

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

P.M., Appellant)	
)	
and)	Docket No. 13-2
)	Issued: March 25, 2013
DEPARTMENT OF DEFENSE, DECA)	
SOUTHWEST REGION, Fort Lee, VA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2012 appellant filed a timely appeal from an August 3, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found that an overpayment in compensation in the amount of \$2,117.57 was created for the period June 14, 2010 through February 12, 2011; (2) whether appellant was at fault in the creation of the overpayment; and (3) whether OWCP properly set the rate of recovery.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This is appellant's third appeal to the Board. By decision dated November 5, 2010, the Board determined that his July 3, 2009 claim for total disability compensation commencing December 20, 2007 should not be treated as a request for reconsideration but was a request for modification of a February 16, 2007 wage-earning capacity determination. The Board set aside OWCP's finding that appellant had filed an untimely request for reconsideration and remanded the case for OWCP to evaluate whether modification of the wage-earning capacity determination was warranted.² In a November 6, 2012 decision, the Board found the case was not in posture for decision as to whether OWCP's February 16, 2007 wage-earning capacity determination should be modified as a supplemental opinion was required from a second opinion examiner, as to whether appellant's condition materially changed. The Board further found that the case was not in posture for decision as to whether the claim should be expanded to include a back condition. The Board, however, affirmed the denial of the claim for expansion for the conditions of stress and depression.³ The facts of the case as set forth in the Board's prior decisions are incorporated by reference herein.

Appellant had a January 3, 1996 work injury that OWCP accepted for a right wrist contusion, right de Quervain's tendinitis, right carpal tunnel syndrome and a consequential right knee condition. She has not worked since May 2007. Appellant received disability compensation at the augmented rate for dependents, based on the fact that she had a dependent son born on December 19, 1991.

In EN1032 forms completed by appellant on multiple occasions, Part C, the section on dependents, explained who was considered a dependent and how having a dependant, such as a child, entitled her to greater compensation:

"A claimant who has no eligible dependants 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. You must answer the questions below to ensure your compensation is paid at the correct rate."

"You may claim compensation for a dependent if you have one or more of the following: (1) a husband or wife that lives with you; (b) an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years of age who is a full[-]time student and has not completed four years of school beyond the high school level; [and] (3) a parent who totally depends upon you for support."

² Docket No. 10-340 (issued November 5, 2010).

³ Docket No. 12-825 (issued November 6, 2012).

Appellant claimed no dependents in EN1032 forms certified April 19, 2009, May 1, 2011 and April 19, 2012. A January 13, 2011 OWCP telephone conversation memorandum indicated that she had “question about dependent change due to son is now in the military and has left the household for good. Advised that [claimant] must send this info in writing before a change in dependent status can be made. [Appellant’s] son is only 19 y[ea]rs old.” In a January 12, 2011 letter, appellant indicated that as of January 3, 2011, she no longer had any dependents living with her.

In a February 16, 2011 letter, OWCP advised appellant that beginning February 13, 2011 she would no longer receive augmented compensation for a dependent. On March 24, 2011 it issued a preliminary determination that an overpayment of \$3,663.12 existed for the period December 19, 2009 through February 12, 2011 due to a change in compensation rate from the augmented three-fourths rate to the basic two-thirds rate due to a change in dependent status as her son turned age 18 on December 19, 2009.

On March 26, 2011 appellant contested the preliminary overpayment decision on the grounds that her son was unmarried and a full-time student until June 13, 2010 and that he was unable to support himself until he enlisted in the U.S. Marine Corps on December 27, 2010. She noted that her son enlisted in the delayed entry program for the U.S. Marine Corps on November 2, 2009 and graduated from high school in June 2010. A March 26, 2011 completed overpayment recovery questionnaire (Form OWCP-20) was provided. In a September 22, 2011 conference, appellant stated that her son was an unmarried full-time student until he graduated high school on June 13, 2010. She indicated that she supported him until he enlisted in the U.S. Marines in December 2010. OWCP clarified that in regards to supporting appellant’s son, this was not the type of “incapable of self-support” that is defined for a person to be classified as a dependent. Appellant stated that she was not contending that her son was incapable of self-support by virtue of physical or mental disability but that she was his sole support until he went into the U.S. Marine Corps.

On February 14, 2012 OWCP made a preliminary determination that appellant received a \$2,117.57 overpayment from June 14, 2010 through February 12, 2011 because she received compensation at the augmented rate for dependants when her son no longer qualified as an eligible dependent after he graduated from high school on June 13, 2010. In attached worksheets, it calculated that she received \$18,997.14 in compensation from June 15, 2010 through February 12, 2011 but was only entitled to \$16,879.57, a difference of \$2,117.57. OWCP found appellant was at fault in creating the overpayment because there was no evidence after June 13, 2010 that her son was a full-time student or incapable of self-support and she was aware of and placed on notice of the definition of self-support as explained in the EN1032 form.

On February 28, 2012 appellant requested a prerecoupment hearing, which was held on June 13, 2012. She did not disagree with the fact or amount of overpayment, but argued that she was without fault in creating the overpayment. Appellant stated that an OWCP document, which she could not identify, told her that her son was a dependent after age 18 as long as he could not support himself. She also stated that she could not

afford to pay the overpayment back. Appellant was provided 30 days to submitted supportive documentation. No additional information was received.

By decision dated August 3, 2012, OWCP's hearing representative finalized the preliminary determination that appellant was at fault in creating a \$2,117.57 overpayment from June 14, 2010 through February 12, 2011 as she received augmented compensation for her son who no longer qualified as an eligible dependent and that appellant knew or should have known she was not entitled to augmented compensation. The hearing representative further found that the overpayment should be recovered at the rate of 10 percent of appellant's compensation or \$200.00 every four weeks until the full amount of the overpayment plus applicable interest was repaid.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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 duty.⁴ 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.⁵

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay. Section 8110 of FECA provides that a claimant is entitled to augmented compensation to three fourths of the employee's rate of monthly pay if he or she has a dependent.⁶ Section 8110(a)(3) 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, as defined under section 8101(17).⁷ FECA provides that compensation will continue at the augmented rate if the child has reached 18 years of age and is a student. Section 8101(17) defines a student as an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at a school, college or university or other educational or training institute an additional type of educational or training institute as defined by the Secretary. The federal regulations provide that an additional type of educational or training institute means a technical, trade, vocational, business or professional school accredited or licensed by the federal or a state government that provides courses of not less than three months duration and prepares the individual for a livelihood in a trade, industry, vocation or profession.⁸ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation to which he or she was

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8110.

⁷ *Id.* at § 8110(a)(3).

⁸ 20 C.F.R. § 10.5(aa)(1).

entitled at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁹

ANALYSIS -- ISSUE 1

Appellant does not contest the fact of the overpayment. Since her son turned 18 on December 19, 2009 but attended high school until he graduated on June 13, 2010, she received augmented compensation because her son was an eligible dependent. After June 13, 2010 appellant's son was no longer a student regularly pursuing a full-time course of study or training at a school, college or university or other educational or training institute. Although she contended that she supported her son until he enlisted into the U.S. Marine Corps in December 2010, she provided no evidence that her son was incapable of self support due to physical or mental disability. As explained in the EN1032 forms and OWCP's February 26, 2011 letter, appellant was on notice of the definition of self-support. Accordingly, she was no longer entitled to augmented compensation after June 13, 2010 as her son was not a qualified dependent. This creates an overpayment of compensation for the period from June 14, 2010 through February 12, 2011.

OWCP provided a detailed accounting of the amount of compensation appellant should have received at the statutory 66 2/3 percent rate since there were no qualified dependents. The worksheets reflect that, from June 15, 2010 through February 12, 2011, appellant was paid \$18,997.14 at the augmented rate but should have been paid \$16,879.57. This amounts to an overpayment amount of \$2,117.57. Thus, the Board finds that OWCP's calculation of a \$2,117.57 overpayment was correct. Accordingly, OWCP properly determined the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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.¹⁰

Section 10.433 of the implementing regulations specifically provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ On the issue of fault, 20 C.F.R. § 10.433(a) 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.

⁹ 5 U.S.C. § 8110(a) (3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁰ 5 U.S.C. § 8129; *see P.M.*, Docket No. 07-2169 (issued March 3, 2009); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹¹ *Id.* at § 10.433(a).

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹² 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.¹³

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment based on the third criterion, that she accepted payments which she knew or should have known to be incorrect.¹⁴ For it to establish that she was at fault in creating the overpayment, it must show that, when she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁵ With respect to whether an individual is with fault, section 10.433(b) of OWCP's 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.¹⁶

The Board finds that appellant was at fault in creating the overpayment. The EN1032 forms provided 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. The evidence establishes that, when placed on compensation, she received it at the augmented rate as her son was under the age of 18. When appellant's son turned 18 years old on December 19, 2009 appellant continued to receive compensation at the augmented rate until he graduated from high school on June 13, 2010. While appellant argued that her son was unmarried and she continued to support him until he enlisted in the U.S. Marine Corps in December 2010, she knew or reasonably should have known that she was not entitled to augmented compensation after her son's graduation from high school on June 13, 2010. As noted, her son did not qualify as a full-time student. Additionally, there is no evidence to support that appellant's son was unable to support himself because of a mental or physical disability.

While appellant advised that she received an OWCP document that told her she could receive augmented compensation for her son as long as he was incapable of self support, and there was no qualification that this lack of self-support had to be due to physical or mental disability, there is no evidence of such a document on record and she presented no corroborating evidence. While she may have been unclear as to the definition of self-support, she knew or should have known that the payments made at the augmented rates after her son graduated high school on June 13, 2010 were incorrect in view of the cautionary language in the EN1032 forms

¹² *Id.*

¹³ *Id.* at § 10.433(b).

¹⁴ *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁵ *See Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ *Supra* note 13.

that she signed. Appellant is at fault in creating the overpayment and is not eligible for waiver of recovery. OWCP is required by law to recover the overpayment.¹⁷

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regards to 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 resulting hardship upon such individual.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of 10 percent of appellant's compensation or \$200.00 every four weeks from her continuing compensation.

In setting the rate of recovery at \$200.00 every four weeks, OWCP's hearing representative noted that appellant did not provide sufficient documentation to determine a repayment schedule that would allow for consideration of minimization of financial hardship. There was no current overpayment statement or documented financial evidence. It is appellant's responsibility to provide information about income, expenses and assets.¹⁹ Section 10.441(a) of OWCP's regulations, as noted, directs OWCP to take certain matters into consideration in establishing the repayment schedule, including 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 In view of these circumstances where appellant did not submit requested financial information after the precoupment hearing, OWCP properly considered the appropriate factors in determining the recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation from June 14, 2010 through February 12, 2011 as she continued to receive augmented compensation following her son's June 13, 2010 high school graduation, in the amount of \$2,117.57. The Board further finds that appellant was with fault in creating the overpayment and that OWCP properly set the rate of recovery from continuing compensation.

¹⁷ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

¹⁸ 20 C.F.R. § 10.441(a); *see supra* note 14.

¹⁹ *Id.* at § 10.438.

²⁰ *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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