

ISSUES

The issues are: (1) whether OWCP properly determined that an overpayment of compensation in the amount of \$6,237.45 was created; (2) whether OWCP properly found appellant was at fault in creating the overpayment and therefore not entitled to consideration for a waiver; and (3) whether OWCP properly found the overpayment should be recovered by deducting \$350.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On November 27, 2002 appellant, then a 54-year-old security screener, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2002 she sustained injuries when a chair in which she was sitting collapsed. OWCP has accepted the claim for: lumbar, cervical and right wrist sprains; cervical spondylosis; displaced lumbar disc; lumbar degenerative disc disease; and chronic pain syndrome. Appellant began receiving wage-loss compensation commencing April 25, 2003, and was placed on the periodic rolls effective October 5, 2003. She was paid at the augmented compensation rate which was based on 75 percent of her pay rate for compensation purposes because she had a daughter, born on February 14, 1989.

As a requirement of receiving compensation on the periodic rolls OWCP regularly sent appellant EN1032 forms requesting information with respect to employment, volunteer activity, dependents, and receipt of other federal benefits. Appellant continued to claim her dependent as a daughter. The EN1032 form provided a definition of dependent: "(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; (e) a parent who totally depends upon you for support." The form also explains that a claimant with no dependents is paid compensation at 66 2/3 percent of the applicable pay rate, while a claimant with at least one dependent is paid at 75 percent of the applicable pay rate.

In the Form EN1032 signed on April 11, 2013, appellant reported her daughter would be finished with school as of June 26, 2013. The record indicates, however, that she continued to receive compensation after that date based on the augmented 75 percent rate. Appellant continued to receive compensation every 28 days in the amount of \$2,282.72 based on the augmented rate.

On July 2, 2015 OWCP issued a preliminary determination of an overpayment in the amount of \$6,237.45 had been created. The overpayment period was June 27, 2013 to June 27, 2015. OWCP indicated that appellant had been improperly paid at the 75 percent augmented rate during this period. The amount actually paid was \$56,405.40, while she should have been paid \$50,167.95 based on 66 2/3 of the pay rate for compensation purposes. OWCP found appellant at fault in creating the overpayment. It indicated that she had signed EN1032 forms which established that she was not eligible for the augmented rate, and she thereafter accepted payments she knew or should have known to be incorrect. Appellant was provided a Form OWCP-20 overpayment recovery questionnaire to complete and return within 30 days.

On July 21, 2015 appellant, through counsel, requested a prereducement hearing before an OWCP hearing representative. On the Form OWCP-20 appellant reported \$3,141.72 in monthly income. As to expenses, she listed approximately \$3,344.00, which included \$1,047.94 in monthly utilities. Appellant listed approximately \$607.00 in cash and bank accounts. A hearing was held on March 10, 2016. On April 7, 2016 she submitted bank account statements from January to February 2016.

By decision dated May 23, 2016, the hearing representative finalized the preliminary overpayment in the amount of a \$6,237.45 overpayment of compensation. He found appellant at fault in creating the overpayment and therefore not entitled to waiver. With respect to monthly expenses, the hearing representative found that some expenses were unreasonable or not well documented. He found the reasonable and documented expenses were: \$909.85 mortgage, \$300.00 food, \$200.00 clothing, and \$763.95 for utilities, or \$2,173.80 per month. Appellant's monthly income was found to be \$3,062.54 based on compensation and Social Security Administration (SSA) benefits. The recovery of the overpayment was set at \$350.00, to be deducted from each 28-day compensation payment.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8102 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. 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 dependents as defined under 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.³ Under 5 U.S.C. § 8110, 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). A student is defined 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...."⁴

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.⁵

ANALYSIS -- ISSUE 1

In the present case, appellant began receiving compensation in 2003 at the augmented rate of 75 percent of her pay rate for compensation purposes. She claimed to have a daughter,

³ 5 U.S.C. § 8110(b).

⁴ 5 U.S.C. § 8101(17). The section notes that if the student's 23rd birthday occurs during a semester or other enrollment period, she is deemed a student until the semester or enrollment period ends.

⁵ See *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004); see also *K.S.*, Docket No. 15-0940 (issued September 9, 2015).

born February 14, 1989. Appellant's daughter, therefore, would have turned 23 years of age on February 14, 2012. To be considered a "student" the individual must be both under 23 years of age and a full-time student. Appellant's daughter's status as a dependent, assuming she was a full-time student on February 14, 2012, would have ceased at the end of that semester in 2012.⁶ Appellant did not claim any other dependents.

The Board finds that as of June 27, 2013, the commencement of the declared overpayment in this case, appellant no longer was eligible to claim a dependent. She continued to receive compensation, however, based on the augmented 75 percent rate through June 27, 2015. An overpayment of compensation was created.

OWCP determined the amount of the overpayment by establishing the actual amount of compensation received from June 27, 2013 to June 27, 2015, and subtracting the amount she should have been paid at the 66 2/3 rate (\$50,167.95). No contrary evidence was presented. The Board therefore finds that OWCP properly found an overpayment of \$6,237.45 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) provides: "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 FECA or would be against equity and good conscience."⁷ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁸ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(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 was incorrect."

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault because she accepted payments she knew or should have known were incorrect. As the factual history indicates, appellant signed an EN1032 form on April 11, 2013. The form clearly explains that a dependent student must be under 23 years of age and a full-time student. In addition, the form indicates that a claimant with no dependents is paid compensation at 66 2/3 of the applicable pay rate, rather than 75 percent. Appellant's daughter was 24 years old at the time appellant completed the April 11, 2013 EN1032 form. She indicated on the form that the daughter's studies were ending on June 26, 2013. Appellant accurately completed the EN1032. Thus, she knew or should have known that she was no longer entitled to receive compensation based on the augmented rate after

⁶ *Supra* note 4.

⁷ 5 U.S.C. § 8129(b).

⁸ *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

June 26, 2013. When appellant continued to accept the compensation payments based on 75 percent of her pay rate, she accepted payments she knew or should have known were incorrect.⁹

On appeal, counsel argues that appellant should not be at fault because she clearly notified OWCP that her daughter's studies were ending in June 2013. The Board also notes that OWCP should have been aware of the daughter's age, as appellant had consistently provided such information. The finding of fault is not based on appellant's failure to provide material information or on what OWCP knew or should have known at the time it paid compensation benefits. The issue is what appellant knew or should have known when she accepted compensation payments after June 27, 2013.¹⁰ Even if appellant properly indicated on the EN1032 form that she had no dependents, the form provides notice that she was not entitled to receive compensation at the augmented rate when she no longer had a dependent child. The Board has held that, although OWCP was provided accurate information regarding dependents on the EN1032 form, a claimant is not excused from accepting payments that she knew or should have been expected to know were incorrect.¹¹ By signing the EN1032 forms, appellant had notice that she was not entitled to compensation at the augmented rate. By continuing to accept payments based on the augmented rate, she had accepted payments she knew or should have known were incorrect.¹²

The Board accordingly finds that OWCP properly found appellant at fault in the creation of the overpayment. Since appellant is at fault in the creation of the overpayment of compensation, consideration of waiver of the recovery of the overpayment is not possible.

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.¹³ 20 C.F.R. § 10.441 provides:

“Whenever 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. 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 other relevant factors, so as to minimize any hardship.¹⁴

⁹ See *G.M.*, Docket No. 15-0939 (issued April 13, 2016) (Form EN1032 provided information regarding dependents and appellant should have known he could not receive augmented compensation after his daughter's 18th birthday).

¹⁰ *Id.*

¹¹ See, e.g., *K.S.*, *supra* note 5; *T.B.*, Docket No. 12-0844 (issued September 19, 2012).

¹² *Id.*

¹³ 5 U.S.C. § 8129(a).

¹⁴ 20 C.F.R. § 10.441.

ANALYSIS -- ISSUE 3

In the present case, appellant submitted a Form OWCP-20 and bank account statements. The hearing representative reviewed the evidence of record. With respect to expenses, he explained that the reasonable and documented expenses were: \$909.85 mortgage, \$300.00 food, \$200.00 clothing, and \$763.95 for utilities, or \$2,173.80 per month. Appellant's monthly income was reported at \$3,062.54, based on compensation and SSA benefits. The hearing representative concluded that appellant could repay the overpayment by deducting \$350.00 per month from her continuing compensation.

The Board finds that OWCP properly considered the relevant factors under 20 C.F.R. § 10.441. OWCP procedures indicate that the hearing representative should evaluate the claimant's financial information and establish the highest reasonable rate of repayment which will collect the debt promptly and at the same time minimize any hardship to the claimant.¹⁵ The hearing representative considered the financial information submitted and reasonably found the overpayment of compensation could reasonably be recovered by deducting \$350.00 from continuing compensation. The Board finds that OWCP properly determined the recovery of the overpayment in this case.

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$6,237.45. The Board further finds that OWCP properly found appellant was at fault with respect to the overpayment, and therefore not entitled to consideration for waiver of recovery. The Board further finds that OWCP properly determined the overpayment could be recovered by deducting \$350.00 from continuing compensation.

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(d) (June 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 23, 2016 is affirmed.

Issued: December 2, 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