

On appeal, counsel contends that OWCP's November 8, 2012 decision is contrary to fact and law.

FACTUAL HISTORY

OWCP accepted that on or before July 1, 2004 appellant, 36-year-old mail handler, sustained cervicalgia, aggravation of a right shoulder sprain and aggravation of a neck sprain due to continuous lifting in the performance of duty. She underwent right shoulder arthroscopy with distal clavicle excision and a superior labral tear repair on October 21, 2010, authorized by OWCP.

On November 19, 2010 appellant claimed wage-loss compensation from October 21 to November 19, 2010. On her claim for compensation (Form CA-7), she listed C.J., a minor child, as her dependent son. OWCP paid appellant compensation at the augmented 75 percent rate from October 20 to November 20, 2010 on the supplemental rolls and from November 21 to December 18, 2010 on the periodic rolls. Appellant did not return to work.

In an affidavit of earnings and employment dated April 15, 2011, appellant again listed C.J. as her son. On November 30, 2011 OWCP spoke with appellant's former business partner, who identified C.J. as her biological son, having no biological or legal relationship to appellant. In a March 29, 2012 memorandum, OWCP noted that she had not adopted C.J. and appeared to claim him as a stepson. Beginning on April 8, 2012, it adjusted appellant's compensation rate to the basic 66 and 2/3 percent rate for claimants without eligible dependents. Appellant noted in an April 15, 2013 affidavit of earnings and employment that she no longer had dependents as of January 2012 as C.J. and his mother were no longer living in her household.

By notice dated April 16 and finalized May 18, 2012, OWCP terminated appellant's compensation benefits on the grounds that the accepted injuries had ceased without residuals. The decision was based on the May 12, 2011 opinion of Dr. David A. Schiff, an attending Board-certified pain management specialist, who found that her accepted conditions had resolved and released her to full duty.²

In a May 9, 2012 interview memorandum, OWCP noted that appellant stated that she had no dependents as of January 2012 when C.J. and his biological mother moved out of her house. Appellant submitted C.J.'s birth certificate, showing that her former housemate and business partner was C.J.'s biological mother.

By notice dated August 6, 2012, reissued August 24, 2012, OWCP advised appellant of its preliminary determination that she received an overpayment in the amount of \$6,315.74 as she received compensation at the augmented rate from October 21, 2010 to April 7, 2012 while having no eligible dependents. It calculated that, for the 535-day period October 21, 2010 to April 7, 2012, she was entitled to receive \$50,517.69 but was paid \$56,833.43, a difference of \$6,315.57. OWCP made the preliminary finding that appellant was at fault in creating the overpayment as she knowingly claimed C.J. as a dependent although he was not her natural

² By decision dated September 10, 2012, OWCP granted appellant a schedule award for three percent permanent impairment of the right upper extremity.

child, adopted child or stepchild.³ It afforded her 30 days from the date of the notice to request a prerecoupment hearing and submit financial information.

In response to the preliminary notice of overpayment, appellant submitted a September 25, 2012 letter, postmarked the same day, requesting a prerecoupment hearing. She asserted that C.J. should be considered an eligible dependent as she supported him financially while he lived in her household. Appellant asserted that she could not repay the overpayment due to financial hardship. In a September 27, 2012 teleconference memorandum regarding the preliminary finding of fault, she explained that C.J.'s biological mother was her partner. C.J. and his mother lived in appellant's household for several years. Appellant paid all the bills for C.J. and his mother, purchased clothes for C.J., and carried both C.J. and his mother on her health insurance. She acknowledged that she was aware that the definition of dependent on the Form CA-7 claims for compensation did not include the child of a domestic partner.

Appellant submitted an overpayment recovery questionnaire on October 1, 2012. She asserted that she had no financial assets other than \$25.00 in a savings account. Appellant listed monthly expenses of \$1,735.00 for rent, food, clothing and utilities, \$67.00 in debt repayment and \$1,350.00 in unspecified expenses. She stated that C.J. and his mother lived with her from 2004 through December 2011 in a committed same-sex relationship. During this time, appellant attended C.J.'s medical appointments, parent-teacher conferences, purchased his school supplies and clothing and paid for his health insurance.

By decision dated November 8, 2012, OWCP denied appellant's request for a prerecoupment hearing as it was untimely. It found that her request for a hearing was postmarked on September 25, 2012, more than 30 days after the issuance of the August 24, 2012 preliminary notice of overpayment.

By decision dated December 7, 2012, OWCP finalized the fact and amount of the preliminary overpayment determination. The hearing representative found that appellant was at fault in creation of the overpayment as she knowingly claimed a child who was not an eligible dependent in order to receive compensation at the augmented rate. OWCP directed repayment in full.

LEGAL PRECEDENT -- ISSUE 1

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.⁴

³ OWCP issued a final overpayment decision on September 10, 2012, then vacated it on September 11, 2012 as appellant was not given 30 days' notice after reissuance of the preliminary notice of overpayment on August 24, 2012.

⁴ 20 C.F.R. § 10.432.

The only review of a final decision concerning an overpayment is an appeal to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision.⁵

ANALYSIS -- ISSUE 1

The overpayment action request form that accompanied the August 24, 2012 preliminary determination was specific as to the 30-day time limitation and the method for requesting a precoupment hearing, including the particular address where the signed, written request was to be mailed. Appellant's written request for a precoupment hearing was dated September 25, 2012.

As appellant's written hearing request was dated and postmarked more than 30 days after the preliminary determination, it was untimely.⁶ OWCP's November 8, 2012 decision denying her request for a precoupment hearing was proper under the law and facts of this case.

On appeal, appellant asserts that OWCP's November 8, 2012 decision was contrary to fact and law. As stated above, OWCP properly found that appellant's precoupment hearing request was not timely filed.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA⁷ 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 his or her duty.⁸ Section 8129(a) of FECA provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter 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 an individual is entitled."⁹

ANALYSIS -- ISSUE 2

Appellant received total disability compensation on the periodic rolls beginning on October 21, 2010. Through April 7, 2012, she was paid compensation at the augmented 75 percent rate used for claimants with eligible dependents. By notice dated August 24, 2012 and finalized December 7, 2012, OWCP found that a \$6,315.74 overpayment of compensation was created in appellant's case as she received compensation at the augmented 75 percent rate from

⁵ *Id.* at § 10.440(b).

⁶ *Id.* at § 10.432. *See also* 20 C.F.R. § 10.439 (provides that precoupment hearings shall be conducted in exactly the same manner as provided in sections 10.615 through 10.622); 20 C.F.R. § 10.616(a) (provides that the hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8129(a).

October 21, 2010 through April 7, 2012, although she had no eligible dependents during that period.

In a November 19, 2010 claim for compensation and an April 15, 2011 affidavit of earnings and employment, appellant claimed C.J., a minor child, as her son and dependent for compensation purposes. The issue is whether the claimed dependent qualified as her child as defined under section 8110 of FECA.¹⁰ FECA provides that a child means one who is under 18 years of age or over that age and incapable of self-support and includes stepchildren, adopted children and posthumous children, but does not include married children.¹¹ The definition of a child covers these specific relationships in addition to the biological one between a person and his or her natural child.¹²

C.J.'s birth certificate confirms that he was not appellant's natural child. Appellant submitted no court records or other documentation to support that C.J. was her adopted child. Her claim that C.J. was her son was predicated on the belief that he was her stepson by virtue of a domestic partnership with C.J.'s biological mother. Appellant explained in a September 27, 2012 teleconference and in an October 1, 2012 questionnaire that C.J.'s mother was her partner in a committed same-sex relationship from 2004 through December 2011. She noted performing many parental functions, such as attending C.J.'s parent-teacher conferences, physician's appointments and paying for clothing and school supplies.

Appellant did not assert a marriage, civil union or other domestic partnership recognized by any state or territory of the United States of America. She did not claim C.J.'s mother as a dependent. This case is therefore distinguished from the Board's holding in *C.M.*,¹³ in which the claimant asserted that a same-sex marriage recognized by the State of Massachusetts entitled her to receive compensation at the augmented rate by claiming her wife as a dependent. The Board noted that it was not the proper forum for consideration of the constitutionality of the Defense of Marriage Act and its application to federal workers' compensation benefits under FECA. In the present case, appellant has not established that C.J. was her stepson. The record does not contain any evidence that appellant was under a court order to contribute to her former partner or the partner's child.¹⁴ C.J. was not an eligible dependent. The difference between the compensation paid at the augmented rate from October 21, 2010 to April 7, 2012 and appellant's entitlement to compensation at the basic 66 and 2/3 percent rate constituted an overpayment of compensation. Therefore, OWCP properly found a \$6,315.74 overpayment of compensation for that period.

¹⁰ *Id.* at 8110.

¹¹ *Id.* at 8101(9).

¹² *See M.B.*, Docket No. 09-471 (issued October 1, 2009).

¹³ 58 ECAB 436 (2007).

¹⁴ *See also Claude O. Gunniv, Jr.*, Docket No. 02-1482 (issued August 26, 2003). *Contrast Dan O. Linnville*, Docket No. 96-1329 (issued November 10, 1998).

LEGAL PRECEDENT -- ISSUE 3

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.¹⁵ A benefits recipient will be at fault if the individual: (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.¹⁶

ANALYSIS -- ISSUE 3

OWCP applied the first standard in this case, finding that appellant claimed C.J. as a dependent when she knew or should have known he was not an eligible dependent under FECA. In the September 27, 2012 interview, appellant acknowledged that she was aware that C.J. did not fit the definition of dependent provided on the Form CA-7 claim for compensation she completed on November 19, 2010. She thus acknowledged an incorrect statement to obtain compensation at the augmented rate. OWCP's determination of fault was therefore proper under the law and facts of this case.

The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁷ As appellant was not in receipt of continuing compensation benefits at the time the final decision was entered in this matter, the Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for hearing as untimely. The Board further finds that OWCP properly found a \$6,315.47 overpayment of compensation for the period October 21, 2010 to April 7, 2012 as she received compensation at the augmented rate while having no eligible dependents. The Board further finds that OWCP properly found appellant at fault in creation of the overpayment such that it is not subject to waiver.

¹⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.423(a) and 10.434.

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ See *Judith A. Carido*, 55 ECAB 348 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 7 and November 8, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 2, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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