

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

N.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gaithersburg, MD, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-2054
Issued: March 9, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 29, 2014 appellant filed a timely appeal from an August 29, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 \$11,437.62 overpayment of compensation; and (2) whether it properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ The record also contains a June 16, 2014 decision of OWCP concerning a \$109.09 overpayment, but appellant has not appealed this decision to the Board.

² 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On November 22, 1999 appellant, then a 33-year-old machine operator, filed a timely notice of injury for a back injury. His claim was accepted for displacement of cervical intervertebral disc without myelopathy. Appellant filed a claim on July 7, 2001 alleging that on May 29, 2001 he sustained injury to his right shoulder. This claim was accepted for adhesive capsulitis of the right shoulder. Appellant received compensation on the daily and periodic rolls.

In EN-1032 forms completed on December 26, 2007, May 10, 2009, April 23, 2010, April 28, 2011, March 15, 2012, and January 31, 2013, appellant indicated that he was no longer married but he continued to claim his daughter and/or his son as a dependent.³ Each form advised him regarding the circumstances when he would be entitled to receive compensation at an augmented pay rate:

“A claimant who has no eligible dependents 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: (a) a husband or wife who 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 (e) a parent who totally depends upon you for support.”

In a November 19, 2013 letter, OWCP advised appellant that a preliminary determination had been made that he received an overpayment of compensation in the amount of \$11,437.62 for the period November 14, 2007 to February 9, 2013 for the reason that he received compensation benefits at the 75 percent augmented rate when he no longer had an eligible dependent. It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment he knew or should have known to be incorrect. OWCP indicated that the record revealed that appellant’s youngest child, his son, turned 18 on November 14, 2007 and therefore he was not entitled to compensation at the dependent rate of 75 percent for the period November 14, 2007 to February 9, 2013, when his compensation was reduced to the 66 2/3 percent rate. This resulted in an overpayment in the amount of \$11,437.62 for the period November 14, 2007 to February 9, 2013.⁴ OWCP provided appellant 30 days to

³ Each EN-1032 form covered the 15-month period prior to being completed. The record contains a February 8, 2013 document associated with the EN-1032 form appellant completed on January 31, 2013 in which an official from Prince George’s Community College indicated that appellant’s daughter was not enrolled for the Spring Semester (January 22 to May 13, 2013).

⁴ The record contains worksheets reflecting that, from November 14, 2007 to February 9, 2013, appellant was paid \$121,157.01 at the augmented rate but should have been paid \$109,719.39. The difference between these two figures is \$11,437.62. The record contains evidence that appellant’s son was born on November 14, 1989 and that his daughter was born on September 19, 1988.

challenge the proposed overpayment, request a prerecoupment hearing, and to submit financial information.

On November 5, 2013 OWCP received an overpayment recovery questionnaire form completed by appellant, which detailed his monthly income, monthly expenses, and assets.⁵ Appellant indicated that he disagreed with the overpayment noting that his daughter was a full-time student at the Dudley School of Cosmetology in 2007 and 2008.⁶

Appellant requested a prerecoupment hearing with an OWCP hearing representative. During the June 12, 2014 hearing, he indicated that his daughter was a full-time student at the Dudley School of Cosmetology in Washington, DC, between “August 2006 and 2008” but that when he tried to contact the institution it was no longer in business for him to get any records. Appellant advised that his daughter also attended Prince George’s Community College, but stated that he had not been able to get any affirmative records of her full-time attendance from that institution. He testified that his son did not continue his education. Appellant stated that he understood how the overpayment occurred, but indicated that he did not have the means to repay the debt.

In an August 29, 2014 decision, an OWCP hearing representative finalized the preliminary determination and found that appellant received an \$11,437.62 overpayment. She also found that he was at fault in the creation of the \$11,437.62 overpayment, thereby precluding waiver of recovery of the overpayment. The hearing representative discussed the financial information submitted by appellant and found that the overpayment should be repaid through monthly payments of \$200.00.⁷

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.⁸ 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.⁹

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

⁵ Appellant listed his income as coming from the Office of Personnel Management.

⁶ Appellant indicated that he called OWCP in 2008 after his daughter stopped being a full-time student, but the record does not appear to contain any documentation of such a telephone call.

⁷ With respect to the recovery of an overpayment, the Board’s jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of compensation at the time of OWCP’s overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

augmented compensation to three fourths of the employee's rate of monthly pay if he or she has a dependent.¹⁰ Section 8110(a)(3) of FECA 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).¹¹ 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) of FECA 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, or 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.¹² 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 entitled at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an \$11,437.62 overpayment of compensation from November 14, 2007 to February 9, 2013. Appellant's son, born November 14, 1989, turned 18 on November 14, 2007. His daughter, born September 19, 1988, turned 18 on September 19, 2006. OWCP continued to issue appellant's compensation at the augmented rate (75 percent) through February 9, 2013. It later found that his son and daughter had turned 18 and there was no evidence that either the son or daughter was either incapable of self-support or a full-time student.

There is no evidence contained in the record to support that appellant's son or daughter was enrolled full time as a student. As neither appellant's son nor his daughter meets the requirements of an eligible dependent under FECA, an overpayment of compensation was created commencing November 14, 2007.

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 November 14, 2007 to February 9, 2013, appellant was paid \$121,157.01 at the augmented rate but should have been paid \$109,719.39. This amounts to an overpayment amount of \$11,437.62. Thus, the Board finds that OWCP's calculation of an \$11,437.62 overpayment was correct and that OWCP, therefore, properly determined the fact and amount of the overpayment.

¹⁰ *Id.* at § 8110.

¹¹ *Id.* at § 8110(a)(3).

¹² 20 C.F.R. § 10.5(aa)(1).

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

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where 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.¹⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁵ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁶

In determining whether an individual is not “without fault” or alternatively “at fault” in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“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 he or she knew or should have known to be incorrect; or
- (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 to be incorrect....”¹⁷

Section 10.433(b) of OWCP’s regulations provide:

“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. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁸

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the \$11,437.62 overpayment based on the third criterion, that he accepted payments which he knew or should have known to be incorrect.

¹⁴ *Id.* at § 8129(a).

¹⁵ *Id.* at § 8129(b).

¹⁶ *L.J.*, 59 ECAB 264 (2007).

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ *Id.* at § 10.433(b).

The Board finds that appellant was at fault in creating the \$11,437.62 overpayment. The EN-1032 forms provided information notifying him 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. While he testified that he did not intend to mislead OWCP about the status of his son and daughter, he knew or reasonably should have known that he was not entitled to augmented compensation when his son and daughter turned 18 years of age. As noted above, appellant's son and daughter did not qualify as full-time students. Additionally, there is no evidence to support that his son or daughter had a mental or physical disability which created an inability to provide self-support. Appellant knew or should have known that the payments made at the augmented rates were incorrect in view of the cautionary language in the EN-1032 forms that he signed.¹⁹ For these reasons, he is at fault in creating the \$11,437.62 overpayment and is not eligible for waiver of recovery.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$11,437.62 overpayment of compensation. The Board further finds that whether OWCP properly determined that he was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁹ Although appellant asserted that he thought his daughter was a full-time student, he acknowledged that he was unable to obtain any evidence of such full-time student status.