

chondromalacia patellae, and left meniscus tear. Additionally, it authorized two left knee arthroscopic procedures performed on April 20, 2001 and January 3, 2006. Appellant received compensation for various periods of intermittent wage loss and temporary total disability. She also received two schedule awards totaling four percent impairment of the left lower extremity.

In November 2011, appellant's treating physician recommended a left total knee arthroplasty. On January 19, 2012 appellant's physician modified appellant's work restrictions.² Appellant had been working full time, limited duty. However, with respect to the January 19, 2012 work restrictions, the employing establishment could no longer accommodate her on a full-time basis. Appellant subsequently filed a recurrence claim (Form CA-2a) and a claim for compensation (Form CA-7) for lost wages beginning February 4, 2012. On both forms she indicated that she had a dependent. The February 10, 2012 CA-7 form specifically identified her 7-year-old grandson as a dependent. Appellant's daughter had passed away, and effective December 20, 2011, the court appointed appellant guardian of her grandson. For wage-loss compensation beginning February 4, 2012, OWCP paid her at the augmented rate ($\frac{3}{4}$) based on her dependent grandson.

On April 2, 2012 OWCP expanded appellant's claim to include aggravation of localized primary arthritis - left lower leg. After further development, it authorized a left total knee arthroplasty, which was performed on August 13, 2012. Following surgery, OWCP paid appellant wage-loss compensation for temporary total disability and placed her on the periodic compensation rolls.

On January 25, 2013 appellant returned to work in a full-time, limited-duty capacity. At that time, OWCP removed her from the periodic rolls. Thereafter, appellant submitted numerous CA-7 forms for intermittent wage loss due to attendance at various medical appointments. She continued to claim her grandson as a dependent and OWCP continued to pay her wage-loss compensation at the augmented rate ($\frac{3}{4}$).

On January 27, 2014 OWCP issued a preliminary finding of overpayment in the amount of \$3,052.12 for the period February 4, 2012 through June 28, 2013. It explained that appellant's grandson did not qualify as a dependent, and she was not therefore entitled to receive wage-loss compensation at the augmented rate ($\frac{3}{4}$). OWCP further explained that appellant was not at fault in creating the overpayment.

Appellant requested a preresoupment hearing, which was held on October 17, 2014. She argued that as her grandson's court-appointed legal guardian, she should be entitled to claim him as a dependent under FECA. Appellant indicated that her net bi-weekly pay was between \$1,100.00 and \$1,150.00.³ She also received \$721.00 per month in supplemental security

² Appellant was previously able to walk her route up to four hours per day and she could lift 30 pounds. As of January 19, 2012, her restrictions included no walking greater than 10 minutes at a time, no standing greater than 15 minutes at a time, and no lifting greater than 15 pounds.

³ The latest pay rate information from April 3, 2012 indicates that appellant's annual salary was \$56,508.00 as of January 19, 2012 (date of recurrence). OWCP calculated her wage-loss compensation based on a weekly pay rate of \$1,086.69.

income (SSI) benefits on behalf of her grandson.⁴ Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), wherein she reported total monthly expenses of \$2,570.24.⁵ She also reported total liquid assets of \$16.00. Post-hearing appellant submitted financial records regarding her 1st and 2nd mortgages, insurance premiums (automobile/life/home), utilities (gas, electric, water/refuse/sewage, cable/Internet and cellular service), lawn care expenses, childcare expenses, automobile repairs, credit card debt (Macy's, JCPenney, Victoria's Secret, CareCredit and CapitalOne), and an unspecified loan from Midwest BankCentre. She also provided a copy of her savings account statement for the period June 16 through September 15, 2014.

By decision dated January 2, 2015, the hearing representative determined that appellant received an overpayment of \$3,052.12 for the period February 4, 2012 through June 28, 2013. She found that appellant's minor grandson did not qualify as a dependent under 20 C.F.R. § 10.405. Consequently, appellant was not entitled to receive wage-loss compensation at the augment rate ($\frac{3}{4}$) for the above-noted period. The hearing representative also found that appellant was not at fault in creating the overpayment. As to the issue of waiver, the hearing representative determined that appellant's monthly income exceeded her monthly expenses by approximately \$400.00, and therefore she had a monthly surplus sufficient to warrant repayment of the \$3,052.12 debt.⁶

LEGAL PRECEDENT -- ISSUE 1

Wage-loss compensation for total disability is computed based on the employee's effective pay rate and whether he or she has any eligible dependents.⁷ Depending on whether the employee has at least one eligible dependent, wage-loss compensation will be paid at either $\frac{2}{3}$ or $\frac{3}{4}$ of the effective pay rate.⁸ For purposes of entitlement to augmented disability compensation, a dependent includes: (1) a wife or husband; (2) an unmarried child under 18 years of age; (3) an unmarried child over 18 who is incapable of self-support; (4) a student, until he/she reaches 23 years of age or completes four years of school beyond the high school level; and (5) a wholly dependent parent.⁹

⁴ Appellant indicated that her grandson's SSI benefits were for speech and learning disabilities, which his mother applied for prior to her death.

⁵ Appellant reported two mortgages totaling \$722.62 each month. Her monthly food expense was \$400.00 and clothing was \$100.00. Appellant's utilities totaled \$702.00 a month, and she reported "Other" unspecified monthly expenses of \$250.00. She also reported other debts totaling \$8,912.00, with combined monthly installment payments of \$395.62.

⁶ The hearing representative advised that appellant was capable of repaying the debt in monthly installments of \$100.00.

⁷ See 5 U.S.C. §§ 8105(a), 8110, 8112 and 8114; 20 C.F.R. §§ 10.5(s) and 10.401(b) (2014).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.12 (February 2013).

⁹ 5 U.S.C. § 8110(a); 20 C.F.R. § 10.405(a).

ANALYSIS -- ISSUE 1

Appellant is the court-appointed guardian of her grandson. However, a grandchild is not considered an eligible dependent for purposes of augmented compensation with respect to disability and/or impairment. While a dependent grandchild is recognized under certain circumstances with respect to FECA death benefits,¹⁰ that is not the case with respect to compensation for disability and/or impairment.¹¹ As appellant did not identify any eligible dependents, she was entitled to wage-loss compensation at the basic rate ($\frac{2}{3}$) rather than the augmented rate ($\frac{3}{4}$).

For the period February 4, 2012 through June 28, 2013, OWCP's records reflect that appellant received net compensation of \$27,079.52 based on the augmented rate ($\frac{3}{4}$). It recalculated her entitlement to disability compensation under the basic rate ($\frac{2}{3}$) and found that she should have only received \$24,027.40, which represented an overpayment of \$3,052.12.

The record establishes that appellant received an overpayment of \$3,052.12 for the period February 4, 2012 through June 28, 2013. Appellant's grandson is not an eligible dependent for purpose of determining entitlement to augmented ($\frac{3}{4}$) disability compensation. Although appellant has legal guardianship over her grandson, this does not qualify the child as a dependent if appellant has not legally adopted him.¹² Accordingly, the Board affirms OWCP's findings with respect to the fact and amount of overpayment. The Board also affirms OWCP's determination that appellant was without fault in either creating or accepting the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁴ Additionally, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on

¹⁰ See 20 C.F.R. § 10.410(f) and (g).

¹¹ *Supra* note 9.

¹² See *C.P.*, Docket 13-1058 (issued October 21, 2013); *H.R.*, Docket No. 12-448 (issued July 12, 2012); *M.G.*, Docket No. 09-1511 (issued March 24, 2010); *P.D.*, Docket No. 09-1007 (issued February 17, 2010).

¹³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁴ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

such payment or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.¹⁵

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁶ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.¹⁷ The information is also used to determine an appropriate repayment schedule, if necessary.¹⁸ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁹

ANALYSIS -- ISSUE 2

Appellant requested waiver of recovery of the \$3,052.12 overpayment. She submitted an overpayment recovery questionnaire OWCP-20 form and provided documentation regarding her assets and various expenses. At the October 17, 2014 prereducement hearing, appellant determined that her net bi-weekly pay was between \$1,100.00 and \$1,150.00. She also reported receiving monthly SSI benefits of \$721.00. The hearing representative found that appellant had monthly income of approximately \$3,000.00. Her OWCP-20 form revealed monthly expenditures totaling \$2,570.24.²⁰ According to the hearing representative, appellant's reported expenses were supported by the financial documentation and appeared reasonable concerning gasoline, utilities, insurance, food, and clothing.

Based on the information of record, appellant's monthly income exceeds her monthly expenses by approximately \$400.00. An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²¹ Because appellant has a monthly surplus of approximately \$400.00, recovery of the overpayment would not defeat the purpose of FECA and²² would not be against equity and good conscience. The record does not support that appellant would experience severe financial hardship in attempting to repay the debt.²³ Accordingly, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁵ *Id.* at § 10.437(a), (b).

¹⁶ *Id.* at § 10.438(a).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at § 10.438(b).

²⁰ *See supra* note 5.

²¹ Federal (FECA) Procedure Manual, *supra* note 14.

²² 20 C.F.R. § 10.436(a).

²³ *Id.* at § 10.437(a). Moreover, there is no evidence of detrimental reliance. *Id.* at § 10.437(b).

CONCLUSION

Appellant received an overpayment of \$3,052.12 for the period February 4, 2012 through June 28, 2013. Although she was not at fault in creating the overpayment, she is not entitled to waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 26, 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