

On appeal appellant asserts that he was not at fault in the creation of the overpayment because he thought compensation was based on his income at the time of injury.

FACTUAL HISTORY

On June 5, 2004 appellant, then a rural carrier, was injured in a motor vehicle accident while in the performance of his federal duties. At that time he was a divorced father who had custody of his three children, then aged 9, 13, and 15. The claim was accepted for cervical fracture with nerve involvement. Appellant had cervical spine surgery on June 6, 2004 and has been paralyzed from the chest down since the injury. Additional conditions have been accepted.² OWCP determined that appellant was permanently totally disabled from employment due to quadriplegia.

In correspondence dated August 10, 2004, OWCP notified appellant that he was placed on the periodic role effective August 8, 2004. The letter explained how compensation was paid and explained that OWCP should be notified if the status of any dependent changes, and if he has only one dependent, he should not cash checks received after the change in status of this dependent because an overpayment of compensation could result.

Appellant submitted annual EN1032 forms, required of recipients of FECA benefits. On forms signed in 2005, 2006, and 2007, he indicated that he had three dependents, two older sons, and a daughter whose birthdate was July 29, 1994. In 2008, appellant listed two dependents, his youngest son and his daughter. In forms completed in 2009 and 2011, he listed one dependent, his daughter.³ On forms signed by appellant on December 11, 2012, November 18, 2013, and November 17, 2014, he indicated that he had no dependents.⁴

OWCP continued to pay appellant compensation at the augmented 3/4 rate until December 14, 2014 when his compensation rate was changed from 3/4 to the basic 2/3 rate.

On January 16, 2015 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$7,657.14 for the period July 29, 2012 through December 13, 2014 the date the compensation rate was adjusted, because he improperly continued to receive disability compensation at the augmented 3/4 rate. The notice explained that, if the status of a dependent changed, he was to have notified OWCP in writing. OWCP found appellant at fault because he knew or should have known that he was no longer entitled to compensation at the augmented rate. Appellant was given 30 days to respond and was provided an overpayment action request form and an overpayment questionnaire. An overpayment worksheet and computer printouts contained in the record showed that during this

² These include depression, a decubitus ulcer, hemorrhage of rectum and anus, tracheostomy complication, neurogenic bladder, kidney stones, daytime fatigue, right eye lid edema, myositis ossificans of the right hip, seizures due to cerebral contusion, deep venous thrombus/pulmonary embolus, spasticity, and neurogenic bowel.

³ The record does not contain an EN1032 form submitted in 2010.

⁴ Appellant, who had previously received FECA compensation payments by check, submitted a direct deposit election form on April 11, 2013. He thereafter received FECA payments by electronic direct deposit.

period he received compensation at the 3/4 rate totaling \$69,123.32 and that compensation at the 2/3 rate would total \$61,466.18, which yielded an overpayment in compensation of \$7,657.14.

Appellant did not respond to the preliminary overpayment notice. On February 24, 2015 OWCP finalized the determination that he was at fault in the creation of an overpayment in compensation in the amount of \$7,657.14 because he should have known he was not entitled to receive wage-loss compensation at the augmented 3/4 rate. It noted that appellant had not responded to the preliminary decision. OWCP informed him \$280.00 would be deducted from his continuing compensation each payment period to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependent as defined in FECA, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.⁷ 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).⁸

If a claimant receives augmented compensation during a period in which he or she has no eligible dependents, the difference between the compensation to which he or she was entitled at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁹

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic compensation rolls in August 2004 at the augmented 3/4 rate. At that time he had three dependents, with the youngest, a daughter who was born on July 29, 1994. Appellant's daughter, therefore, became 18 years of age on July 29, 2012. The record contains no evidence that she was disabled due to a mental or physical

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8110(b).

⁸ 5 U.S.C. § 8110(a)(3). 5 U.S.C. § 8101(17) 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 is currently pursuing a full-time course of study at a qualifying college, university or training program.

⁹ *Id.* at § 8110(a)(3); see *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

condition. Likewise, there is no evidence that appellant was an unmarried student attending an approved full-time course of study, had not completed four years of post-high school education, or had not completed the academic semester in which she became 23 years old.¹⁰

The record supports that appellant continued to receive compensation at the augmented 3/4 rate from July 29, 2012, when he no longer had an eligible dependent, through December 13, 2014, the date his compensation was properly adjusted to the 2/3 compensation rate. For this period appellant received augmented compensation at the 3/4 rate totaling \$69,123.32 and should have received compensation at the 2/3 rate or \$61,466.18. Thus the \$7,657.14 difference constitutes an overpayment of compensation.¹¹ The Board finds that OWCP correctly determined the fact and amount of overpaid compensation in this case.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹³

Section 10.433(a) of OWCP regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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; (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. (This provision applies only to the overpaid individual).”¹⁴

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected

¹⁰ *Id.*

¹¹ 5 U.S.C. §§ 8101(17), 8110.

¹² See *Ralph P. Beachum, Sr.*, *supra* note 9.

¹³ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁴ 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁵

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in the creation of the overpayment because he accepted compensation payments 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, OWCP must show that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹⁶ Whether or not an individual is 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.¹⁷

The Board finds that appellant was at fault in the creation of the \$7,657.14 overpayment for the period July 29, 2012 through December 13, 2014. Although appellant indicated that he had no dependents on EN1032 forms signed on December 11, 2012, November 18, 2013, and November 17, 2014, these forms 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.

Even if an overpayment results from negligence by OWCP, a claimant is not excused from accepting payments that he or she knew or should have been expected to know were incorrect.¹⁸ By signing the EN1032 forms, appellant had notice that he was not entitled to compensation at the augmented rate if he did not have a dependent. Moreover, at the time he was placed on the periodic compensation rolls in August 2004, OWCP informed him that it should be notified if the status of any dependent changed and explained that if he had no dependents and continued to receive FECA compensation, an overpayment could result. Appellant thus knew or should have known that the compensation he received after July 29, 2012, his daughter's 18th birthday, was incorrect.¹⁹

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP FECA 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

¹⁵ *Id.* at § 10.433(b); *see Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁶ *Id.* at § 10.433(a)(3); *see Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁷ *Id.* at § 10.433(b); *see Danny E. Haley*, 56 ECAB 393 (2005).

¹⁸ *Danny E. Haley, id.*

¹⁹ *T.B.*, docket No. 12-844 (issued September 19, 2012).

circumstances of the individual, and any other relevant factors, so as to minimize hardship.²⁰ As appellant is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.²¹

ANALYSIS -- ISSUE 3

Although OWCP provided an overpayment recovery questionnaire with the January 16, 2015 preliminary overpayment finding, appellant did not submit a completed questionnaire or other financial information that OWCP requested prior to the final February 24, 2015 overpayment decision.

The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.²² When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²³ As appellant did not submit the requested financial information to OWCP, the Board finds that there is no evidence in the record to show that OWCP erred in directing recovery at a rate of \$280.00 from his continuing compensation payments.

CONCLUSION

The Board finds that appellant was at fault in the creation of an overpayment of compensation in the amount of \$7,657.14, and that OWCP properly required repayment of the overpayment by deducting \$280.00 every 28 days from his continuing compensation.

²⁰ 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

²¹ No waiver of recovery of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

²² 20 C.F.R. § 10.438.

²³ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2015
Washington, DC

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

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

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