

FACTUAL HISTORY

On August 4, 2006 appellant, then a 47-year-old lead transportation security screener, filed an occupational disease claim (Form CA-2) alleging that he developed a foot injury as a result of factors of his federal employment. By decision dated October 19, 2006, OWCP accepted the claim for temporary aggravation of preexisting cellulitis, great toe right. Appellant stopped work on September 4, 2006 and received wage-loss compensation for total disability effective October 5, 2006 for which he was placed on the periodic rolls.

On October 11, 2006 appellant filed a claim for compensation (Form CA-7) for wage-loss compensation beginning October 4, 2006. He initially claimed his wife as a dependent who was living with him. The record reflects that appellant submitted affidavits of earnings and employment (Form CA-1032) beginning August 29, 2007. The form explained the circumstances under which appellant would be entitled to augmented compensation for dependents and stated that he may claim compensation for a spouse who lives with him.²

On March 8, 2011 appellant signed a Form CA-1032 claiming that he was separated from his wife and that she no longer lived with him. He listed the date of separation as March 6, 2011 and stated that he did not make regular direct payments for her support.

On a March 21, 2012 Form CA-1032, appellant stated that he was married but no longer living with his wife, listing the date of separation as December 31, 2010.

OWCP, however, did not reduce appellant's compensation from the augmented compensation rate to the basic 2/3 compensation rate without dependents.

On May 23, 2012 OWCP made preliminary findings that appellant received an overpayment of \$5,196.42 for the period December 31, 2010 through May 5, 2012 and was at fault in its creation. It pointed out that he was aware or reasonably should have been aware that there was no entitlement at the augmented three-fourths rate because there was no eligible dependent when he separated from his wife on December 31, 2010. In an attached memorandum, OWCP calculated that he received \$46,652.78 in compensation from December 31, 2010 to May 5, 2012 at the 75 percent augmented rate. Appellant should have been paid compensation at 66 percent from December 31, 2010 to May 5, 2012 in the amount of \$41,456.36. The amount of \$41,456.36 was subtracted from the \$46,652.78 received during that period to total an overpayment of \$5,196.42. OWCP stated that although it was in error for continuing to issue checks for disability at the 75 percent rate after appellant advised that he was no longer claiming a dependent, this did not excuse his acceptance of such checks which he knew or should have known were inappropriate. Appellant was informed of his options if he wished to contest the fact or amount of overpayment or request a waiver of recovery and was provided with an overpayment recovery questionnaire (Form OWCP-20).

² The form noted that 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.

On June 11, 2012 appellant contested OWCP's preliminary determination and requested a precoupment hearing. He stated that he had notified OWCP of his change in dependent status multiple times and nothing was done to correct his compensation benefits.

At the October 9, 2012 hearing, appellant testified that he and his wife began living apart in December 2010. He had no children with whom he lived or supported. Appellant argued that he disagreed with the finding of fault as he had informed OWCP that his wife was no longer a dependent multiple times. When no action was taken to correct his compensation rate, he thought that he might have misunderstood his entitlement and was eligible for dependent status because he was still technically married. Appellant further stated that his payments were made by direct deposit and he did not know how to return them. The record was held open for 30 days.

On November 10, 2012 appellant completed an overpayment recovery questionnaire. He listed his monthly income as \$2,439.00 every four weeks. Appellant also stated that he received \$45.00 in social security benefits every month. He added the \$2,439.00 to the \$45.00 in social security benefits for a total of \$2,484.00. Appellant then added \$3,050.00 to that amount, which he noted as gross net, for a total of \$5,534.00 in total monthly income. He listed various monthly expenses totaling \$3,453.00 and provided some documents in support of his expenses. Appellant also stated that he had \$200.00 in his checking account.

By decision dated December 18, 2012, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$5,196.42 for the period December 31, 2010 through May 5, 2012 because there was no eligible dependent after December 31, 2010 when he and his wife separated. It found that appellant was at fault in the creation of the overpayment. OWCP determined that a repayment of the overpayment at \$1,000.00 from continuing compensation was reasonable and appropriate.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ 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.⁴ When an overpayment has been made to an individual 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.⁵

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁶ Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependents. A dependent means a wife if: (a) she is a member of the same household

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

as the employee; (b) she is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to her support.⁷

ANALYSIS -- ISSUE 1

Appellant's wife was claimed as a dependent and OWCP accordingly paid wage-loss compensation at the augmented rate of 75 percent. As noted on his March 21, 2012 Form CA-1032, appellant and his wife were separated beginning December 31, 2010. He advised that his wife was no longer living in the same household and that he did not provide any regular support to his wife following their separation. The Board finds that, pursuant to FECA, appellant's wife was no longer a dependent after December 31, 2010.

The record confirms that he continued to receive compensation at the augmented rate for dependents through May 5, 2012. An overpayment of compensation is therefore established. The amount of compensation actually paid during this period (\$46,652.78) less the compensation appellant should have received at the correct pay rate (\$41,456.36) establishes the amount of the overpayment (\$5,196.42). Compensation payment worksheets in the record confirm these figures. The Board will therefore affirm OWCP's December 18, 2012 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁸ provides that an overpayment of 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 Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.¹⁰ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹¹

On the issue of fault, section 10.433 of OWCP's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(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 was incorrect.”¹²

⁷ *Id.* at § 8110(a)(2).

⁸ *Id.* at § 8129(b).

⁹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁰ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹¹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹² 20 C.F.R. § 10.433(a).

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide in relevant part:

“Whether or not [OWCP] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”¹³

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 OWCP 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.¹⁴ 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.¹⁵

The Board finds that appellant was at fault in creating the overpayment from December 31, 2010 through May 5, 2012.¹⁶ Appellant completed Forms CA-1032 on August 29, 2007, March 8, 2011 and March 21, 2012 which provided him with the definition of a dependent, explaining that he was not entitled to receive compensation at the augmented rate if he did not have dependents. By signing the CA-1032 forms, he had notice that he was not entitled to compensation at the augmented rate. Appellant did not claim dependents on the CA-1032 forms beginning March 8, 2011 and noted on the form that he was separated from his spouse, no longer living with her and not providing her support. Thus, he knew or should have known that the compensation he received at the augmented rate after December 31, 2010 was incorrect when he ceased living with his wife.

Appellant contends on appeal that he informed OWCP about the change in his marital status, that he did not mislead OWCP, correctly noted that he no longer had dependents on the CA-1032 forms and called OWCP to inform them of the incorrect payments but still received payment at the augmented rate.¹⁷ He stated that he thought that he might have been entitled to the augmented compensation because he was still married after OWCP failed to correct the rate.

¹³ *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 11.

¹⁴ *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁵ 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).

¹⁶ *L.J.*, Docket No. 10-2322 (issued August 3, 2011).

¹⁷ *K.T.*, Docket No. 09-2075 (issued August 23, 2010).

The Board notes that 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.¹⁸ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁹ 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.²⁰

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.²¹

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 any hardship.²²

ANALYSIS -- ISSUE 3

Appellant receives \$2,151.15 in continuing compensation benefits every 28 days pursuant to his 2006 occupational claim. OWCP determined the overpayment could be recovered by deducting \$1,000.00 from his continuing compensation payments. The Board notes that a claimant is responsible for submitting necessary information with respect to income, expenses and assets as required by OWCP.²³ In this case, appellant submitted limited information regarding his financial circumstances and his income and expenses were not sufficiently documented.

OWCP's hearing representative noted that appellant was receiving approximately \$2,151.15 every 28 days in wage-loss compensation. The overpayment questionnaire indicates that appellant has monthly income of \$5,534.00 and monthly expenses of \$3,453.00. OWCP considered the amount of his assets and the extent his monthly income exceeded his monthly

¹⁸ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁹ *See J.W.*, Docket No. 10-1271 (issued February 3, 2011); *see also Karen K. Dixon*, 56 ECAB 145 (2004).

²⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

²¹ 20 C.F.R. § 10.438.

²² *Id.* at § 10.441(a).

²³ *Id.* at § 10.438.

expenses. It determined that appellant had a surplus of \$2,081.00 monthly in excess income. The evidence indicates that the hearing representative did consider the financial circumstances of the claimant and other factors to minimize the hardship in accord with 20 C.F.R. § 10.441.²⁴ Therefore, OWCP properly required repayment of the overpayment by deducting \$1,000.00 from appellant's continuing compensation payments every 28 days.²⁵

On appeal, appellant argues that he cannot pay his bills and that deducting \$1,000.00 a month from his continuing compensation payments is causing him severe hardship. The Board finds that OWCP determined appellant's monthly surplus and excess income based on the information he provided in his overpayment recovery questionnaire. As noted, appellant provided limited information but OWCP's hearing representative did consider the evidence of record and supported his findings.²⁶ Thus, the payment schedule was reasonable in the absence of any additional financial documentation.²⁷ The Board finds that OWCP properly determined that the overpayment should be recovered by deducting \$1,000.00 from continuing compensation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period December 31, 2010 through May 5, 2012 in the amount of \$5,196.42. The Board further finds that it properly determined that appellant was at fault in creating the overpayments and, therefore, ineligible for waiver. The Board also finds that OWCP properly directed recovery of the \$5,196.42 overpayment at the rate of \$1,000.00 every four weeks from appellant's continuing compensation payments.

²⁴ *W.M.*, Docket No. 13-291 (issued June 12, 2013).

²⁵ *M.G.*, Docket No. 07-2317 (issued April 11, 2008).

²⁶ *See S.C.*, Docket No. 12-1871 (issued February 26, 2013).

²⁷ *D.E.*, Docket No. 07-27 (issued April 6, 2007); 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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