

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

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Alexander, AR, Employer**

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**Docket No. 13-1106
Issued: August 12, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 4, 2013 appellant filed a timely appeal of a March 14, 2013 Office of Workers' Compensation Programs' (OWCP) merit decision regarding an overpayment. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$405.14 for the period October 8 through December 14, 2012, and if so, (2) whether appellant is not without fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 20, 2001 appellant, then a 56-year-old modified rural carrier filed a traumatic injury claim alleging that a coworker assaulted her in the performance of duty. OWCP accepted her claim for strain of right shoulder and upper arm on September 17, 2001. Appellant began filing claims for compensation due to the National Reassessment Process on July 30, 2010. These claims provided: “Any person who knowingly makes any false statement, misrepresentation, concealment of fact or any other act of fraud, to obtain compensation as provided by FECA or who knowingly accepts compensation to which that person is no entitled is subject to civil or administrative remedies as well as felony criminal prosecution and may, under appropriate criminal prosecution, be punished by a fine or imprisonment or both.”

In a letter dated November 22, 2010, OWCP noted that appellant’s formal loss of wage-earning capacity determination should be modified and that her claims for compensation would be authorized. The record indicates that appellant received compensation at the 75 percent augmented rate. Appellant received compensation from October 5 through December 14, 2012 at the augmented rate. On October 18, 2012 she filed a claim for compensation for the period October 8 through 19, 2012 which indicated that there was no change in her dependents but did not list her husband. Appellant completed a similar form on November 2, 2012 for the period October 22 through November 2, 2012. On November 16, 2012 she completed a claim for compensation for the period November 5 through 16, 2012 and indicated that there was no change in her dependents but did not list her husband as a dependent. On a claim for compensation dated December 14, 2012 appellant requested compensation from December 13 through 14, 2012 and indicated that there was no change in her dependents but did not list her husband.

On January 25, 2013 the employing establishment indicated that appellant had no dependents. Appellant’s supervisor indicated that appellant should be compensated at 66 2/3 percent as she had no dependents due to her divorce on October 8, 2012. The claims examiner telephoned appellant on January 29, 2013 and confirmed verbally that she was divorced on October 8, 2012.

OWCP calculated that appellant was paid incorrectly at the augmented rate for 169.25 hours for the period October 8 through December 14, 2012 resulting in an overpayment of \$405.14.

In a letter dated February 1, 2013, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$405.14 during the period October 8 through December 14, 2012 because there was a change in her dependent status. It noted that she was at fault in the creation of the overpayment because she was “aware or should have reasonably been aware that there should have been a reduction in compensation payments since she no longer had a dependent, her husband, as of October 8, 2012.” OWCP provided appellant with an overpayment action request allowing her 30 days to respond if she wished to contest the overpayment. It also provided her with an overpayment recovery questionnaire.

Appellant submitted her divorce decree dated October 8, 2012 on February 4, 2013.

By decision dated March 14, 2013, OWCP determined that appellant was at fault in the creation of an overpayment in the amount of \$405.14 for the period October 8 through December 14, 2012 as there was a change in her dependent status and OWCP was not immediately notified. It stated that she was found with fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material and accepted payments that she knew or reasonably should have known were incorrect.

LEGAL PRECEDENT -- ISSUE 1

FECA pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.² A disabled employee with one or more dependents is entitled to have his or her basic compensation augmented from two-thirds to three-fourths of her monthly pay.³ A dependent means a husband if: (a) he or she is a member of the same household as the employee; (b) he or she is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to his or her support.⁴

ANALYSIS -- ISSUE 1

Appellant and her husband were granted a divorce on October 8, 2012. The record confirms that she continued to receive compensation at the augmented rate for dependents through December 14, 2012. An overpayment of compensation is therefore established. The amount of compensation actually paid during this period (\$3,647.34) less the compensation appellant should have received at the correct pay rate (\$3,242.20) establishes the amount of the overpayment (\$405.14). Compensation payment worksheets in the record confirm these figures. The Board will therefore affirm OWCP's March 14, 2013 decision on the issues of fact and amount of overpayment.⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁶ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8110(b).

⁴ *Id.* at § 8110(a)(2).

⁵ *M.C.*, Docket No. 13-150 (issued March 28, 2013).

⁶ 5 U.S.C. §§ 8101-8193, 8129(a).

against equity and good conscience.”⁷ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433 of OWCP’s regulations⁸ provide a recipient will be found at fault who made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or failed to furnish information which the individual knew or should have known to be material or accepted a payment which the individual knew or should have been expected to know was incorrect.”

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment applying the second and third criteria. In the preliminary determination, it stated that she was “aware or should have reasonably been aware that there should have been a reduction in compensation payments since she no longer had a dependent, her husband, as of October 8, 2012.” In the March 14, 2013 final decision, OWCP stated that appellant was at fault because she failed to provide information which she knew or should have known to be material and accepted payments that she knew or reasonably should have known were incorrect. 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.⁹

The Board finds that OWCP has not clearly explained the basis for appellant’s understanding of the augmented compensation payments and how a divorce would impact her benefits. Appellant’s initial acceptance decision did not include information about augmented compensation or dependents. The claims for compensation completed by appellant requested that she provide information regarding her dependents, but did not inform her of the possibility of an overpayment. OWCP has submitted no basis for its determination that appellant was aware that she was receiving augmented compensation due to her marriage which could result in an overpayment on divorce and no basis for its determination that appellant should have known that her divorce was a material fact.¹⁰

The Board finds that the case must be remanded for further development of the issue of fault and for a clear statement of the basis of the decision by OWCP on this issue. Section 10.126 of OWCP’s regulations provide that an OWCP decision shall contain findings of fact and

⁷ *Id.* at § 8129(b).

⁸ 20 C.F.R. § 10.433.

⁹ *Id.* at § 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).

¹⁰ *Compare K.Z.*, Docket No. 12-784 (issued August 27, 2012).

a statement of reasons. As the March 14, 2013 overpayment decision is deficient regarding the basis for the finding of fault, the case is not in posture for a decision.

CONCLUSION

The Board finds that appellant has received an overpayment of compensation in the amount of \$405.14 for the period October 8 through December 14, 2012. However, the Board further finds that OWCP did not offer a factual basis for its finding of fault.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further development consistent with this decision of the Board.

Issued: August 12, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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