

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

M.C., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Andover, MA, Employer)

Docket No. 13-150
Issued: March 28, 2013

Appearances:
Steve Connor, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 26, 2012 appellant, through her representative, filed a timely appeal from the April 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which found her at fault in the creation of 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 over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$17,112.36 overpayment of compensation from September 14, 2004 through June 6, 2009; and (2) whether she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

As the Board noted in the prior appeal,² appellant, a 62-year-old mail clerk, filed a claim for compensation in 1995 alleging that exposure to chemical fumes in the course of her federal employment caused chronic laryngitis. OWCP accepted her claim for rhinitis and blepharitis. Appellant received compensation for temporary total disability at the augmented rate for dependents.

In 2001 appellant appointed her son to be her power of attorney, effective upon any subsequent disability or incapacity, mental or physical, that rendered her unable to administer her affairs. "Such disability shall be certified in writing by an accredited medical doctor." Appellant and her husband were granted a divorce on September 14, 2004.

In January 2005 appellant's son brought her to a mental health center. Appellant presented with visual hallucinations. She was having issues with the neighbors, which intensified over the preceding five months. Appellant stated that people were always coming onto her property -- all kinds of people with costumes and big pointed hats. She was very upset about this. Although there was no evidence of it from the snow on the ground, still appellant insisted. It was fixed in her mind that this was real.

A December 2004 computerized tomography (CT) scan reportedly showed no physical cause for appellant's behavior. A nurse practitioner at the mental health center noted that she was currently taking antipsychotic medication. Appellant's attention span was short and fixed on the hallucinations. She had difficulty with her judgment and insight secondary to her level of depression and cognitive loss. The nurse practitioner offered a possible diagnosis of major depressive disorder, recurrent, with psychotic features, senile dementia of the Alzheimer's type, versus Lewy Body dementia.

Appellant continued to report that she was married and living with her husband. She completed and signed EN1032 forms to this effect in March 2005, April 2006 and March 2007.

Dr. Paul Fallon, a Board-certified psychiatrist, first saw appellant in February 2007. Appellant had a history of dementia and had been on two medications for Alzheimer's disease. Dr. Fallon reviewed her treatment since she originally appeared at the clinic in 2005 with paranoid ideation, feeling that people were wandering in the back yard planning to harm her. Appellant's symptoms waxed and waned over the years. Her son found it difficult to care for his mother and deal with her obsessive focus on certain issues; she did not understand that she was demented. Dr. Fallon identified the admitting diagnosis as major depression, recurrent, with psychotic features and dementia.

On this first visit, the son sensed that, if Dr. Fallon told appellant not to drive, she would never come back for help. Dr. Fallon noted that she showed obvious memory difficulties. Appellant asked twice in a similar fashion what had happened with the last person who had treated her. She did not recall taking medications or know why she was taking them. Appellant

² Docket No. 10-936 (issued January 20, 2011). The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

showed flashes of anger toward her son when he presented information that she disagreed with, such as her not driving.

Dr. Fallon saw appellant again in June 2007. Appellant's son was concerned that she was becoming very upset around discussions about her driving. On examination, appellant showed no insight into concern about her driving and repeated that she had driven all of her 74 years. She felt that, if it were a problem, she would stop. Appellant did not recall her son previously talking to her about the car. The son noted that this was pretty much a daily argument, though she continued to refrain from driving. When Dr. Fallon told her that she should not drive on medications, she did not return to the clinic.

In September 2007 Dr. Ping Cui, a Board-certified psychiatrist, examined appellant and declared her mentally ill and incapable of caring for her personal or financial needs. He found her a candidate for medical guardianship: "[Appellant] does not understand the risk, benefit of the treatment. She has no capacity to properly understand and follow through with medical needs. [Appellant's] lacks of capacity to manage funds that are spent reasonably to pay for her needs."

In March 2008 appellant completed and signed another Form EN1032, again indicating that she was married and living with her husband. Appellant's son, exercising power of attorney, completed a Form EN1032 in March 2009. He, too, indicated that appellant was married and living with her husband. Appellant's son would later explain that he followed the advice of appellant's attorney and simply copied what appellant had filled out the previous year. "Taking care of my mother by myself has been mentally and emotionally taxing to say the least. I truly have done the very best I could and the mix-up was purely unintentional."

OWCP continued to pay compensation at the augmented rate for dependents. Effective June 7, 2009, however, it received a copy of the Final Decree of Divorce began paying compensation at the basic rate for no dependents.

OWCP issued a preliminary decision finding that appellant received a \$17,112.36 overpayment of compensation from September 14, 2004 through June 6, 2009 because she received augmented compensation for dependents after her divorce. It paid her at the incorrect rate of \$493.83 per week instead of the correct pay rate of \$474.51. OWCP found appellant at fault in creating the overpayment: after her divorce, she continued to report each year that she was married and living with her husband. It finalized its overpayment findings in a December 9, 2009 decision.

In the prior appeal, the Board set aside OWCP's overpayment decision. OWCP had not addressed the issue of appellant's mental capacity, which bore on the issue of fault.

In a decision dated April 27, 2012, OWCP found that appellant was at fault in creating the \$17,112.36 overpayment because she was divorced in 2004 but continued to report that she was married and living with her spouse for the calendar years 2004 through 2008. In addition, her power of attorney reported the same for calendar year 2009. OWCP noted that the son's power of attorney would have become effective on September 14, 2007 the date she was placed

in medical guardianship. It determined that the recovery should be made by deducting \$100.00 from her continuing compensation payments.

Appellant's representative argues that he has been appellant's dependent since September 2009. "I have been a 24/7 caregiver for my mother since December of 2004. I believe I am [the] second person reliant on my mother's workers' compensation check due to the fact that she has required around the clock supervision and care caused by Alzheimer's disease." Since the reduction in her compensation, he has been providing food for his mother with the use of his credit cards, which has resulted in his filing for bankruptcy.

LEGAL PRECEDENT -- ISSUE 1

FECA pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.³ A disabled employee with one or more dependents is entitled to have her basic compensation augmented from two-thirds to three-fourths of her monthly pay.⁴ A "dependent" means a husband if (a) he is a member of the same household as the employee; (b) he is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to his support.⁵

ANALYSIS -- ISSUE 1

Appellant and her husband were granted a divorce on September 14, 2004. The record confirms that she continued to receive compensation at the augmented rate for dependents through June 6, 2009. An overpayment of compensation is therefore established. The amount of compensation actually paid during this period (\$110,654.46) less the compensation appellant should have received at the correct pay rate (\$93,542.10) establishes the amount of the overpayment (\$17,112.36). Compensation payment worksheets in the record confirm these figures. The Board will therefore affirm OWCP's April 27, 2012 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.

A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8110(b).

⁵ *Id.* at § 8110(a)(2).

should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁶

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.⁷

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in the creation of the overpayment on the grounds that she made an incorrect statement as to a material fact which she knew or should have known to be incorrect, namely, that she was still married and living with her husband. In the prior appeal, the Board remanded the case for OWCP to consider the issue of her mental capacity. OWCP considered the matter and reasoned that appellant was not placed in medical guardianship until September 14, 2007, at which point her son's power of attorney became effective. It concluded that she was at fault for the entire amount.

Dr. Cui, a psychiatrist, confirmed that appellant was mentally ill on September 14, 2007, but there is no evidence that she suddenly became mentally ill on or about that date. Rather, her mental difficulties appear to have arisen years earlier. The record makes clear that she began to display psychotic features by the end of 2004, around the time of her divorce. Appellant's issues with her neighbors intensified thereafter to the point that she underwent diagnostic testing in December 2004 to determine if there was any organic basis for her behavior. She began taking antipsychotic medication and in January 2005 her son took her to a mental health center, where she presented with visual hallucinations. Two months later appellant completed and signed the first Form EN1032 that is at issue in this case.

Dr. Fallon, a psychiatrist, first saw appellant in February 2007. Appellant had a history of dementia and was taking two medications for Alzheimer's disease. She showed obvious memory difficulties. Appellant completed the second Form EN1032 in 2006. She would complete the third one month after seeing Dr. Fallon.

As noted, whether an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid. Under the circumstances presented in this case, the Board finds that appellant did not have the capacity to realize that the information she was providing on the EN1032 forms was incorrect. That appellant would be declared a candidate for medical guardianship in September 2007 does not establish what she knew or should have known in March 2005, April 2006 or March 2007.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

OWCP did not adequately explain its finding that appellant was at fault in creating the overpayment when she completed and signed the fourth Form EN1032 in March 2008, half a year after being declared mentally ill and a candidate for medical guardianship. As her son's power of attorney became effective in September 2007, she was mentally incompetent to handle her own affairs when she completed the form in March 2008.

The Board finds that appellant is without fault in the creation of the overpayment based on the forms she signed in March 2005, April 2006, March 2007 and March 2008. The Board will set aside OWCP's April 27, 2012 fault determination in this regard and remand the case for consideration of waiver of recovery of the overpayment based on appellant's current financial information.

In March 2009, appellant's son, exercising power of attorney, completed a Form EN1032 advising that appellant was married and living with her husband. He explained that he simply copied, on the advice of appellant's attorney, what she had filled out the previous year. Although the mistake may have been purely unintentional, appellant's son made an incorrect statement as to a material fact that he knew or should have known to be incorrect. Under the circumstances, the Board finds that appellant, through her power of attorney, was at fault in creating the overpayment attributable to the information contained in the March 2009 Form EN1032. Appellant is therefore not eligible for consideration of waiver for that position of the overpayment of compensation so created.

CONCLUSION

The Board finds that appellant received a \$17,112.36 overpayment of compensation from September 14, 2004 through June 6, 2009. The Board finds that she was not at fault in the creation of the overpayment attributable to the EN1032 forms she completed and signed in March 2005, April 2006, March 2007 and March 2008. Appellant is therefore eligible for consideration of waiver of recovery of the overpayment. The Board further finds that appellant is at fault, through her power of attorney, in the creation of the overpayment attributable to the Form EN1032 that he completed and signed in March 2009, thereby precluding waiver of recovery of that amount.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact and amount of overpayment and on the issue of fault with respect to the March 2009 Form EN1032. OWCP's decision is otherwise set aside and the case returned for further action in conformance with this decision.

Issued: March 28, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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