

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.S., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, ROBINS  
AIR FORCE BASE, GA, Employer**

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**Docket No. 17-1224  
Issued: August 28, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 15, 2017 appellant filed a timely appeal from a May 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,577.64 for the period April 8, 2016 to March 4, 2017; (2) whether OWCP properly found appellant at fault in creating the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by deducting \$25.00 every 28 days from appellant's continuing compensation payments.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that a questionnaire did not ask her if she had additional expenses. She asserts that she has medical and travel expenses associated with her stage 4 nonHodgkins lymphoma and invasive breast cancer.

### **FACTUAL HISTORY**

On January 14, 1976 appellant then a 31-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 1976 she sustained a back contusion and strained lumbar muscles when she slipped on water on the floor in a restroom at work. She stopped work on January 15, 1976 and returned on January 20, 1976. Appellant stopped work again on January 27, 1976 and has not returned to work.

OWCP accepted the claim for low back strain and permanent aggravation of a pars interarticularis defect. The record indicates that appellant received compensation at the 75 percent augmented rate effective September 16, 1976 and continuing.

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 continually claimed her spouse as a dependent. Each of the completed EN1032 forms explained 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 February 7, 2017, appellant answered “no” to questions asking if she was married and if her spouse lived with her. On March 16, 2017 OWCP received an obituary from McCullough Funeral Home, which indicated that her husband had died on April 7, 2016.

In a March 28, 2017 notice, OWCP advised appellant of its preliminary determination that she received a \$2,577.64 overpayment of compensation for the period April 8, 2016 to March 4, 2017 because she was erroneously receiving compensation at the augmented 75 percent rate instead of the proper basic 66 2/3 percent rate. It also made a preliminary finding that she was at fault in creating the overpayment because she was aware or should have reasonably been aware that she was not entitled to the augmented rate when she had no eligible dependents after April 7, 2016. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of recovery of the overpayment. Additionally, it informed her that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

The record includes an OWCP worksheet containing calculations showing that, from April 8, 2016 to March 4, 2017, appellant received \$23,033.71 in compensation at the augmented, 75 percent rate, but was entitled to only \$20,456.07 in compensation at the basic 66 2/3 percent rate, a difference of \$2,577.64. It noted that the \$2,577.64 amount constituted an overpayment of compensation.

On March 31, 2017 appellant requested that OWCP make a decision based on the written record and submitted a completed overpayment questionnaire. She contended that the overpayment occurred through no fault of her own and requested waiver of recovery of the overpayment. Appellant asserted that she had always answered requests honestly and would not do otherwise. She reported monthly income of \$5,341.12, which included \$1,669.00 in Social Security Administration benefits, \$1,907.12 in other Federal Government benefits, and \$1,765.00 in other income “DFEC” benefits. Appellant also reported monthly expenses of \$3,550.00,<sup>2</sup> which included \$1,800.00 for mortgage or rent, \$600.00 for food, \$200.00 for clothing, \$500.00 for utilities, \$250.00 for other expenses, and \$200.00 for a Visa credit card. She had \$50.00 cash on hand and \$43.00 in a savings account for a total of \$93.00 in assets.

In a May 3, 2017 decision, OWCP finalized the finding that appellant received an overpayment of compensation in the amount of \$2,577.64. It found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP directed repayment of the overpayment by deducting \$25.00 every 28 days from appellant’s continuing compensation.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup> 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 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.<sup>5</sup>

Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of 3/4 of his or her weekly pay if he or she has one or more dependents.<sup>6</sup> A dependent includes a husband if: (a) he is a member of the same household as the employee; (b) he is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to his support.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant initially received compensation payments at the augmented rate of 75 percent as she was married and lived in the same household with her husband. Her husband died on

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<sup>2</sup> The Board notes that appellant incorrectly calculated a total of \$3,100.00 in monthly expenses.

<sup>3</sup> The Board notes that the cover letter accompanying the May 3, 2017 decision fails to accurately convey the finding of fault within the decision.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8105(a).

<sup>6</sup> *Id.* at § 8110(b).

<sup>7</sup> *Id.* at § 8110(a)(2).

April 7, 2016. However, appellant continued to receive compensation at the augmented rate after his death, when she had no eligible dependents.

The record indicates that appellant was erroneously paid compensation based on the augmented rate of 75 percent for a person with a dependent for the period April 8, 2016 through March 4, 2017. Appellant was paid \$23,033.71 in compensation at the augmented rate of 75 percent, but should have received only \$20,456.07 at the basic 66 2/3 percent rate. OWCP properly determined that the difference of \$2,577.64 is the amount of the overpayment. The Board finds that OWCP properly determined the fact and amount of the overpayment in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>8</sup> The fact that the overpayment was the result of error by OWCP or another government employing establishment does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.<sup>9</sup>

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that 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 with respect to 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).<sup>10</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was 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.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

As the factual history indicates, appellant signed several EN1032 forms which provided her with the definition of a dependent and explained that she was not entitled to receive

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<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> *Id.* at § 10.435(a).

<sup>10</sup> *Id.* at § 10.433(a); see *Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>11</sup> *Id.* at § 10.433(b).

compensation at the augmented rate if she did not have dependents. By signing the EN1032 forms, she had notice that she was not entitled to compensation at the augmented rate if she did not have a dependent. Appellant did not claim dependents on the February 7, 2017 Form EN1032 and noted that she was no longer entitled to compensation for a spouse. Thus, she knew or reasonably should have known that the compensation she received at the augmented rate after April 7, 2016, the day her husband died, was incorrect. Even if an overpayment resulted from negligence by OWCP, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.<sup>12</sup> The Board therefore finds that appellant was at fault in creating the \$2,577.64 overpayment of compensation. As appellant is not without fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

When an overpayment has been made to an individual who is entitled to further payments, 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.<sup>14</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP gave due regard to the financial information appellant submitted as well as the factors set forth in section 10.441. As appellant's monthly income was \$5,341.12 and her monthly expenses were \$3,550.00, OWCP did not abuse its discretion in setting the rate of recovery as \$25.00 from each of her continuing compensation payments. The Board finds that OWCP properly determined the recovery of the overpayment in this case.

On appeal, appellant contends that a questionnaire did not ask her if she had additional expenses. She asserts that she has medical and travel expenses associated with her stage 4 nonHodgkins lymphoma and invasive breast cancer. However, the record does not contain any financial documents supporting such expenses and such expenses were not noted under section 5 of OWCP-20 form which specifically requests itemization of other expenses, including medical care and other transportation costs. As found above, OWCP took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.441(a) of its regulations in determining that the \$25.00 deduction from her 28-day compensation payments would minimize any hardship.

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<sup>12</sup> *Supra* note 9; *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>13</sup> *L.J.*, 59 ECAB 264 (2007) (no waiver of an overpayment is possible if the claimant is at fault in creating the overpayment).

<sup>14</sup> 20 C.F.R. § 10.441(a).

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,577.64 for the period April 8, 2016 to March 4, 2017. The Board further finds that OWCP properly found her at fault in creating the overpayment, and properly determined that it would recover the overpayment by deducting \$25.00 from continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 28, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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