

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

C.V., Appellant)

and)

**DEPARTMENT OF THE ARMY, PENTAGON,
OFFICE OF THE ASSISTANT SECRETARY,
FINANCIAL MANAGEMENT &
COMPTROLLER, Arlington, VA, Employer**)

**Docket No. 13-2108
Issued: June 17, 2014**

Appearances:
Richard Kulick, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2013 appellant, through her representative, filed a timely appeal from a March 27, 2013 overpayment 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 determined that appellant received an overpayment of compensation in the amount of \$35,791.14 for the period July 8, 2007 through December 17, 2011; (2) whether she was at fault in the creation of the overpayment and not entitled to waiver of recovery; and (3) whether OWCP properly determined that the overpayment should be recovered by deducting \$509.20 from continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant, through her representative, contests the amount of the overpayment the fault determination. Appellant's representative also argued that the overpayment was beyond appellant's means to repay in its entirety.

FACTUAL HISTORY

Appellant, then a 48-year-old budget analyst, has an accepted occupational disease claim for post-traumatic stress disorder. On September 11, 2001 she was on the telephone with a colleague who was killed when the plane hit the Pentagon.

Appellant completed CA-7 claim forms on March 21, April 2 and May 19, 2007 and listed no dependents. In a claim for compensation form (CA-7) dated June 5, 2007, she listed her nephew, who was born on October 31, 2001, as a dependent. Appellant also submitted an order from the Circuit Court for Prince George's County, Maryland dated June 12, 2007 appointing her as the legal guardian, *pendent lite*, of her minor nephew. OWCP initially paid appellant compensation based on the statutory 66 2/3 rate. After receipt of the court order, it paid compensation at the augmented rate of 75 percent as of July 8, 2007. Appellant submitted CA-1032 forms listing her nephew as a dependent on April 8, 2008, April 2, 2009, March 23 2010 and April 30, 2011.

OWCP reduced appellant's compensation rate to 66 2/3 effective December 18, 2011. On January 9, 2012 appellant inquired as to why her compensation was reduced. On January 10, 2012 an OWCP claims examiner advised her that guardianship was not grounds for augmented compensation. To be eligible for augmented compensation, a child had to be legally adopted. The record reflects telephone calls between OWCP and appellant's attorney regarding the dependency status of the minor living with her. By letter dated January 30, 2012, OWCP informed appellant's attorney that her compensation rate was reduced because she did not have any dependents and she had not legally adopted her nephew. By letter dated March 31, 2012, appellant's representative contended that pursuant to 5 U.S.C. § 8110(a)(3), a dependent included an unmarried child who, while living with the employee or receiving regular contribution from the employee toward his support, is under age of 18. By letter dated May 9, 2012, OWCP responded that 20 C.F.R. § 8101(9) of FECA provided for three specific relationships in addition to the biological relationship to establish a child: stepchildren, adopted children and posthumous children. It reiterated that a nephew was not included among the definitions of child under FECA. Therefore, appellant was not entitled to augmented compensation.

On September 20, 2012 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$35,791.14 because she had no eligible dependents from July 8, 2007 through December 17, 2011, but received compensation at the augmented rate of 75 percent. It also made a preliminary determination that she was at fault in the creation of this overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. OWCP noted that appellant had signed and returned a Form EN-1032 which provided that she understood that she must immediately report any change in the status of her claimed dependents. It forwarded to her instructions and forms for challenging the overpayment and requested that she complete financial forms. For the period July 8, 2007 through December 17, 2011, appellant was paid at the augmented rate and received \$318,808.51

but should have been paid at the rate for a person without dependents in the total amount of \$283,017.37. The difference represented an overpayment of \$35,791.14.

On October 17, 2012 appellant disagreed that an overpayment occurred and contended that she was without fault. She requested waiver of the recovery of the overpayment. Appellant requested that OWCP review the written evidence. She stated that her sister was unable to properly care for her infant, so an older sister took care of the nephew until he was four years old. When the older sister died in 2007, appellant took care of him. She stated that the only mother her nephew knew was her and that she was his legal guardian. Appellant submitted financial information listing her total assets as \$10,118.70, and her monthly income as \$581.00 (\$400.00 Supplemental Security Income payment and \$181.00 welfare payment). She listed monthly expenses as \$6,089.00, including \$3,430.00 for rent/mortgage/property tax, \$600.00 for food, \$100.00 for clothing, \$936.00 for utilities and \$1,023.00 for miscellaneous. The total of appellant's regular monthly expenses was \$6,089.00. She also listed \$960.00 for monthly debt payments. In support of her financial information, appellant submitted a copy of her account activity at Wells Fargo, a breakdown of payments for rent/mortgage property tax listing \$1,100.00 in rent, \$2,089.00 for a mortgage and \$241.00 for taxes, copies of money gram payments, a copy of bill from Schewel Furniture Company, and a copy of a bill from Century Link for telephone and Internet services.

In a letter to appellant dated February 27, 2013, a senior claims examiner advised that she tried to reach appellant on February 20 and 27, 2013 but was unsuccessful. She noted that she would contact appellant on March 12, 2012 to conduct a telephone conference. The claims examiner was unable to contact appellant for the conference. On March 1, 2013 OWCP sent appellant a new CA-1032 to complete. Appellant completed the form and signed it on March 20, 2013. By letter dated March 20, 2013, she informed OWCP that she had moved and provided a new telephone number and address.

By decision dated March 27, 2013, OWCP finalized the overpayment of compensation in the amount of \$35,791.14. Appellant was at fault in the creation of the overpayment. OWCP directed that \$509.20 be withheld from her continuing compensation payments beginning April 7, 2013 until the overpayment was recovered.

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.² 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.³

² 5 U.S.C. § 8102.

³ O.R., 59 ECAB 432 (2008).

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 a physical or mental disability.⁴ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has not completed 4 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.⁵

ANALYSIS -- ISSUE 1

Appellant initially received compensation payments at the statutory rate of 66 2/3. After she submitted a court order showing that she was guardian for her nephew, OWCP began paying her compensation payments at the augmented rate of 75 percent effective July 8, 2007. The Board notes, however, that a nephew is not recognized as an eligible dependent for purposes of augmented compensation. Pursuant to 5 U.S.C. § 8101(9) the term child under FECA may include stepchildren, adopted children or posthumous children. The Board has specifically held that when a claimant has legal guardianship over a nephew, this does not qualify the child as a dependent if the recipient of compensation has not adopted the child.⁶ Although appellant's nephew may be living with her and she may be his legal guardian, appellant did not legally adopt her nephew. Therefore, he does not qualify as an eligible dependent

The record indicates that appellant was erroneously paid compensation based on the augmented rate of 75 percent for a person with a dependent for the period July 8, 2007 through December 17, 2011. Appellant was paid \$318,808.51 but should have received \$283,017.37. OWCP properly determined that the difference of \$35,791.14, is the amount of the overpayment. The Board finds that OWCP properly determined the fact and amount of the overpayment in this case.

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.⁷

⁴ 5 U.S.C. § 8129(b).

⁵ *E.G.*, 59 ECAB 599 (2008); *see also C.T.*, Docket No. 13-886 (issued July 19, 2013).

⁶ *Aretha Hudson*, 28 ECAB 423 (1988).

⁷ *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

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.”⁸

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.⁹ 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.¹⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. With respect to whether an individual is with fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.¹¹

The Board finds that appellant was at fault in the creation of the overpayment. The Board notes that appellant accepted payments that she knew or should have known to be incorrect. The initial award notification advised appellant of her responsibility to correctly identify her eligible dependents. Appellant submitted multiple financial statements, Forms CA-1032, which provided notification of who and under what circumstances a person could be claimed as a dependent. In submitting the completed forms, appellant certified that she read and understood the basis on which her benefits were made. The Board finds that appellant is at fault in creating the overpayment of benefits.¹² For more than three years, she accepted payments she

⁸ 5 U.S.C. § 8129(b)

⁹ 20 C.F.R. § 10.433(a)

¹⁰ *Id.*

¹¹ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

¹² *See C.A.*, Docket No. 08-1889 (issued June 17, 2009); *Julia M. Butler*, Docket No. 04-1107 (issued November 15, 2004).

knew or should have known to be incorrect. Because appellant was at fault, she is not eligible for a waiver of recovery 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.¹³

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.¹⁴

ANALYSIS -- ISSUE 3

OWCP determined that it would collect appellant's overpayment by deducting \$509.20 from each compensation check.

OWCP was unable to contact appellant on the date of the hearing. Appellant did not provide any reason prior to the hearing for not being available on the date scheduled. The Board notes that a notice of hearing was sent to appellant at her address of record. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹⁵ As OWCP properly mailed this notice to appellant at her address of record, it is presumed to have arrived at her mailing address. The Board further notes that appellant received and completed the Form CA-1032 that was mailed to her the same month. On appeal, appellant's counsel makes various arguments about appellant's health and her inability to handle stress during this period. The Board cannot consider the reasons provided by appellant's representative for the first time on appeal.¹⁶

The Board notes that the financial information submitted by appellant was not sufficient to give OWCP a clear picture of her finances. Although certain financial documents were submitted, she listed monthly expenses that are not supported financial records such as official documentation supporting that she pays \$3,430.00 for rent/mortgage/taxes or \$600.00 for food. There is only partial documentation for appellant's listing that she spends \$936.00 for utilities and \$1,023.00 for miscellaneous expenses. She also did not include her compensation payments under her monthly income. Because appellant did not provide adequate financial documentation

¹³ 20 C.F.R. § 10.436.

¹⁴ *Id.* at § 10.441(a).

¹⁵ *M.T.*, Docket No. 12-74 (issued May 21, 2012).

¹⁶ *Z.S.*, Docket No. 07-415 (issued June 6, 2007).

and failed to make herself available for the telephonic hearing, OWCP did not have the appropriate financial information. Its procedures provide that when an individual fails to provide requested financial information, it should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁷ Because appellant failed to provide the necessary financial documentation, OWCP did not abuse its discretion in directing recovery by withholding \$509.20 from appellant's continuing compensation payments.¹⁸

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$35,791.14 for the period July 8, 2007 through December 17, 2011, that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery and that OWCP may collect the overpayment by deducting \$509.20 per 28 days from each of appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 27, 2013 is affirmed.

Issued: June 17, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁷ C.S., Docket No. 13-1423 (issued October 23, 2013).

¹⁸ See N.R., Docket No. 12-1853 (issued June 10, 2013).