

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

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**T.B., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
NATIONAL GUARD, Kingsport, TN, Employer**

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**Docket No. 12-844  
Issued: September 19, 2012**

*Appearances:*  
*Elizabeth L. McConnell, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 6, 2012 appellant, through his attorney, filed a timely appeal from a February 8, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$11,489.17 for the period December 18, 2007 to July 2, 2011 because he received compensation at the augmented rate when he had no dependents; (2) whether he was at fault in the creation of the overpayment and thus not entitled to waiver; and (3) whether OWCP properly found that it would recover the overpayment by deducting \$400.00 a month from appellant's continuing compensation benefits.

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

## **FACTUAL HISTORY**

On October 28, 2002 appellant, then a 44-year-old heavy mobile equipment repairer, filed an occupational disease claim alleging that he sustained an emotional condition causally related to factors of his federal employment. He listed his wife as a dependent on the claim form. OWCP accepted the claim for mixed disorders as a reaction to stress, major depressive disorder and neurotic disorder.<sup>2</sup> Appellant stopped work on October 28, 2002. OWCP paid him compensation beginning February 23, 2003 based on the augmented rate of three-fourths of his monthly pay as he had a dependent.

On February 4, 2008 appellant informed OWCP that he was divorced and needed to change his insurance. On February 11, 2008 OWCP requested that he submit a copy of his divorce decree. On May 19, 2008 appellant submitted a disclosure of coverage for insurance indicating that he was divorced, effective December 18, 2007.

In a Form EN1032 signed June 17, 2008, appellant indicated that he had no dependents. On November 3, 2008 he informed OWCP by telephone that he was divorced as of December 2007. OWCP again requested that he provide a copy of the divorce decree. On November 28, 2008 appellant submitted a judgment of absolute divorce effective December 18, 2007. On EN1032 forms signed June 5, 2009 and June 12, 2010, he listed no dependents.

OWCP continued to pay appellant at the augmented rate until July 3, 2011. By letter dated July 15, 2011, it advised him of its preliminary determination that he received an overpayment of \$11,489.17 because he received augmented compensation from December 18, 2007 to July 2, 2011 even though he had no dependents. OWCP calculated the overpayment by subtracting the amount that it should have paid appellant at the 66 2/3 percent rate for claimants without dependents, \$93,067.40, from the augmented rate actually paid of \$106,321.00. It further found that it overdeducted benefits at the augmented rate of \$1,764.43 and subtracted this amount as well to find an overpayment of \$11,489.17. OWCP further advised him of its preliminary determination that he was at fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On August 2, 2011 appellant requested a prerecoupment hearing by teleconference. He alleged that the overpayment was not his fault as he had reported his change in dependent status to OWCP by telephone and by submitting his divorce decree. Appellant submitted an overpayment recovery questionnaire listing monthly income as \$3,278.86 and expenses as

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<sup>2</sup> By decision dated December 29, 2003, OWCP denied appellant's schedule award claim after finding that an award was not payable under FECA for an impairment of the brain or a psychiatric condition. By decision dated July 21, 2005, a hearing representative vacated the December 29, 2003 decision and remanded the case for OWCP to determine whether he sustained an erectile impairment due to his accepted work injury. On September 9, 2005 OWCP denied appellant's schedule award claim as the evidence did not establish a ratable penile impairment.

\$2,283.18. He additionally listed a checking account balance of \$8,391.70, a savings account balance of \$6,635.00 and a balance in his Thrift Savings Plan (TSP) of \$26,738.89.

At the telephonic prerecoupment hearing, held on November 15, 2011, appellant related that he sent his divorce decree to OWCP and noted that OWCP had changed his health benefits. He knew that his benefits would be reduced without dependents but asserted that he failed to notice that OWCP had not changed his compensation. In December 2008, a claims examiner told appellant that she was reducing his compensation and he believed that the situation was resolved. He stopped opening his direct deposit slips. Appellant asserted that he was unable to repay the overpayment due to catastrophic medical bills from a chainsaw accident. His attorney argued that he had depression and anxiety and thus should not be considered to have normal awareness. The hearing representative requested that appellant submit financial documentation supporting his monthly income and expenses.

Following the hearing, appellant submitted a statement dated December 1, 2011 listing monthly expenses of \$3,605.51 and monthly income of \$3,278.86. He indicated that he had \$11,292.00 in checking and savings accounts and \$26,892.12 in his TSP. Appellant included expenses of \$960.00 a month for his mortgage, \$1,000.00 per month on a VISA card, \$311.32 per month for medical insurance, \$39.00 per month for life insurance, \$280.00 for cigarettes, \$625.00 for groceries, \$165.00 for cable and Internet, \$120.00 for telephone, \$230.00 for vehicle expenses, \$105.00 for clothing and laundry, \$40.00 for haircuts, \$350.68 for insurance, \$416.66 for medical expenses and \$75.00 for medicine. He submitted a credit card statement showing various charges. The credit card required a minimum payment of \$11.00 in October 2011 and \$25.00 in November 2011.

By decision dated February 8, 2012, an OWCP hearing representative finalized OWCP's preliminary finding that appellant received an overpayment from December 18, 2007 to July 2, 2011 of \$11,489.17 because it paid him compensation at the augmented rate when he had no dependents. She further found that he was at fault in creating the overpayment as he knew or should have known that the compensation he received was incorrect. The hearing representative reviewed appellant's income, expenses and assets and determined that he had not submitted sufficient financial evidence to support all expenses. She further noted that he had originally completed an overpayment questionnaire indicating monthly expenses of \$2,283.18, but later changed the monthly expenses to \$3,605.51 without adequate documentation. The hearing representative found that OWCP should recover the overpayment by deducting \$400.00 a month from his continuing compensation.

On appeal appellant's attorney argues that he was not at fault in creating the overpayment as he submitted a copy of his divorce decree to OWCP and as a claims examiner informed him that she was correcting his benefits. She notes that he received payments due to a mental condition and that he needed his income to pay his living expenses.

**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 monthly pay, which is known as his basic compensation for total disability.<sup>5</sup> Where the employee has one or more dependents as defined by 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> If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he 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>7</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$11,489.17 for the period December 18, 2007 to July 2, 2011. Appellant advised OWCP that he was divorced from his wife, his only claimed dependent, effective December 18, 2007. OWCP, however, paid him compensation at the augmented rate of 75 percent of his monthly pay until July 3, 2011. It should have paid him at the basic rate of 66 2/3 percent of his monthly pay as he had no qualifying dependents. Accordingly, appellant received an overpayment of compensation.

OWCP paid appellant \$106,321.00 at the augmented rate from December 18, 2007 to July 2, 2011. From this amount it subtracted the overdeductions that it took for this period at the three-quarters or 75 percent rate, \$1,764.43 and the amount that it should have paid him at the 66 2/3 percent basic rate, \$93,067.40, to find an overpayment of \$11,489.17. Appellant consequently received an overpayment of \$11,489.17, the difference between the compensation to which he was entitled at the two-thirds rate and the augmented compensation he received at the three-quarters rate.<sup>8</sup>

**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

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Id.* at § 8102(a).

<sup>5</sup> *Id.* at § 8105(a).

<sup>6</sup> *Id.* at § 8110(b).

<sup>7</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8129(b).

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, it 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.”<sup>11</sup>

### ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. In order for it to establish that he was at fault in creating the overpayment of compensation, it must show that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.<sup>12</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>13</sup>

The Board finds that appellant was at fault in creating the overpayment from December 18, 2007 to July 2, 2011. Appellant advised OWCP on February 4, 2008 that he no longer had a dependent. He completed EN1032 forms on June 15, 2006, June 6, 2007, June 17, 2008, June 5, 2009 and June 12, 2010 which provided him with the definition of a dependent and explained that he was not entitled to receive compensation at the augmented rate if he did not have dependents. Appellant did not claim dependents on the EN1032 forms beginning June 17, 2008.<sup>14</sup> By signing the EN1032 forms, he had notice that he was not entitled to compensation at the augmented rate if he did not have a dependent. Appellant thus knew or should have known that the compensation he received after December 18, 2007, the date of his divorce, was incorrect.

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<sup>10</sup> 20 C.F.R. § 10.433.

<sup>11</sup> *Id.*

<sup>12</sup> *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>13</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>14</sup> The forms cover the 15 months prior to signature.

On appeal appellant's attorney noted that appellant had a mental condition for which he received compensation. While the record supports that he has a psychiatric condition, there is no evidence showing that his condition is such that he is unable to manage his financial affairs. Further, appellant acknowledged that he knew that his compensation would be reduced following his divorce.

Counsel also argues that appellant was without fault in creating the overpayment as he advised OWCP of his divorce and as it told him that it was adjusting his compensation. Even if an overpayment resulted from negligence by OWCP, however, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.<sup>15</sup> As appellant is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>16</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>17</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>18</sup>

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

The hearing representative determined that OWCP should withhold \$400.00 per month from appellant's continuing compensation until it recovered the overpayment. She considered that he initially listed expenses of \$2,283.18 and income of \$3,278.86, a difference of \$995.68. After the hearing, appellant submitted a statement detailing expenses of \$3,605.51 and income of \$3,278.86. He did not, however, sufficiently document the claimed expenses. An overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.<sup>19</sup> Appellant further listed assets of \$11,292.00 in checking and savings accounts and \$26,892.12 in his TSP. The Board finds that OWCP gave due regard to his

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<sup>15</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>16</sup> No waiver of recovery of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

<sup>17</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>18</sup> 20 C.F.R. § 10.441(a).

<sup>19</sup> *Id.* at § 10.441(a); see *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$400.00 every four weeks from appellant's compensation.

On appeal appellant's attorney argues that he requires all of his income for his living expenses. As discussed, however, he did not submit adequate documentation supporting his claimed expenses.

**CONCLUSION**

The Board finds that appellant received an overpayment of \$11,489.17 for the period December 18, 2007 to July 2, 2011 because he received compensation at the augmented rate when he had no dependents. The Board further finds that he was at fault in the creation of the overpayment and thus not entitled to waiver of recovery and that OWCP properly found that it would recover the overpayment by deducting \$400.00 a month from his continuing compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board