

FACTUAL HISTORY

This case was previously before the Board.² In a decision dated August 31, 2001, the Board affirmed the September 22, 2000 decision finding an overpayment in the amount of \$1,402.21 and denying waiver of recovery.³ The facts contained in the prior decision are incorporated by reference. The relevant facts are set forth.

OWCP accepted that on December 7, 1998 appellant sustained a lumbar strain and subsequent L5-S1 disc herniation in the performance of duty. In Form CA-7 compensation claims and CA-1032 forms filed since July 27, 1999, appellant identified her daughter as a dependent and noted a date of birth of June 25, 1989. She stopped work and received wage-loss compensation at an augmented rate of 75 percent of her weekly pay.

On September 19, 2007 OWCP advised appellant that it needed additional information to determine whether her daughter had eligibility for compensation beyond her 18th birthday. It requested verification that her daughter was pursuing a full-time course of study at an accredited school, college or university or evidence establishing that her daughter was incapable of self-support.

In a September 25, 2007 form, Mary Beth Carr, a guidance counselor at South Aiken High School, verified that appellant's daughter was enrolled as a full-time student from August 20, 2007 to June 5, 2008.

In various student dependency forms, an official for the Registrar's Office of the University of South Carolina, verified that appellant's daughter was enrolled as a full-time student at the University of South Carolina at Beaufort from August 21, 2008 to December 12, 2011. Her expected date of completion of the course of study was May 2013.

OWCP wrote to appellant on September 15, 2011 and advised that further information was necessary to determine her daughter's dependency status. To verify her daughter's status as a student, appellant was requested to submit certification of school enrollment. She was also advised that if her daughter was incapable of self-support, due to a physical or mental disability, appellant could establish dependence by submitting a medical report from an attending physician.

On September 24, 2012 appellant informed OWCP by telephone that her daughter was unable to complete her Fall 2011 semester in college because she had gallbladder surgery and

² Docket No. 01-229 (issued August 31, 2001).

³ In a preliminary determination dated July 18, 2000, OWCP found that appellant received an overpayment of \$1,420.21 because she received duplicate payments for the period July 22 through August 23, 1999. It found that she was not at fault in the creation of the overpayment and requested additional information to determine waiver of recovery. By decision dated September 22, 2000, OWCP finalized the July 18, 2000 preliminary determination and determined that appellant was not entitled to waiver of the recovery of the overpayment as she had failed to respond to the overpayment notification or submit any financial information to support a request for waiver. It stated that it would withhold the sum of \$75.00 from appellant's continuing compensation payments until overpayment was recovered.

received incompletes for school. Her daughter was given seven months by the college to complete her school work for the Fall 2011 semester. Appellant requested information regarding how to complete the dependency portion of the Form CA-1032. OWCP advised appellant that her daughter was considered a dependent only through the time for which she was actually enrolled with the college.

In a letter dated September 25, 2012, OWCP stated that according to the September 9, 2011 CA-1032 form, appellant's daughter turned 23 on June 25, 2012. It advised appellant that, based on this information, her compensation pay rate would be reduced from 75 percent to 66 2/3 percent effective June 25, 2012.⁴

In a September 25, 2012 statement, appellant reported that her daughter was no longer enrolled in school and was currently under medical care. She enclosed medical records dated from December 28, 2010 to July 21, 2012 noting that her daughter had illnesses and underwent gallbladder surgery during and before the covered period of December 13, 2011 to June 24, 2012. Appellant explained that on December 5, 2011 her daughter withdrew from a college class after being discharged from the hospital for gallbladder surgery but she forgot to report her status as less than full time. She initially asked her daughter if she had withdrawn from class in November 2011 and her daughter stated that she did not. Appellant stated that because of privacy laws she did not have access to her daughter's records and was unaware of her daughter's withdrawal from college. She contended that her daughter's change in school enrollment status did not change her claim for "augmented compensation" because her daughter was not married, 18 or older and could not support herself because of her physical disability. Appellant continued to list her daughter as a dependent because she believed that her daughter still qualified as a dependent according to OWCP regulations. During this period, her daughter was under medical care and receiving medical treatment from physicians.

An October 4, 2012 unsigned form report was received from Sumter Neurology and Pain Management, which indicated that appellant's daughter was seen that day for a migraine.

On November 20, 2012 OWCP issued a preliminary decision that appellant received an overpayment in the amount of \$3,432.50 for the period December 13, 2011 to September 22, 2012. Appellant received compensation at the augmented 75 percent rate for dependents after her last remaining dependent became ineligible for benefits. OWCP found that she was not at fault in creating the overpayment because she was not aware nor could reasonably have been expected to be aware that OWCP paid compensation incorrectly. It provided a memorandum containing a calculation of the overpayment totaling \$3,432.50.⁵ Appellant was informed of her options if she wished to challenge the fact and amount of the overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment, she

⁴ An electronic printout indicated that appellant received compensation in the amount of \$2,252.74 based on the basic rate of 66 2/3 percent beginning September 23, 2012.

⁵ The overpayment worksheet indicated that appellant received a gross amount of \$30,698.00 from December 13, 2011 to September 22, 2012 but she should have been paid a gross amount of \$27,265.50 for a difference of \$3,432.50.

was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On January 8, 2013 appellant requested that OWCP make a decision based on the written record and submitted a completed overpayment questionnaire. She contended that the overpayment occurred through no fault of her own and requested waiver. Appellant stated that she acted on incorrect information from OWCP and spent funds in ways that she would not have done. She alleged a financial hardship if waiver was not granted. Appellant reported approximately \$2,252.74 as monthly income. Her monthly expenses were listed as a total of \$1,000.00, including \$300.00 for food, \$300.00 for clothing, \$400.00 for utilities and \$1,000.00 for "other." Appellant listed various debts being paid totaling \$241.00 a monthly installment.⁶ She reported her daughter as a dependent and stated that she had \$162.00 in her checking account and \$5.00 in her savings account.

On January 23, 2013 OWCP advised appellant by telephone that it received the completed overpayment questionnaire and had additional questions regarding her financial records. Appellant stated that she did not want to participate in a conference. She did not provide any additional information regarding monthly income and expenses.

By decision dated January 23, 2013, OWCP finalized the overpayment in the amount of \$3,432.50 for the period December 13, 2011 to September 22, 2012. It determined that appellant should have received \$27,265.50 based on the statutory 2/3 compensation rate instead of \$30,698.00 based on the 75 percent augmented compensation rate. OWCP found that she was not at fault in the creation of the overpayment but determined that the overpayment was not subject to waiver because there was insufficient evidence of record to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁷ If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 of his or her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁸

A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.⁹ A

⁶Appellant listed her debts as \$1,800.00 with Time Finance with a monthly payment of \$150.00 and \$470.00 at Macy's with a monthly payment of \$25.00 and \$470.00 at Belk with a monthly payment of \$41.00 and \$550.00 at NAPA with a monthly payment of \$25.00.

⁷5 U.S.C. § 8102.

⁸*O.R.*, 59 ECAB 432 (2008).

⁹5 U.S.C. § 8110(a).

child is also considered a dependent if he or she is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.¹⁰

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was paid at the 75 percent augmented rate and the compensation that should have been paid at the 66 2/3 percent basic rate constitutes an overpayment of compensation.¹¹

ANALYSIS -- ISSUE 1

Appellant claimed her daughter, who was born on June 25, 1989, as a dependent. OWCP paid wage-loss compensation at the augmented rate of 75 percent beginning July 25, 1999. Although her daughter reached the age of 18 on June 25, 2007, appellant asserted that she was still an eligible dependent because she was registered as a full-time college student. The student dependency forms of record confirm that appellant's daughter was enrolled on a full-time basis at the University of South Carolina until December 12, 2011. On September 24, 2012 appellant informed OWCP that her daughter was unable to complete the 2011 fall school semester due to an illness. In a September 28, 2012 statement, she explained that her daughter withdrew from college in order to undergo gallbladder surgery and was under medical care. Appellant stated that she did not initially notify OWCP of the change in her daughter's student status because she was unaware of her daughter's withdrawal from school and believed that her daughter still qualified as a dependent. The record reveals that appellant's daughter pursued a full-time course of study at a qualifying college from August 21, 2008 to December 12, 2011. After December 12, 2011, she did not enroll as a full-time student for the 2012 spring semester and therefore was no longer a dependent as defined under FECA.

Appellant also alleged that her daughter was incapable of self-support during the relevant time period because she had undergone gallbladder surgery. OWCP properly advised her by letter dated September 15, 2011 that if her daughter was incapable of self-support due to a physical or mental disability, a medical report was required from an attending physician. The only medical report OWCP received regarding her daughter, however, was an October 4, 2012 unsigned form report referencing a migraine. OWCP did not receive adequate medical evidence to establish physical or mental disability.

Accordingly, appellant was entitled to compensation at the basic rate following December 12, 2011.¹² OWCP calculated the difference between \$30,698.00, the compensation that was paid at the 75 percent augmented rate and \$27,265.50, the compensation that should have been paid at the 66 2/3 percent basic rate, to total \$3,432.50. Appellant did not dispute the calculation of overpayment. The Board finds that OWCP properly determined the fact and amount of overpayment.

¹⁰*E.G.*, 59 ECAB 599 (2008).

¹¹*Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹²*W.M.*, Docket No. 11-2000 (issued May 21, 2012).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.¹³

Section 10.436 of the implementing regulations¹⁴ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet her current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics (BLS).¹⁵ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁶

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay debts; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁷

The individual who received the overpayment is responsible for the submission of information regarding income, expenses and assets. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁸

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. It may only recover the overpayment if such collection would not defeat the purpose of FECA or be

¹³5 U.S.C. § 8129(b).

¹⁴20 C.F.R. § 10.436 (1999).

¹⁵ An individual's assets must exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

¹⁶*Sherry A. Hunt*, 49 ECAB 467 (1998).

¹⁷20 C.F.R. § 10.437 (1999).

¹⁸*Id.* at § 10.438(a).

against equity and good conscience. The Board finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Appellant submitted a completed overpayment recovery questionnaire with financial information outlining her monthly income, expenses and assets. She reported approximately \$2,252.74 as income. Her expenses were listed as a total of \$2,000.00 a month, including \$300.00 for food, \$300.00 for clothing, \$400.00 for utilities and \$1,000.00 for "other." Appellant also included various debts being paid totaling \$241.00 a month installment. She stated that she had \$162.00 in her checking account and \$5.00 in her savings account. The Board notes that appellant did not submit any financial documents to verify her monthly expenses despite a request by OWCP and an opportunity to submit such evidence. OWCP determined that although she had claimed \$1,000.00 per month in miscellaneous expenses, she did not provide adequate documentation or additional evidence to support the listed expenses or to support the expenses were reasonable. It also determined that it was unreasonable for appellant to require \$300.00 per month for clothing when the BLS Consumer Expenditure Survey indicated that the average clothing expense for women 16 years of age and over was \$300.00 per year. The Board notes that these findings were reasonable based on the evidence of record.

The Board finds that appellant has not established that she needs substantially all of her current income to meet ordinary and necessary living expenses. OWCP's procedures provide that an individual is deemed to need substantially all of her current income to meet current, ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Appellant reported a monthly income of \$2,252.74. OWCP determined that her actual expenses were \$941.00 as she could not establish the additional \$1,000.00 expenses for "other" or the \$300.00 clothing expenses. Because appellant's reported income exceeds her ordinary and necessary living expenses by more than \$50.00, the Board finds that she has not shown that waiver of recovery would defeat the purpose of FECA as she does not need substantially all of her current income to meet current ordinary and necessary living expenses.

The Board finds that appellant has not established that recovery would be against equity and good conscience. The financial evidence available, as noted above, does not indicate that appellant would experience severe financial hardship in repaying the debt. She did not submit any evidence to establish that she had given up a valuable right in reliance on the overpayment or changed her position for the worse.

Because appellant failed to establish that recovery of the overpayment in compensation would defeat the purpose of FECA or be against equity or good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment in this case.

On appeal, appellant contends that the January 23, 2013 decision was premature because OWCP failed to consider all the evidence submitted. She noted that her completed overpayment questionnaire revealed that her monthly income exceeded her monthly expenses by only \$1,011.74. The Board has reviewed the evidence of record and determined that the evidence does not establish that recovery of the overpayment would be against equity and good conscience. The Board finds that OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹⁹

Section 10.441 of OWCP's regulations provide that, 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.²⁰

Under OWCP's procedures, the compromise of all or part of the overpayment and any charges may be made depending upon the claimant's financial circumstances in order to set a repayment schedule. Compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment more than 35 percent. Such a determination is made at the time the repayment schedule is established.²¹ Compromise is a matter which rests in the discretion of OWCP.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$250.00 from each continuing compensation payment.

OWCP took several factors into consideration in setting the rate of recovery from appellant's continuing compensation, including financial circumstances, the extent of the overpayment and the amount of time it would take to recover the debt. It determined that the debt would be collected by deducting \$250.00 from each of appellant's continuing compensation payments.

The Board finds that OWCP did not act unreasonably in determining the amount to be taken out of appellant's continuing compensation checks. Appellant's monthly income was \$2,252.74 and her monthly expenses were determined to be \$941.00. The difference between these two amounts is \$1,311.74. OWCP acted within its discretion when it determined that it would collect the overpayment of \$3,432.50 by deducting \$250.00 from each of appellant's continuing compensation payments.

¹⁹*Id.* at § 10.436.

²⁰*Id.* at § 10.441(a).

²¹*Supra* note 15 at Chapter 6.300.5 (May 2004). See *Jorge E. Diaz*, 53 ECAB 403 (2002).

²²*D.C.*, Docket No. 10-1046 (issued January 19, 2011); *Linda D. Lane*, 46 ECAB 727 (1995).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,432.50. OWCP properly denied waiver and required recovery of the overpayment by deducting \$250.00 from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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