

FACTUAL HISTORY

On June 29, 1999 appellant, then a 41-year-old nursing assistant, sustained injury to her abdomen and back when lifting a patient. She stopped work on January 2000 and retired as of February 13, 2000. On July 12, 2001 OWCP accepted the claim for herniated nucleus pulposus at L5-S1, lumbar annular tears and authorized a lumbar interbody fusion. On May 16, 2005 it expanded the claim to include abdominal strain. On September 7, 2010 OWCP accepted bilateral lumbosacral plexopathy and lumbosacral sprain.

On October 3, 2001 appellant filed claim for wage-loss compensation beginning February 7, 2000. She initially claimed two dependents, including a son born on November 6, 1981 and a daughter born on October 22, 1986. The record reflects that appellant submitted affidavits of earnings and employment (Form CA-1032) beginning October 23, 2001. The forms explained the circumstances under which she would be entitled to augmented compensation for her dependent children. Appellant was advised that compensation for a dependent child may continue after the 18th birthday only if the dependent was unmarried and either incapable of self-support due to a mental or physical disability or a full-time student. The forms noted that compensation was payable until age 23 for an unmarried child who had reached age 18, had not completed four years of education beyond high school and was a full-time student at an approved educational institution.

On November 15, 2004 appellant elected FECA benefits effective June 29, 2000. By letter dated June 23, 2005, OWCP advised her regarding the conditions under which she would be paid compensation. Appellant was informed that she would be compensated at the augmented rate of 75 percent beginning February 20, 2005. The letter noted that she should immediately advise OWCP of any change in the status of her dependents. The letter contained an enclosure, Form EN1049, that provided instructions and noted that appellant should immediately advise OWCP of any change in the status of any claimed dependents.

By letter dated April 16, 2009, OWCP again advised appellant that the circumstances under which she would be entitled to augmented compensation for her dependent children.

On March 8, 2011 appellant signed a Form CA-1032 claiming her daughter as a dependent whose birth date was on October 22, 1986.

By letter dated January 25, 2012, OWCP reiterated the circumstances under which augmented compensation for a dependent child could continue after the 18th birthday.

On January 25, 2012 OWCP made preliminary findings that appellant received an overpayment of compensation in the amount of \$5,776.24 for the period October 22, 2009 through January 14, 2012 for which she was at fault in its creation. It found that she was aware that a claimant who has one or more eligible dependents is paid compensation at the augmented rate and must immediately report any change in the status of a claimed dependent. OWCP found that appellant's daughter reached age 23 on October 22, 2009 which rendered her ineligible as a dependent. In an attached memorandum, it calculated that appellant received \$54,196.00 in compensation from September 27, 2009 to January 14, 2012 at the 75 percent augmented rate; but she should have received compensation only to October 21, 2009 in the amount of \$1,561.61

at the augmented rate. From October 22, 2009 to January 14, 2012, appellant should have received compensation at the 66 2/3 percent statutory rate in the amount of \$46,858.15. It added compensation for the period September 27, 2009 to January 14, 2012 as \$1,561.62 plus \$46,858.15 to total \$48,419.76. OWCP subtracted this amount from the \$54,196.00 received during that period to total an overpayment of \$5,776.24. Although it was in error for continuing to issue checks for disability at the 75 percent rate after appellant advised that she was no longer claiming a dependent, this fact did not excuse her acceptance of checks which she knew or should have known to be incorrect. Appellant was informed of her options if she 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).

Appellant did not respond to OWCP's January 25, 2012 preliminary determination to contest her overpayment and did not submit a Form OWCP-20.

By decision dated March 2, 2012, OWCP finalized the overpayment determination in the amount of \$5,776.24 for the period October 22, 2009 through January 14, 2012 because appellant had no eligible dependent. It found that she was at fault in the creation of the overpayment. OWCP determined that a repayment of the overpayment at \$200.00 from continuing compensation was reasonable and appropriate.

LEGAL PRECEDENT-- ISSUE 1

Section 8102 of FECA² 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.³ 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.⁴

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁵ Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of her weekly pay if she has one or more eligible dependents. Section 8110(a)(3) of FECA provides that a child is considered a dependent if he or she is under 18 years of age, is over 18 but, is unmarried and incapable of self-support because of a physical or mental disability, or 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 at an accredited institution.⁶ If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation she was entitled to receive at the

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

⁶ *Id.* at §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405.

two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

Appellant's daughter was born on October 22, 1986, was claimed as a dependent and OWCP paid-wage-loss compensation at the augmented rate of 75 percent. Although she reached the age of 18 on October 22, 2004 and graduated high school on May 26, 2005, appellant asserted that her daughter was an eligible dependent because she was registered as a full-time college student. Appellant received compensation at the augmented rate after her daughter turned 23 years old on October 22, 2009. The record contains no evidence that she was disabled due to a mental or physical condition. Appellant's daughter qualified as a dependent as long as she was an unmarried student attending an approved full-time course of study, had not completed four years of post high school education and had not completed the academic semester in which she became 23 years old.⁸

The Board finds that, when appellant's daughter turned 23 years of age on October 22, 2009, she was no longer an eligible dependent and appellant was not entitled to compensation at the augmented rate of 75 percent from October 22, 2009 through January 14, 2012.⁹ OWCP reduced appellant's compensation to the two-thirds rate effective January 15, 2012. It paid her \$54,196.00 in compensation from September 27, 2009 to January 14, 2012 at 75 percent. Appellant should have been paid compensation at 75 percent from September 27 to October 21, 2009 in the amount of \$1,561.61. From October 22, 2009 to January 14, 2012, she should have been paid compensation at the 66 2/3 percent basic rate in the amount of \$46,858.15. OWCP determined the amount of overpayment from September 27, 2009 to January 14, 2012 as \$1,561.62 plus \$46,858.15 to total \$48,419.76. This amount was subtracted from \$54,196.00 to total an overpayment of \$5,776.24. Thus, the Board finds that OWCP's calculation of a \$5,776.24 overpayment was correct. Accordingly, OWCP properly determined the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁰ 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.¹¹ Thus, OWCP may not waive the overpayment of compensation

⁷ *Id.* at § 8110(a)(3); see *Ralph P. Beachum, Sr.*, *supra* note 5.

⁸ *Id.*

⁹ *Id.*; see also *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.¹² Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹³

On the issue of fault, section 10.433 of OWCP's regulations provide 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.”¹⁴

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.”¹⁵

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment based on the third criterion, that she accepted payments which she knew or should have known to be incorrect.¹⁶

For OWCP to establish that appellant was at fault in creating the overpayment, it must establish that, when she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁷ With respect to whether an individual is with fault, section 10.433(b) of OWCP regulations provide that whether OWCP determines that an individual was with fault with respect to the receipt 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 was being overpaid.¹⁸

¹² *Norman F. Bligh*, 41 ECAB 230 (1989).

¹³ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 13.

¹⁶ *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁷ See *J.D.*, Docket No. 10-640 (issued December 17, 2010); *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁸ 20 C.F.R. § 10.433(b).

The Board finds that appellant was at fault in creating the overpayment. The CA-1032 forms provided extensive information notifying her as to the status of dependents for augmented compensation. Appellant was advised as to the requirements for claiming a child as a dependent and informed that a claimant with no dependents was paid at the 66 2/3 percent basic rate, not the 75 percent augmented rate. When initially placed on compensation, she received the augmented rate as her daughter was under the age of 18. Appellant continued to claim and receive augmented compensation as her daughter was registered as a full-time student after the age of 18. On October 22, 2009 her daughter turned 23 years of age. On March 8, 2011 appellant signed a Form CA-1032 claiming her daughter, as a dependent, who was 24 years of age at the time. The Board notes that there is no evidence to support that her daughter was unable to support herself because of a mental or physical disability. The record establishes that appellant knew or should have known that the payments made at the augmented rates were incorrect in view of the cautionary language in the CA-1032 forms that she signed. She is at fault in creating the overpayment and is not eligible for waiver of recover. OWCP is required by law to recover the overpayment.

Appellant contends on appeal that she has claimed her daughter as a dependent since she began receiving wage-loss compensation. She stated that due to medication for pain she cannot remember things and that OWCP had records that established when her daughter turned 23 years of age and should have reduced her benefits at that time.¹⁹ The fact that OWCP may have been negligent in issuing an overpayment does not mitigate the finding of fault in this case.²⁰ Appellant signed and filed multiple CA-1032 form affidavits prior to her daughter reaching 23 years of age which detailed her eligibility to receive compensation benefits for a dependent. She certified as to the dependent status of her daughter and was issued compensation in an amount she was not entitled to receive.

Appellant stated that recovery of the overpayment would pose a severe financial hardship. Since she was at fault in the creation of the overpayment, she is not eligible for a waiver of recovery.²¹

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information

¹⁹ As noted above, appellant submitted additional evidence after OWCP rendered its March 2, 2012 decision and the Board is precluded from reviewing this evidence for the first time on appeal.¹⁹

²⁰ *E.V.*, 59 ECAB 258 (2007).

²¹ *Supra* note 17.

about income, expenses and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.²²

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.²³

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$200.00 from each continuing compensation payment.

Regarding the recovery of \$5,776.24 from appellant's continuing compensation, the Board notes that she did not provide any financial information which would assist OWCP in determining the amount to deduct from future compensation payments in order to recoup the overpayment. OWCP set the rate of recovery as \$200.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.²⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period of October 22, 2009 through January 14, 2012 in the amount of \$5,776.24. The Board further finds that OWCP properly determined that she was at fault in creating the overpayments and, therefore, ineligible for waiver. The Board also finds that OWCP properly directed recovery of the \$5,776.24 overpayment at the rate of \$200.00 every four weeks from appellant's continuing compensation payments.

²² 20 C.F.R. § 10.438.

²³ *Id.* at § 10.441(a).

²⁴ On appeal, appellant submitted a listing of her current bills. As the Board's review is limited to evidence in the case record at the time OWCP made its decision over which the Board has jurisdiction, the Board cannot review this evidence submitted for the first time on appeal. *D.E.*, Docket No. 07-27 (issued April 6, 2007); 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2013
Washington, DC

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

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

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