

FACTUAL HISTORY

On January 21, 2004 appellant, then a 44-year-old registry clerk, filed a traumatic injury claim alleging that on January 8, 2004 she sprained her neck and lower back when she lifted heavy parcels while working on the window. OWCP accepted her claim for cervical and lumbar sprain.

Appellant stopped work and filed claims for wage-loss compensation, Form CA-7, beginning February 24, 2004. She identified two daughters as dependents and listed the dates of birth as July 17, 1986 and March 11, 1990. OWCP paid wage-loss compensation at an augmented rate of 75 percent of her weekly pay. On June 24, 2004 appellant was placed on the periodic rolls at the augmented rate of 75 percent of her weekly pay.

On July 19, 2005 appellant was approved for disability retirement.

The record reflects that appellant submitted affidavits of earnings and employment (Form CA-1032) beginning November 30, 2004. The forms explained the circumstances under which she would be entitled to augmented compensation for her dependent children. Compensation for a dependent may be claimed for an unmarried child, including an adopted child or stepchild who lived with her and was under 18 years of age. 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.

Appellant completed subsequent CA-1032 forms dated April 10, 2006 to January 2, 2011. She listed her daughter, with a date of birth of March 11, 1990, as a dependent.

By letters dated January 18 and November 20, 2008 and July 2, 2009, OWCP again advised appellant of the circumstances under which she was entitled to augmented compensation for her dependent children. It requested additional information to determine whether her daughter, born on March 11, 1990, had eligibility for compensation beyond her 18th birthday. OWCP informed appellant that verification that her daughter was pursuing a full-time course of study at an accredited school, college or university was needed at least twice each year.

In a January 21, 2008 student dependency form, an official at Satellite Academy High School verified that appellant's daughter was enrolled as a full-time student from September 2007 through June 2009.

In a September 8, 2009 student dependency form, an official for the Registrar's Office of York College verified that appellant's daughter was enrolled as a full-time student at York College from August 28 to December 13, 2009. Her expected date of completion of the course of study was September 2013.

In a February 14, 2012 Form CA-1032, appellant listed her daughter and grandson, with a date of birth of June 12, 2005, as dependents.

In a February 27, 2012 letter, OWCP advised appellant that further information was necessary to determine her daughter's dependency status following December 2009 and her grandson's dependency status. It advised her that, in order for her grandson to be considered a dependent, she needed to provide OWCP with formal adoption documents because legal adoption was the only condition under which a grandchild could be considered a dependent for the augmented compensation rate. OWCP also stated that appellant needed to submit certification of her daughter's status as a full-time student.

On May 30, 2012 OWCP adjusted appellant's compensation rate to the statutory 66 2/3 percent beginning June 3, 2012. Appellant did not respond to the February 27, 2012 letter.²

On August 21, 2012 OWCP issued a preliminary decision that appellant received an overpayment in the amount of \$10,758.69 for the period December 14, 2009 to June 2, 2012. It determined that she received compensation at the augmented 75 percent rate for dependents after her last remaining dependent became ineligible for benefits. OWCP found that appellant was at fault in creating the overpayment because she knew or should have known that on and after December 14, 2009 she was in receipt of payment at a rate to which she was not entitled. It provided a memorandum containing a calculation of the overpayment totaling \$10,758.69.³ 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 was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On August 26, 2012 appellant requested a preresoupment hearing and submitted a completed overpayment questionnaire. She contended that the overpayment occurred through no fault of her own and requested waiver. Appellant contended that, although her daughter no longer attended school, she still remained a dependent in her household. She explained that she did not report any changes because her daughter and grandson still lived with her and were dependent on her. Appellant reported no monthly income and noted that she supported two daughters and a grandson. Her monthly expenses were listed as a total of \$3,067.49, including \$1,315.49 for rent, \$400.00 for food, \$152.00 for utilities and \$1,000.00 for "other." Appellant reported that her various debts included a \$200.00 monthly installment payment for a \$2,498.43 U.S. Barclay card. She stated that she had \$40.00 cash on hand, \$35.47 in her checking account and \$550.00 in her savings account. Appellant submitted bank statements, an August 6, 2012 rent receipt for \$1,315.49, a utility bill for \$152.27, a T-Mobile phone bill for \$256.89 and a monthly car payment of \$416.00.

In a December 18, 2012 preresoupment hearing, appellant stated that her daughter was enrolled as a full-time student until June 2010. She believed that her daughter would be covered

² On July 12, 2012 OWCP issued a preliminary decision proposing to terminate appellant's compensation for wage-loss and medical compensation benefits because the medical evidence established that appellant's January 8, 2004 injury-related disabilities had resolved. By decision dated August 13, 2012, it finalized the termination decision.

³ The overpayment worksheet indicated that from December 14, 2009 to December 18, 2010 appellant received an overpayment of \$4,342.52. From December 19, 2010 to January 14, 2012 she received an overpayment of \$4,697.21. From January 15 to June 2, 2012 appellant was overpaid \$1,718.96.

until she was 22 years of age and was unaware that her daughter had to be enrolled in college after her 18th birthday in order to be considered a dependent. The hearing representative advised appellant to obtain documentation of her daughter's last day of full-time college attendance. Regarding her grandson, appellant explained that she did not adopt him but that he lived with her and was dependent on her. She stated that she received a net income of \$616.00 a month and noted that she lived with her grandson and two daughters who all worked and supported each other. The hearing representative reviewed the financial documents she had provided and clarified her financial assets.

In a January 7, 2013 letter, an official for the Registrar's Office of York College noted that appellant's daughter was enrolled as a full-time student from August 28, 2009 to May 25, 2010.

In a February 28, 2013 memorandum, an OWCP hearing representative modified the amount of overpayment to \$8,867.44 for the period May 26, 2010 to June 2, 2012. He noted that the initial overpayment of \$10,758.69 covered the period December 14, 2009 to June 2, 2012, but appellant presented documentation of her daughter's full-time enrollment as a student through May 25, 2010. The hearing representative reported that appellant should have received \$1,891.25 from December 14, 2009 to May 25, 2010 at the augmented rate. He subtracted that amount from the original overpayment of \$10,758.69 to modify the overpayment amount of \$8,867.44.

By decision dated March 1, 2013, an OWCP hearing representative finalized the overpayment in the amount of \$8,867.44 for the period May 26, 2010 to June 2, 2012. Appellant received compensation based on the 75 percent augmented compensation rate instead of the 66 2/3 percent basic rate. The hearing representative further found that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to augmented compensation during that period.

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.⁴ 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.⁵

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.⁶ A

⁴ 5 U.S.C. § 8102.

⁵ *O.R.*, 59 ECAB 432 (2008).

⁶ 5 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.⁷

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 disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.⁸

ANALYSIS -- ISSUE 1

Appellant does not contest the fact or amount of the overpayment. She initially claimed her daughter, who was born on March 11, 1990, as a dependent and OWCP paid wage-loss compensation at the augmented rate of 75 percent beginning February 24, 2004. Although appellant's daughter reached the age of 18 on March 11, 2008, she was still an eligible dependent because she attended high school full time until she graduated in June 2009. After graduating from high school, the evidence of record confirms that her daughter was enrolled on a full-time basis at York College until May 25, 2010. After May 25, 2010 there is no evidence that appellant's daughter was enrolled as a full-time student for the 2010 fall semester. The Board finds, therefore, that she was no longer a dependent as defined under FECA.

Appellant also claimed her grandson, born on June 12, 2005, as a dependent. The Board notes, however, that a child and grandchild are not synonymous. A grandchild is not specifically recognized as an eligible dependent for purposes of augmented compensation.⁹ Although appellant's grandchild may be living with her, she did not provide any documentation or evidence that she legally adopted her grandson. In addition, appellant stated at the hearing that she did not formally adopt her grandson. Accordingly, the Board finds that her grandson was not a dependent as defined under FECA.

Appellant was entitled to compensation at the basic rate following May 25, 2010.¹⁰ OWCP initially calculated that she was overpaid \$4,342.52 from December 14, 2009 to December 18, 2010; \$4,697.21 from December 19, 2010 to January 14, 2012; and \$1,718.96 from January 15 to June 2, 2012 for a total of \$10,758.69. On March 1, 2013 an OWCP hearing representative modified this determination to reflect that appellant was properly paid at the augmented rate from December 14, 2009 to May 25, 2010. He calculated that she should have been paid an additional \$1,891.25 from December 14, 2009 to May 25, 2010 at the augmented rate. The hearing representative subtracted that amount from the original overpayment of \$10,758.69 to modify the overpayment amount of \$8,867.44. Appellant does not dispute the calculation of overpayment. The Board finds that OWCP properly determined the fact and amount of the overpayment.

⁷ *E.G.*, 59 ECAB 599 (2008).

⁸ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁹ *P.D.*, Docket No. 9-1007 (issued February 17, 2010).

¹⁰ *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.¹¹

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment 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 provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”¹²

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹³ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹⁴

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. It must show, therefore, that when she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁵

The Board finds that appellant was at fault in creating the overpayment. The CA-1032 forms provided information regarding the status of dependents for augmented compensation. Appellant was advised that she could claim an unmarried child or stepchild under 18 years of age. In order to claim compensation for a dependent child after he or she turns 18 years old he or she must be unmarried and incapable of self-support due to a mental or physical disability or

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.*

¹⁴ *Id.* at § 10.433(b).

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

enrolled as a full-time student. Appellant was also notified 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 beginning February 24, 2004 appellant received compensation at the augmented rate as her daughter was under the age of 18. On March 11, 2008 appellant's daughter turned 18 years old, but she was still eligible as a dependent because she was enrolled as a full-time student until May 25, 2010. While appellant alleged that she did not realize that her daughter needed to be a full-time student in order to be a dependent, the record contains CA-1032 forms and letters informing her of the requirements, for her daughter to be considered as a dependent. After May 25, 2010, appellant knew or reasonably should have known that she was not entitled to augmented compensation because her daughter was no longer enrolled as a full-time student and her grandson was not her stepchild. There is also no evidence to support that appellant's daughter was unable to support herself because of a mental or physical disability. Appellant testified at the hearing that both her daughters worked and earned income. In addition, the CA-1032 forms also explicitly state that an unmarried child or stepchild, not grandchild, may be considered dependent. The Board finds, therefore, that OWCP properly determined that appellant was at fault in the creation of the overpayment because she knew or should have known that after May 25, 2010 she was no longer entitled to compensation at the augmented rate.

On appeal, appellant contended that she was never informed that unless her daughter was enrolled in school she had to be taken off as a dependent. She requested a waiver because of income hardship. Although appellant contends that she was not aware of the qualifications of dependency status after a dependent turned 18 years old, the record confirms that she received various CA-1032 forms from April 10, 2006 to January 2, 2011 and letters dated January 18 and November 20, 2008 and July 2, 2009, which explained the circumstances under which she was entitled to augmented compensation for her dependent children. The Board finds, therefore, that she knew or should have known that the payments made at the augmented rates after her daughter was not enrolled in school were incorrect in view of the CA-1032 forms that she signed.¹⁶ Because appellant is at fault in creating the overpayment, she is not eligible for waiver of recovery and OWCP is required by law to recover the overpayment.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of \$8,867.44 from May 26, 2010 to June 2, 2012 as she continued to receive compensation at the augmented rate instead of the basic rate. The Board further finds that appellant was at fault in creating the overpayment.

¹⁶ See *P.M.*, Docket No. 13-2 (issued March 25, 2013).

¹⁷ *Supra* note 10; see also *L.J.*, 59 ECAB 264 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2013
Washington, DC

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

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

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