

FACTUAL HISTORY

On May 22, 1993 appellant, then a 33-year-old special agent, filed a timely neck and back injury claim resulting from a collision between vehicles. OWCP accepted his claim for thoracic strain on August 3, 1993. The record does not indicate that appellant initially stopped work. On September 15, 1994 OWCP also accepted right inguinal strain under this claim. In a decision upon reconsideration dated February 19, 2002, it additionally accepted a condition of bulging discs at T10-11 under this claim.

In a letter dated April 4, 2002, OWCP informed appellant that a court order had been received from the Superior Court of California instructing that payment of \$1,419.00 per month in child support should be made to appellant's ex-wife. Therefore \$1,309.85 would be withheld every 28-day pay cycle and paid to his ex-wife. Appellant received compensation on the periodic rolls as of June 16, 2002, at a 75 percent rate due to having one or more dependents.²

Through the years appellant completed EN1032 forms reporting his two sons as dependents. Their birthdates were listed as February 6, 1993 and January 9, 1995.

By letter dated March 8, 2011, appellant informed OWCP that his oldest son would turn 18 on February 6, 2011, and that he would graduate from high school on June 16, 2011, at which time his child support obligation to his oldest son would cease.

In a Form EN1032 completed on February 7, 2013, appellant continued to claim his two sons as dependents. The 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.

On February 25, 2013 appellant advised OWCP by letter that his youngest son had turned 18 on January 6, 2013, and that he would graduate from high school on June 19, 2013, at which time his child support obligation would cease.

² This case has previously been before the Board. In an October 14, 2008 order, Docket No. 08-0342, the Board remanded the case to OWCP to hold a telephone conference regarding a prior overpayment.

By letter dated July 19, 2013, appellant again advised OWCP that he had not received any response to his letter dated February 25, 2013, and that an overpayment would occur if payment was not corrected to reflect that his youngest son was no longer a dependent.

On August 5 and October 3, 2013 OWCP wrote to appellant advising that an overpayment had occurred because information had only been received on July 19, 2013 that the overpayment would occur if his pay rate was not adjusted. It advised him that he would have to resolve the overpayment issue with his ex-wife.

In a payment worksheet dated April 10, 2014, an OWCP representative noted that appellant was paid \$8,293.50 for the period June 20 through July 27, 2013, at the 75 percent rate, but was entitled only to \$7,376.07 at the 66.66 percent rate for that period. As such, the representative stated that appellant was overpaid by \$917.43.

By letter dated April 28, 2014, OWCP advised appellant that a preliminary determination had been made that he received an overpayment of compensation in the amount of \$917.43 for the period June 20 through July 27, 2013 because he received compensation benefits at the 75 percent augmented rate when he no longer had an eligible dependent. It noted that his youngest son turned 18 on January 6, 2013 and graduated from high school on June 19, 2013, and therefore he was not entitled to compensation at the dependent rate of 75 percent for the period June 20 through July 27, 2013. OWCP also made a preliminary determination that appellant was without fault in the creation of the overpayment because appellant was not aware nor could he reasonably be expected to know that it had paid compensation incorrectly. It provided him 30 days to challenge the proposed overpayment, request a telephone conference, and to submit financial information.

On May 15, 2014 appellant requested a telephone conference with an OWCP hearing representative, noting that he disagreed with the preliminary determination because he was not at fault and was requesting a waiver of recovery of the overpayment. He also provided a completed overpayment recovery questionnaire detailing his monthly income of \$6,000.00, monthly expenses of \$4,300.00, and assets of \$500.00. Appellant submitted copies of bills documenting his expenses. He noted in an attached statement that he had done his due diligence in alerting OWCP to the upcoming graduation of his son, and that the overpayment actually went to a different individual.

In a record of a telephone conversation dated August 21, 2014, an OWCP representative advised appellant that OWCP had already determined that he was not at fault in creating the overpayment, and that it would proceed to review his financial data.

In a memorandum of a conference dated September 3, 2014, appellant claimed that OWCP had previously "pulled out money" from his ex-wife's account. OWCP stated that it had no ability to do so. Appellant explained that he had no way to contact his ex-wife in order to recover the money. He had her address, but was under a restraining order not to contact her. Appellant noted that he received social security of approximately \$1,300.00 per month, expenses of \$500.00 per month for food, and \$400.00 of other expenses. The claims examiner determined that appellant appeared to have sufficient income to pay back the overpayment.

In a September 23, 2014 decision, OWCP finalized the preliminary determination and found that appellant received a \$917.43 overpayment. It found that appellant was without fault in the creation of this overpayment, but that waiver of recovery of the overpayment was denied, as appellant appeared to have sufficient income and resources needed for ordinary and necessary living expenses. OWCP found that the overpayment should be repaid through deduction of \$306.07 from the next two compensation payments and \$306.05 from the payment thereafter.

LEGAL PRECEDENT -- ISSUE 1

The basic rate of compensation under FECA is 66 2/3 percent of the injured employee's monthly pay.³ When the employee has one or more dependents as defined by FECA, he is entitled to have his compensation augmented at eight and one-third percent.⁴

The basic statutory rate of compensation under FECA is 66 2/3 percent of the injured employee's monthly pay.⁵ Under section 8110 of FECA, a claimant is entitled to augmented compensation at 75 percent of his or her weekly pay if he or she has one or more dependents.⁶ Under FECA a dependent includes an unmarried child, while living with the employee or receiving regular contributions from the employee toward his support, who is either under 18 years of age, or over 18 years of age and incapable of self-support because of physical or mental disability.⁷ FECA further provides that compensation payable for a child that would otherwise end at the time he or she reaches 18 years of age shall continue if he or she is a student as defined by 5 U.S.C. § 8101.⁸

ANALYSIS -- ISSUE 1

Because appellant's youngest son graduated high school on June 19, 2013, appellant should have received compensation at the adjusted rate of 66 2/3 percent commencing June 20, 2013. However, the evidence reflects that appellant received compensation at the augmented rate from June 20 through July 27, 2013.

The record contains logs of appellant's compensation payments from OWCP and a payment worksheet reflecting OWCP's calculation of his overpayment during that period. The documents reveal that appellant was entitled to receive the amount of \$7,376.07, but actually received \$8,293.50, an overpayment of \$917.43. The Board finds that OWCP properly

³ 5 U.S.C. § 8105(a).

⁴ *Id.* at § 8105(b).

⁵ *Id.* at 8105(a).

⁶ *Id.* at § 8110.

⁷ *Id.* at § 8110(a)(3).

⁸ *Id.* at § 8101(17).

determined that appellant received an overpayment of compensation for the period June 20 through July 27, 2013 in the amount of \$917.43.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹⁰ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments has been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹²

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹³ OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in sections 10.434 and 10.437 of the implementing federal regulations.¹⁴

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹⁵

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment of compensation and considered whether he was entitled to waiver of recovery. The fact that OWCP may have been negligent in the creation of the overpayment does not entitle appellant to waiver of the overpayment.¹⁶ An overpayment may be waived only upon a showing that recovery would defeat the purpose of FECA or would be against equity and good conscience.

To establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current, ordinary,

⁹ See *K.S.*, Docket No. 15-940 (issued September 9, 2015).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ *Id.*

¹² *Id.* at § 8129(b).

¹³ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁴ 20 C.F.R. §§ 10.434 and 10.437.

¹⁵ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁶ See *M.C.*, Docket No. 07-1613 (issued August 26, 2008).

and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.¹⁷

Appellant provided an overpayment recovery questionnaire indicating that he had an income of \$6,000.00 per month, monthly expenses of \$4,300.00, and assets of \$500.00. At the conference, he noted that he received social security payments of \$1,300.00 per month, and \$400.00 of additional expenses. The record of payments to appellant reveals that he receives gross compensation in the amount of \$5,534.00 every 28 days. The evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Moreover, appellant submitted no evidence or argument that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Thus, the Board finds that he is not entitled to waiver of recovery of the overpayment of compensation as he has not established that recovery would be against equity or good conscience, or defeat the purpose of FECA.¹⁸

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of OWCP 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 same.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 3

OWCP reduced appellant's future compensation payments by \$306.07 from the next two compensation payments and \$306.05 from the payment thereafter, taking into account the amount of compensation and the financial circumstances of appellant to minimize hardship, as well as the factors set forth in section 10.441 of its regulations. It found that this method of recovery would minimize any resulting hardship on him. The Board finds that OWCP properly

¹⁷ 20 C.F.R. § 10.436.

¹⁸ The Board notes that a portion of this overpayment was paid to appellant's ex-wife as child support under a court order. While this portion of the overpayment was not deposited directly into appellant's bank account, it was paid in his name. The implementing regulations contemplate garnishment of compensation and allow such garnishment as proved by a court order for the purposes of child support or alimony. *See id.* at § 10.423. OWCP mistakenly continued garnishment of appellant's compensation after the expiration of the child support order. However, the payments were still being made to appellant as a beneficiary. OWCP has no authority to collect an overpayment from a nonbeneficiary under these circumstances. As such, the portion of the overpayment resulting from OWCP's continued garnishment of compensation after the expiration of a child support order must remain attributable to appellant.

¹⁹ *Id.* at § 10.441.

²⁰ *Id.*

required repayment of the overpayment of compensation by deducting \$306.07 from the next two compensation payments and \$306.05 from the payment thereafter. However, it appears that the total amount OWCP found to be deducted for the overpayment is greater than the combined compensation payment rates by 76 cent. As such, the Board finds that the last payment should be \$305.29.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$917.43 for the period June 20 through July 27, 2013, for which he was not at fault. The Board further finds that appellant is not entitled to waiver of recovery of the overpayment of compensation and that OWCP properly required repayment of the overpayment by deducting \$306.07 from the next two compensation payments and \$305.29 from the payment thereafter.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: October 26, 2015
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board