



## **FACTUAL HISTORY**

This matter has previously been before the Board. Pursuant to the first appeal, the Board reversed OWCP's October 10, 1995 decision rescinding acceptance of a recurrence of disability.<sup>2</sup> Pursuant to the second appeal, by decision and order issued May 9, 2013,<sup>3</sup> the Board affirmed OWCP's August 30, 2012 decision denying modification of a wage-earning capacity determination.<sup>4</sup> The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

Appellant sustained a lumbar strain on June 21, 1979. OWCP later expanded the claim to include an L3-4 disc herniation. Appellant retired on October 30, 1987. OWCP issued compensation benefits on the periodic rolls beginning on November 1, 1989 at the 75 percent, augmented rate as appellant was married. The record reflects that appellant had received compensation by direct deposit beginning in 2005.

Appellant completed annual affidavits of earnings and employment (Form EN1032) as requested by OWCP. On November 22, 2012 he completed a Form EN1032 form, in which he answered "yes" to questions asking if he was married and if his spouse lived with him. Appellant's wife died on November 27, 2012. On December 15, 2012 OWCP issued a compensation payment for \$1,523.04 for the period November 18 to December 15, 2012. Appellant did not advise OWCP of his wife's demise until September 23, 2013.

On September 26, 2013 OWCP compiled payment logs and provided calculations showing that from November 28, 2012 to September 21, 2013, appellant received \$18,919.14 in compensation at the augmented, 75 percent rate, but was entitled to only \$16,864.40, a difference of \$2,054.74.<sup>5</sup> It noted that the \$2,074.54 amount constituted an overpayment of compensation.

By notice dated September 27, 2013, OWCP advised appellant of its preliminary determination that an overpayment of compensation of \$2,054.74 was created in his case because he received compensation at the augmented rate for the period November 28, 2012 through September 21, 2013 when he had no eligible dependents. It found that he was at fault in creating the overpayment as he accepted a payment that he knew or should have known to be incorrect. OWCP afforded appellant 30 days to submit information regarding his income, assets, and expenses, and to request a prerecoupment hearing. It provided him an overpayment recovery questionnaire (Form OWCP-20).

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<sup>2</sup> 49 ECAB 375 (1998); *Order Granting Petition for Correction and Reaffirming Prior Decision*, 50 ECAB 229 (1999) (March 4, 1998).

<sup>3</sup> Docket No. 12-1961 (issued May 9, 2013).

<sup>4</sup> By decision issued October 8, 2010, OWCP reduced appellant's compensation effective October 24, 2010, based on his projected ability to earn wages as a small products assembler. It affirmed the determination on August 30, 2012. The Board affirmed OWCP's August 3, 2012 decision by decision and order issued May 9, 2013.

<sup>5</sup> The overpayment calculation was incorrect. OWCP noted \$2,074.54; but the math reflects an overpayment of only \$2,054.74.

In response, appellant submitted an October 3, 2013 statement asserting that he had advised OWCP in early December 2012 that his wife had died. He requested a prerecoupment hearing. Appellant also requested waiver of the overpayment, asserting that he was without fault in its creation. He submitted his wife's death certificate, confirming that she died on November 27, 2012.

OWCP conducted a telephonic prerecoupment hearing on May 7, 2014. At the hearing, counsel acknowledged the period, fact, and amount of the overpayment, but contended that appellant was not at fault. He argued that appellant was severely debilitated due to diabetes and the sequelae of his accepted lumbar injuries. Counsel asserted that appellant did not deliberately deceive OWCP. Appellant testified that although he called OWCP to report his wife's death in December 2012, he did not submit the death certificate or other paperwork until September 2013, when a relative reviewed his insurance documents and realized he was paying for a family plan although he no longer had dependents. Counsel asserted that appellant had monthly income of \$1,682.00, and over \$4,000.00 in expenses. Appellant paid the difference from savings. Counsel contended that under these circumstances, recovery of the overpayment would be against equity and good conscience.

Following the hearing, appellant submitted documentation of his monthly expenses, including a \$1,345.19 mortgage payment, \$105.00 for auto insurance, and \$82.35 for life insurance. He supplied utility bills for water, telephone, gas, and electricity which did not clearly specify an average monthly payment. Recent payments for these utilities totaled approximately \$448.00 a month. Appellant also provided credit card bills with recent payments totaling approximately \$395.00 a month. Bank statements showed \$2,992.00 in a savings account and \$406.00 in a checking account. Appellant also submitted a federal tax payment receipt.

By decision dated July 25, 2014, an OWCP hearing representative found an overpayment of \$2,054.74 for the period November 28, 2012 to September 21, 2013 as appellant received compensation at the augmented rate when he had no eligible dependents. OWCP found appellant at fault in creation of the overpayment, as he was familiar with EN1032 forms and knew or should have known he was no longer entitled to receive compensation at the 75 percent rate after his wife died. Also, appellant had contacted OWCP on several occasions in the past regarding changes in his compensation benefits, evincing a high degree of knowledge and care. OWCP directed recovery of the overpayment by deducting \$100.00 from his continuing compensation payments. It found that appellant submitted insufficient financial information to determine a repayment schedule. The hearing representative noted that the documents appellant submitted were incomplete or confusing as they did not distinguish between monthly payments, minimum payments, and the balances due. Also, the federal tax payment did not indicate if there was an additional debt due and owing.

### **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.<sup>6</sup> 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.<sup>7</sup>

Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of 3/4 of his or her weekly pay if he or she has one or more dependents.<sup>8</sup> A dependent includes a wife if: (a) she is a member of the same household as the employee; (b) she is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to her support.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant initially received compensation payments at the augmented rate of 75 percent as he was married, and lived in the same household with his wife. His wife died on November 27, 2012. However, appellant continued to receive compensation at the augmented rate after her death, when he had no eligible dependents.

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 November 28, 2012 through September 21, 2013. Appellant was paid \$18,919.14 in compensation at the augmented, 75 percent rate, but should have received only \$16,864.40. OWCP properly determined that the difference of \$2,054.74 is the amount of the overpayment.<sup>10</sup> The Board finds that OWCP properly determined the fact and amount of the overpayment in this case.

On appeal, counsel does not contest the fact or amount of the overpayment.

### **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.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8105(a).

<sup>8</sup> *Id.* at § 8110(b).

<sup>9</sup> *Id.* at § 8110(a)(2).

<sup>10</sup> The Board notes the amount of overpayment is incorrect and affirms only \$2054.74, the difference between \$18,919.14 and \$16,864.40.

<sup>11</sup> *C.V.*, Docket No. 13-2108 (issued June 17, 2014); *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.”<sup>12</sup>

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.<sup>13</sup> 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.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. In order for it to establish that he was at fault in creating the overpayment of compensation, it must show that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.<sup>15</sup> 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 an individual was with 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.<sup>16</sup>

Appellant's receipt of the December 15, 2012 direct deposit in the amount of \$ 1,523.04 covered a portion of the overpayment from November 28 to December 15, 2012.<sup>17</sup> The Board has found a claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear

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<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.433(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>16</sup> 20 C.F.R. § 10.433(b); *F.A.*, Docket No. 08-1519 (issued December 18, 2008); *see also Otha J. Brown*, 56 ECAB 228 (2004) (each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she receives from OWCP are proper).

<sup>17</sup> The deposit covered the period November 28 to December 15, 2012.

knowledge that the payments were incorrect.<sup>18</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>19</sup> Appellant had no reason to suspect at the time the \$1,523.04 payment was deposited into his checking account on December 15, 2012 that OWCP had issued an incorrect payment, given that this was the first incorrect payment made.<sup>20</sup> Because the funds were deposited directly into his bank account, he was not in a position to immediately decline acceptance of the amount paid by OWCP. The Board finds that appellant was not at fault in either creating or accepting the applicable portion of the overpayment for the period November 28 to December 15, 2012.<sup>21</sup> A finding of no fault does not mean, however, that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period and the case must be remanded to determine whether appellant is entitled to waiver for this period. After such further development as OWCP deems necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the December 15, 2012 direct deposit.

After appellant's receipt of the first direct deposit, for which fault may not be imputed to him, it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks exceeded the amount to which he was entitled. He knew or should have known that he was receiving augmented compensation because of his wife.<sup>22</sup> Appellant consistently completed numerous annual EN1032 forms, which provided him with the definition of a dependent and explained that he was not entitled to receive compensation at the augmented rate if he did not have dependents. By signing the EN1032 forms, he had notice that he was not entitled to compensation at the augmented rate if he did not have a dependent. Appellant did not claim dependents on EN1032 forms in the years following his wife's death. However, as he certified each of the EN1032 forms, he knew or should have known that the compensation he received at the augmented rate after the December 15, 2012 direct deposit was incorrect. Even if an overpayment resulted from negligence by OWCP, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.<sup>23</sup> Therefore, the Board finds that appellant was with fault for the direct deposits covering the period December 16, 2012 through September 21, 2013 as he should have known that he accepted a payment for an incorrect amount.

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<sup>18</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>19</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>20</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>21</sup> *Id.*

<sup>22</sup> *A.H.*, Docket No. 11-714 (issued October 5, 2011).

<sup>23</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

### **ISSUE 3**

As the amount of the overpayment cannot yet be determined, the repayment issue will not be considered on the present appeal. On remand, appellant will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue an appropriate final decision in the case.

On appeal, counsel asserts appellant should have been given a second hearing to “develop the record to give [appellant] the opportunity to fully explain and explore the true nature of his income and expenses.” As appellant will have the opportunity on remand of the case to submit financial information regarding his income, assets, and expenses, counsel’s argument is moot.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,054.74 for the period November 28, 2012 through September 21, 2013. The Board further finds that he was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery, with the exception of the December 15, 2012 payment. The case will be remanded for additional development on this issue. As the case is not in posture regarding waiver of a portion of the overpayment, the Board also finds that the case is not in posture regarding the rate of recovery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part regarding the fact and amount of overpayment, and the finding of fault for the period December 16, 2012 to September 21, 2013. The July 25, 2014 decision is set aside in part regarding the finding of fault from November 28 to December 15, 2012, and the rate of recovery. The case is remanded to OWCP for additional development consistent with this decision and order.

Issued: July 16, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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