

FACTUAL HISTORY

On November 7, 1996 appellant, mother of the deceased employee's minor daughter, filed a claim for compensation by widow, widower, or child (Form CA-5)² alleging that on August 26, 1996 the employee had died in a motor vehicle accident while in the performance of duty. The employee's daughter was four years old at the time of his death, born November 25, 1991. Appellant began receiving dependent compensation on behalf of the minor daughter of the employee as of December 8, 1996.³

Appellant periodically submitted CA-12 forms with respect to continuing entitlement to compensation benefits. The form requests information regarding the dependent, including the age of the dependent. Appellant provided the completed forms to OWCP. Appellant submitted evidence on December 7, 2009 that her daughter would graduate from high school in June 2010. On November 21, 2011 OWCP received a Form CA-12 dated November 3, 2011 reflecting that the deceased employee's daughter was 19 years old.

OWCP sent appellant a letter dated March 6, 2012, requesting additional information regarding continuing entitlement to compensation benefits. It was noted that compensation was payable for an unmarried child who had reached age 18, and until 23 if the child was a full-time student. In addition, OWCP notified appellant "Compensation is not payable beyond the end of the semester or enrollment period in which the child either completes the fourth year of education beyond high school or reaches the age of 23 years." The record indicates that OWCP also sent a similar letter dated April 10, 2012 to the dependent daughter, at the same address as appellant.

On May 1, 2012 OWCP received a response from the daughter indicating that she had been a full-time student since September 2010. Appellant continued to complete CA-12 forms annually. In a Form CA-12 dated October 13, 2014, she indicated that her daughter was a college student and was not living at home. OWCP continued to pay compensation to appellant every 28 days through June 25, 2016.

By letter dated August 3, 2016, OWCP made a preliminary determination of an overpayment of compensation in the amount of \$19,139.57. It explained that the daughter was not entitled to compensation after turning 23 years of age on November 25, 2014. In addition, OWCP found appellant at fault as she had accepted compensation payments she knew or should have known were incorrect. Appellant was advised of actions she could take within 30 days and, if she did not respond, a final decision would be issued based on the evidence of record.

A memorandum of telephone call dated August 18, 2016 related that appellant believed her daughter would receive life-long payment of compensation. On August 22, 2016 OWCP

² Appellant was claiming on behalf of the minor daughter of the employee. Her minor daughter was born on November 25, 1991.

³ Under 5 U.S.C. § 8133(a)(3), if the employee dies from an employment injury and has one child, the child receives 40 percent of the deceased employee's monthly pay.

sent appellant copies of the evidence of record, including a copy of the April 10, 2012 letter with respect to a child's entitlement to compensation.

By decision dated September 23, 2016, OWCP finalized the preliminary determination of the creation of an overpayment in the amount of \$19,139.57 for which appellant was at fault as she had accepted payments she knew or should have known were incorrect. Therefore appellant was not entitled to waiver of recovery.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to 5 U.S.C. § 8133, if death results from an employment injury, compensation is paid "to the children, if there is no widow or widower, 40 percent [of the monthly pay of the deceased employee] for one child..." The compensation is payable until the child becomes 18 "or if over 18 and incapable of self-support becomes capable of self-support." However, the child may continue to receive compensation if he or she is a student at the time he or she reaches 18 years of age, and for as long as she continues to be a student as defined by 5 U.S.C. § 8101(17) or until he or she marries. 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 high school and who is regularly pursuing a full-time course of study.⁴

ANALYSIS -- ISSUE 1

In the present case, appellant was the mother of the deceased employee's minor daughter. The daughter was eligible for compensation benefits under 5 U.S.C. § 8133, following the death of her father on August 26, 1996. She turned 18 years of age on November 25, 2009. The evidence of record indicates that she continued to be a high school student until June 2010.

The daughter began education beyond high school in the fall semester of 2010. She would have completed four years of education beyond the high school level as of the end of July 2014.⁵ Under 5 U.S.C. § 8101(17), the daughter is no longer a student once she completes four years of education beyond the high school level. Therefore, she was no longer a student as of July 31, 2014. OWCP continued to pay compensation, however, through June 25, 2016. Therefore it properly found an overpayment of compensation.

OWCP declared the period of overpayment from November 25, 2014 (the date the daughter turned 23 years old) to June 25, 2016 (the date compensation payments ceased). It calculated that it had paid \$19,137.59 in compensation for that period. No contrary evidence was presented, and appellant does not contest the amount. The Board accordingly finds that an overpayment of \$19,137.59 was created for the declared period.

⁴ For a full-time student that has not completed four years beyond high school, if the 23rd birthday occurs during a semester or other enrollment period, student status continues until the end of the semester or enrollment period. 5 U.S.C. § 8101(17).

⁵ A year of education is defined as the 12-month period beginning the month after high school graduation, if the student indicated an intention to continue in school during the next regular session, and each successive 12-month period, provided that school attendance continues. *S.B.*, Docket No. 07-0554 (issued September 4, 2007).

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.”⁶ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁷ 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.” The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.⁸ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.⁹

ANALYSIS -- ISSUE 2

OWCP found appellant was at fault as she accepted payments she knew or should have known were incorrect. In this regard, the Board notes that OWCP did send appellant a March 6, 2012 letter, as well as an April 10, 2012 letter to the daughter, at the same address, which clearly explained the definition of a student.

As discussed above, the employee’s child would have completed four years of education by the summer of 2014. The daughter turned 23 years of age on November 25, 2014. The March 6 and April 10, 2012 letters clearly explained that compensation was not payable after four years of education. OWCP issued compensation payments to appellant’s account on July 26, August 23, September 20, October 18, and November 15, 2014. By the time appellant accepted the December 13, 2014 payment, she should have known it was incorrect.¹⁰

On appeal appellant alleges that she does not recall receiving any letters regarding student status ending at age 23. The record clearly indicates that OWCP had mailed her information regarding the daughter’s entitlement to compensation as a student, after the age of 18.

Appellant also notes that OWCP had evidence of the daughter’s birthday for 20 years and should have stopped payments. However, even if the overpayment occurred because OWCP was negligent, this does not excuse the acceptance of payments that appellant knew or should have

⁶ 5 U.S.C. § 8129(b).

⁷ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

⁸ 20 C.F.R. § 10.433(a). See also *C.V.*, Docket No. 13-2108 (issued June 17, 2014).

⁹ *Id.*

¹⁰ See *N.T.*, Docket No. 13-2050 (issued April 25, 2014); *D.T.*, Docket No. 16-0710 (issued November 2, 2016); *G.M.*, Docket No. 15-0939 (issued April 13, 2016).

known were incorrect.¹¹ For the reasons discussed above, the Board finds that OWCP properly found an overpayment of compensation and appellant was at fault in creating the overpayment. Since she is at fault, appellant is not entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds an overpayment in the amount of \$19,139.57 because OWCP paid compensation pursuant to 5 U.S.C. § 8133 after the employee's daughter was no longer a student. The Board further finds that OWCP properly found appellant was at fault and therefore not entitled to waiver of recovery of the overpayment.

ORDER

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

Issued: December 1, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *V.D.*, Docket No. 16-0578 (issued November 3, 2016).