP accepted her claim for sprain and osteoarthritis of the right leg and provided appropriate compensation. Appellant received compensation for partial disability at the augmented rate for dependants.

The record reflects that appellant received compensation by direct deposit. On September 4, 2004 appellant received a direct deposit of compensation in the amount of \$551.04 for the period August 8 through September 4, 2004.

In letter dated September 15, 2004, appellant informed OWCP that her husband died on September 2, 2004. She also provided a copy of the death certificate, which confirmed her husband died on September 2, 2004.

On October 15, 2004 she completed a Form EN1032, a form she had completed many times in the past. In Part C, the section on dependants, the form explained who was considered a dependent and how having a dependant, such as a husband living with her, entitled her to greater compensation:

“A claimant who has no eligible dependants 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 indicated that her husband died on September 2, 2004 and claimed no other dependents. At the end of the form, she certified: “I understand that I must immediately report to OWCP ... any change in the status of claimed dependents.”

Appellant claimed no dependents in subsequent EN1032 forms certified September 30, 2005, July 28, 2006, August 19, 2007 and August 8, 2008.<sup>2</sup> OWCP continued to pay augmented compensation for dependents from September 5, 2004 through August 8, 2008. In an August 8, 2008 letter, appellant informed it that she had a total right hip replacement on January 28, 2008.

In payment worksheets dated August 5, 2008, OWCP determined that an overpayment existed due to change in compensation rate from the augmented three-fourths rate to the basic two-thirds rate due to the death of appellant’s dependant spouse on September 2, 2004. It found that she was paid \$1,803.80 for the period September 3 to December 25, 2004 and \$28,808.01 for the period December 26, 2004 through August 2, 2008 for a total of \$30,611.81. However, at the correct compensation rate, appellant should have been paid \$26,299.12 for the period September 3, 2004 through August 2, 2008. Thus, OWCP determined that appellant was overpaid \$4,312.69 for the period September 3, 2004 through August 2, 2008.

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<sup>2</sup> In the form signed on August 8, 2008, appellant indicated that her husband died September 2, 2004.

On September 12, 2008 OWCP made a preliminary determination that appellant received an \$8,083.40 overpayment from September 3, 2004 through August 8, 2008 because she received compensation at the augmented rate for dependants when she was actually entitled to compensation at the regular rate. It provided the total amount of compensation received at the augmented rate and the amount she should have been paid for the periods September 2 to December 25, 2004 and December 26, 2004 to August 2, 2008. OWCP found that appellant was without fault in creating the overpayment.

In a September 30, 2008 letter, appellant requested a prerecoument hearing before a representative of OWCP. By decision dated June 24, 2009, OWCP's hearing representative vacated OWCP's finding of fault as appellant had been apprised on numerous occasions that she was in receipt of compensation at the augmented rate due to her dependent husband and she was queried on numerous occasions regarding her dependents but continued to receive augmented compensation after her husband's death.

On April 6, 2010 OWCP issued a preliminary finding that appellant was overpaid in the amount of \$8,083.40 during the period September 3, 2004 through August 8, 2008 as she continued to receive compensation at the augmented dependent rate subsequent to the death of her dependent husband on September 2, 2004. It provided the total amount of compensation received at the augmented rate and the amount she should have been paid for the periods September 2 to December 25 and 26, 2004 to August 2, 2008. OWCP found that appellant was at fault in creating the overpayment as she accepted payments she knew or should have known to be incorrect.

Appellant requested a telephonic prerecoument hearing before an OWCP hearing representative on May 5, 2010. In an August 12, 2010 letter, she was informed her telephonic hearing would take place on September 30, 2010 at 10:00 a.m. eastern time. Appellant was provided a toll free number and a pass code to use. She did not appear for the telephonic hearing but contacted OWCP. In an October 6, 2010 letter, OWCP notified appellant that her request to postpone the September 30, 2010 hearing could not be granted. Thus, appellant was advised a review of the written record would be conducted.<sup>3</sup> She was sent a Form OWCP-20, overpayment recovery questionnaire form, and requested to complete the form and provide supporting documentation within 15 days.

On October 21, 2010 OWCP received an October 16, 2010 overpayment recovery questionnaire from appellant along with some supporting financial documentation. Appellant stated that she should be found without fault because of the deaths of her husband, sister, daughter and grandson occurring near the same time. She indicated that she had a new hip replacement and experienced depression and anxiety. Appellant stated that her other daughter helped her pay her monthly bills and she did not realize she was overpaid until she received notice from OWCP. In the October 16, 2010 overpayment recovery questionnaire, she indicated that her monthly income was \$1,546.38 which was comprised of \$894.00 in social security and \$652.38 in OWCP payments. Appellant indicated that her monthly expenses were \$1,732.09 which was comprised of \$558.39 for rent or mortgage, \$280.00 for food (\$70.00 a week);

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<sup>3</sup> A copy of appellant's request to postpone is not of record.

\$463.70 for utilities and cable (telephone \$194.56, \$247.82 electric and \$21.32 cable); and \$430.00 for other miscellaneous household expenses (\$30.00 auto expense, \$100.00 fuel, \$175.00 lawn-yard and \$125.00 personal necessities including clothing). She stated that other debts were being paid by monthly installments. Appellant noted that she only had \$162.44 in available funds, which was comprised of \$5.00 in cash, \$51.65 checking account balance and \$105.79 savings account balance. Financial documentation submitted indicated that she received monthly social security income of \$894.00 and wage-loss compensation of \$652.38 every 28 days.

By decision dated December 17, 2010, OWCP's hearing representative finalized the preliminary determination that appellant was at fault in creating an \$8,083.40 overpayment for the period September 3, 2004 through August 8, 2008 because she accepted a payment she knew or reasonably should have known was incorrect. The hearing representative reviewed the financial information appellant submitted and determined that she has net monthly income of \$1,546.38 and \$1,451.81 of ordinary and necessary monthly expenses. As the difference equated to \$94.57, the hearing representative found that appellant was able to repay the overpayment in monthly installments and that OWCP should deduct installment payments of \$60.00 every 28 days until the overpayment is collected in full.

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

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.<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 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.<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>4</sup> 5 U.S.C. § 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).

A final decision of OWCP shall contain findings of fact and a statement of reasons.<sup>9</sup> With respect to overpayment decisions, it must provide clear reasoning showing how the overpayment was calculated.<sup>10</sup>

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

Appellant does not contest the fact of the overpayment, which is well established. Before her husband's September 2, 2004 death, she received augmented compensation because her husband was an eligible dependent. After appellant's husband passed away and she was no longer entitled to augmented compensation, she continued to receive compensation at the augmented rate. The Board finds that this created an overpayment.

As to the amount of the overpayment, however, the record contains little probative evidence. As the Board has explained, OWCP needs to support its finding as to the amount of an overpayment.<sup>11</sup> There is no evidence as to the source of the information concerning the amount appellant received at the augmented rate and the amount she should have been paid during the period in question and whether any changes, such as changes in health benefits and life insurance, were considered. As such the Board is unable to determine if OWCP calculations were correct. The only evidence in the record is a calculation grid noting the amounts of augmented compensation paid and the amount that should have been paid that does not explain how the amount was determined. There should be some authorized documentation regarding the proper amount of compensation due as well as the health and life insurance premiums for a specific year or specific period, so that appellant, as well as the Board or other reviewers, may be able to determine if the calculation of the overpayment amount was correct. A calculation grid that simply indicates the amount appellant was paid at the augmented rate and the rate she should have been paid for periods covered is not sufficient documentation. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>12</sup> The Board further notes that the record contains two separate overpayment amounts, one for \$4,312.69 and the other for \$8,083.40, based on the same overpayment period. OWCP did not explain why it selected the greater amount in determining the overpayment. The case will accordingly be remanded to OWCP for a proper determination as to the amount of the overpayment.

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

Section 8129(b) of FECA<sup>13</sup> provides that adjustment 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

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<sup>9</sup> 20 C.F.R. § 10.126.

<sup>10</sup> *James Tackett*, 54 ECAB 611 (2003).

<sup>11</sup> *See James Tackett*, *supra* note 10; *G.K.*, Docket No. 08-1620 (issued July 2, 2009).

<sup>12</sup> *See Jenny M. Drost*, 56 ECAB 587 (2005).

<sup>13</sup> 5 U.S.C. § 8129(b).

and good conscience. Section 10.433 of OWCP's implementing regulations<sup>14</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>15</sup> With respect to whether an individual is with fault, section 10.433(b) 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>16</sup>

Appellant's receipt of the September 4, 2004 direct deposit in the amount of \$551.04 covered a portion of the first overpayment from September 3 to 4, 2004.<sup>17</sup> The Board has found a claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>18</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>19</sup> Appellant had no reason to suspect at the time the

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<sup>14</sup> 20 C.F.R. § 10.433.

<sup>15</sup> *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>16</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 OWCP are proper).

<sup>17</sup> The deposit covered the period August 8 through September 4, 2004.

<sup>18</sup> *See Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>19</sup> *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

\$551.04 payment was deposited into her checking account that OWCP had issued an incorrect payment, given that this was the first incorrect payment made by it.<sup>20</sup> Because the funds were deposited directly into her bank account, she was not in a position to immediately decline acceptance of the amount paid by OWCP. The Board finds that appellant was not at fault in either creating or accepting the applicable portion of the overpayment for the period September 3 to 4, 2004.<sup>21</sup> A finding of no fault does not mean, however, that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period and the case must be remanded for it to determine whether appellant is entitled to waiver for this period. After such further development as OWCP may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the September 4, 2004 direct deposit.

After appellant's receipt of the first direct deposit, for which fault may not be imputed to her, it could be presumed that she knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which she was entitled. She knew or should have known that she was receiving augmented compensation because of her husband.<sup>22</sup> Appellant completed EN1032 forms on September 30, 2005, July 28, 2006, August 19, 2007 and August 8, 2008 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, she had notice that she was not entitled to compensation at the augmented rate if she did not have a dependent. Appellant promptly notified OWCP of her husband's death and did not claim dependents on the EN1032 forms in the years following his death. However as she certified each of the EN1032 forms, she knew or should have known that the compensation she received at the augmented rate after the September 4, 2004 direct deposit 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>23</sup> Therefore, the Board finds that appellant was with fault for the direct deposits covering the period September 5 through August 8, 2008 as she should have known that she accepted a payment for an incorrect amount.

On appeal, appellant argues that she should not be found at fault due to the deaths of her husband, sister, daughter and grandson occurring near the same time. She also had a new hip replacement and experienced depression and anxiety, from which she still suffers. Appellant should have known, however, that what was being deposited into her checking account did not decrease automatically after her husband's death on September 2, 2004. A reasonable person should have realized that the compensation being deposited into her checking account on a regular basis was incorrect. Appellant nonetheless accepted these incorrect payments for approximately four years. The Board therefore finds that, except as noted, OWCP had sufficient grounds to find that she accepted payments which she should have known was incorrect.

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<sup>20</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>21</sup> *Id.*

<sup>22</sup> *A.H.*, Docket No. 11-714 (issued October 5, 2011).

<sup>23</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

In light of the Board's finding that the amount of the overpayment cannot be determined, the repayment issue will not be considered at this time. On remand appellant will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue and it shall issue an appropriate final decision as to the amount and repayment of the overpayment.

**CONCLUSION**

OWCP properly found that appellant received an overpayment of compensation but the case is not in posture for decision regarding the amount of overpayment. The Board further finds that it properly found appellant at fault in creating the overpayment for the period September 5, 2004 through August 8, 2008, but that it improperly found her at fault in creating the overpayment that occurred from September 3 to 4, 2004.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and remanded for further proceedings consistent with this decision.

Issued: February 16, 2012  
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