

recovery; and (3) whether OWCP properly directed recovery of the overpayment by withholding \$75.00 every 28 days from appellant's continuing compensation payments.

On appeal, appellant contends that he was not at fault in creating the overpayment of compensation and argues that recovery of the overpayment would be against equity and good conscience.

FACTUAL HISTORY

On February 20, 2009 appellant, a 48-year-old electrician helper, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder injury on December 22, 2008 as a result of closing a swing gate in the performance of duty. OWCP accepted the claim for right shoulder sprain and right rotator cuff tear.³ Appellant was paid disability on the supplemental rolls until he was placed on the periodic rolls effective November 5, 2011.⁴ He submitted EN1032 reports dated January 18, 2012, January 18, 2013 and February 20, 2014. Appellant claimed no dependents on the 2012 and 2013 forms, but on the 2014 form, he claimed his daughter, whose date of birth was July 2, 1994.

In a February 6, 2014 letter, OWCP advised appellant that it required additional information to determine eligibility for a dependent beyond her 18th birthday, from July 2, 2012 to present. It requested verification of her student status at least once each year or medical evidence establishing that she was incapable of self-support. Appellant was asked to provide a statement and certification of school enrollment using attached forms. OWCP afforded him 30 days to submit additional evidence and respond to its inquiries.

In a telephone call dated February 20, 2014, appellant requested an extension of time to provide the documentation on student dependency. He stated that his daughter lived with her mother and was attending school part time and working part time, but he was still paying child support because he wanted to help her out and the court order did not give a date for him to stop paying.

By decision dated March 11, 2014, OWCP denied augmented compensation as appellant had failed to establish that his 18-year-old daughter was a full-time student as of July 2, 2012. It adjusted his compensation to the basic statutory 66 and 2/3 (two-thirds) rate effective March 9, 2014.

On March 14, 2014 OWCP advised appellant that it had made a preliminary overpayment determination in the amount of \$7,554.66 for the period July 2, 2012 to March 8, 2014 because he had erroneously received compensation at the augmented three-fourths rate instead of the

³ Appellant also has accepted claims for a left rotator cuff tear under OWCP File No. xxxxxx495 (date of injury March 19, 2010), cervical strain and right epicondylitis under OWCP File No. xxxxxx324 (date of injury February 26, 2003), lumbar strain under OWCP File No. xxxxxx495 (date of injury May 4, 2000), right shoulder sprain and right lateral epicondylitis under OWCP File No. xxxxxx260 (occupational disease claim), and lumbar disc displacement and a herniated disc at L4-5 under OWCP File No. xxxxxx307 (date of injury September 8, 1987). All files are combined under the current file, which serves as the master file.

⁴ Appellant received augmented compensation at the three-fourths rate.

basic two-thirds rate. For this period he had received a total of \$68,126.26. Appellant should have received only \$60,571.60 in compensation at the basic two-thirds rate, resulting in an overpayment of compensation in the amount of \$7,554.66.⁵ OWCP found that he was without fault in the creation of the overpayment.

Appellant requested waiver of recovery and submitted a copy of the last two checking and savings account statements from his bank. In an overpayment recovery questionnaire (Form OWCP-20) dated April 11, 2014, he reported a monthly income of \$2,310.22. Appellant indicated that he did not support, either fully or in part, anyone other than himself. He also reported approximately \$2,005.00 in monthly household expenses (\$775.00 for rent; \$300.00 for food; \$430.00 for utilities; \$500.00 for other miscellaneous expenses); and \$1,010.00 in monthly debts (\$775.00 to his landlord; \$190.00 attorneys' fees; \$45.00 credit card). Appellant reported the following assets: \$60.00 cash on hand, \$80.00 in a checking account, \$5.00 in a savings account, and a \$13,000.00 truck which equaled \$13,145.00 in assets. He submitted a number of financial documents and bills in support of his claim.

In a May 21, 2014 letter, OWCP notified appellant that it had reviewed the circumstances of the overpayment and changed its preliminary overpayment determination. It determined that he was at fault in creating the overpayment of compensation because the Form EN1032, which provided definitions of eligible dependents, clearly stated that a claimant with no eligible dependents should be paid at the 66 and 2/3 rate and therefore he knew, or should have known, that he accepted payments that were incorrect. OWCP afforded appellant 30 days in which to submit arguments, evidence, and financial information and to request a telephone conference or prerecoumment hearing. It also provided the computation of the overpayment⁶ and advised that this determination superseded that of March 14, 2014.

In an overpayment action request dated June 21, 2014, appellant requested a prerecoumment hearing. By decision dated December 10, 2014, OWCP denied his request for a prerecoumment hearing as untimely as it was not made within the requisite 30 days.

Appellant submitted additional financial documentation.

By decision dated December 29, 2014, OWCP finalized its preliminary determination of an overpayment of compensation in the amount of \$7,554.66 for the period July 2, 2012 to March 8, 2014, as appellant had improperly received augmented compensation. It found that the evidence of record failed to establish that his daughter was a full-time student during the period July 2, 2012 (when she turned 18 years old) to March 8, 2014 (when the augmented compensation ceased). OWCP adjusted appellant's compensation payments to the two-thirds

⁵ \$68,126.26 - \$60,571.60 = \$7,554.66.

⁶ The amounts of gross compensation paid to appellant during the period July 2, 2012 to March 8, 2014 at a rate were as follows: for the period July 2 to 28, 2012, \$2,961.10; for the period July 29 to August 25, 2012, \$3,070.77; for the period August 26, 2012 to January 12, 2013, \$15,353.85; for the period January 13 to June 1, 2013, \$15,510.54; for the period June 2 to October 19, 2013, \$15,615.00; and for the period October 20, 2013 to March 8, 2014, \$15,615.00. The total amount paid was \$68,126.26. However, as appellant was entitled to gross compensation during the same period of \$60,571.60 based on a two-thirds rate, there was a resulting overpayment of compensation in the amount of \$7,554.66.

rate and found that he was overpaid \$7,554.66 for the period July 2, 2012 to March 8, 2014. It found him at fault in the creation of the overpayment and therefore not entitled to waiver of recovery. OWCP directed recovery of the overpayment by withholding \$75.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.⁷ 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 percent of his monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁸

A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.⁹ A child is also considered a dependent if he or she is an unmarried student 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.¹⁰

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,554.66 for the period July 2, 2012 to March 8, 2014, as he received augmented compensation without having any dependents.

Appellant was paid augmented compensation for his dependent daughter until March 8, 2014, born July 2, 1994. Although the daughter had reached the age of 18 on July 2, 2012, he continued to receive augmented asserted compensation through March 8, 2014. OWCP asked appellant to provide documentation that the daughter was either in school full time or disabled

⁷ 5 U.S.C. § 8102(a).

⁸ See *O.R.*, 59 ECAB 432, 436 (2008). See also 5 U.S.C. §§ 8105(a) and 8110(b).

⁹ 5 U.S.C. § 8110(a).

¹⁰ See *E.G.*, 59 ECAB 599, 603 n.10 (2008).

¹¹ See *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

due to a mental or physical condition, but he failed to verify her eligibility as a qualified dependent.

By letter dated February 6, 2014, OWCP informed appellant that additional information was required to determine whether his daughter was an eligible dependent. Appellant was asked to provide a statement and certification of school enrollment using attached forms. There is no documentation of record, such as a certificate or college transcripts, to establish that his daughter was enrolled as a full-time student during the period July 2, 2012 to March 8, 2014. The evidence does not establish that appellant's daughter was pursuing a full-time course of study as defined under FECA during the period of the overpayment.¹² The Board finds that after July 2, 2012 appellant was no longer entitled to augmented compensation as there is no evidence to support that his daughter was a qualified dependent as of July 2, 2012 when she reached 18 years of age.

Payroll records establish that OWCP continued to pay appellant compensation at the augmented, three-fourths rate from July 2, 2012 to March 8, 2014, which amounted to a total of \$68,126.26. Appellant, however, was only entitled to receive \$60,571.60 in compensation at the basic two-thirds rate, resulting in an overpayment of compensation in the amount of \$7,554.66. Accordingly, the Board finds that OWCP properly determined an overpayment of compensation in the amount of \$7,554.66.

LEGAL PRECEDENT -- ISSUE 2

According to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law.¹³ The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁴ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹⁵ A recipient is at fault in the creation or acceptance of an overpayment if he has done any of the following: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect.¹⁶

¹² 5 U.S.C. § 8110(a)(3). Section 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. 5 U.S.C. § 8101(17); *see also* L.G., Docket No. 08-2129 (issued August 25, 2009).

¹³ *Id.* at § 8129(a).

¹⁴ *Id.* at § 8129(b).

¹⁵ 20 C.F.R. § 10.433(a). *See* K.C., Docket No. 11-1307 (issued January 10, 2012).

¹⁶ *Id.* *See* B.H., Docket No. 09-292 (issued September 1, 2009).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found appellant at fault in the creation of the overpayment and therefore not entitled to waiver of recovery.

When appellant was placed on the periodic rolls, by letter dated November 29, 2011 he advised of his augmented compensation and the enclosed form advised appellant that if the status of any dependent changed, he was to notify OWCP. He notified that he should not cash any checks after the change in status. The EN1032 forms appellant submitted in 2012, 2013, and 2014 clearly advised at Part C, that compensation at the augmented rate would be paid for “an unmarried child between 18 and 23 who is a full-time student even if that person does not live with you, as long as you make regular direct payments for his or her support.” He completed the EN1032 form dated February 20, 2014 claiming a dependent daughter, with a birthdate of July 2, 1994, but failed to provide verification of her student status or medical evidence establishing that she was incapable of self-support. Appellant knew or should have known that receiving augmented compensation after the daughter’s 18th birthday, without verification of student status was improper and could result in forfeiture of compensation.¹⁷ Accordingly, the Board finds that OWCP properly found that he reasonably knew or should have known that the augmented compensation payments he received from OWCP for the period July 2, 2012 to March 8, 2014, were in error. The Board finds appellant at fault under the third standard outlined above,¹⁸ and, as such, recovery of the overpayment of compensation in the amount of \$7,554.66 may not be waived.

On appeal, appellant contends that he was not at fault in creating the overpayment of compensation and argues that recovery of the overpayment would be against equity and good conscience. In the instant case, he should have been aware as of July 2, 2012 that he was no longer entitled to augmented compensation at the three-fourths rate unless his daughter was enrolled in full-time school.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁹ When an overpayment of compensation 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 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 circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²⁰

¹⁷ *Id.* See also *Alvin Hardt*, 33 ECAB 472 (1982).

¹⁸ See *supra* note 14.

¹⁹ *Supra* note 13.

²⁰ 20 C.F.R. § 10.441.

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment by withholding \$75.00 every 28 days from appellant's continuing compensation payments.

In an overpayment recovery questionnaire (Form OWCP-20) dated April 11, 2014, appellant reported a monthly income of \$2,310.22. He also reported approximately \$2,005.00 in monthly household expenses (\$775.00 for rent; \$300.00 for food; \$430.00 for utilities; \$500.00 other miscellaneous expenses) and \$1,010.00 in monthly debts (\$775.00 to his landlord; \$190.00 attorneys' fees; \$45.00 credit card). Appellant reported the following assets: \$60.00 cash on hand, \$80.00 in a checking account, \$5.00 in a savings account, and a \$13,000.00 truck totaling \$13,145.00. He further indicated that he did not support, either fully or in part, anyone other than himself.

Appellant erroneously claimed his \$775.00 rent twice, both as a household expense and a monthly debt to his landlord. Thus, the Board finds that he did not need substantially all of his income to cover ordinary and necessary living expenses. Appellant's monthly household income was \$2,310.22, with \$2,240.00 in allowable monthly ordinary and necessary living expenses,²¹ leaving \$70.22 in discretionary income per month.²²

OWCP procedures provide that, if a claimant is being paid compensation or is due accrued benefits, the debt should be recovered from such benefits as quickly as possible.²³ Accordingly, the Board finds that OWCP reasonably concluded that a repayment schedule of \$75.00 every 28 days would minimize any resulting hardship while effecting recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,554.66 for the period July 2, 2012 to March 8, 2014, as he received augmented compensation without having any dependents. The Board also finds that OWCP properly found him at fault in the creation of the overpayment and therefore not entitled to waiver of recovery. The Board further finds that OWCP properly directed recovery of the overpayment by withholding \$75.00 every 28 days from appellant's continuing compensation payments.

²¹ \$775.00 for rent + \$300.00 for food + \$430.00 for utilities + \$500.00 miscellaneous + \$190.00 attorneys' fees + \$45.00 credit card = \$2,240.00.

²² \$2,310.22 - \$2,240.00 = \$70.22.

²³ See *Frederick Arters*, 53 ECAB 397 (2002).

ORDER

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

Issued: April 13, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board