

FACTUAL HISTORY

On October 28, 2013 appellant, then a 31-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging numbness in the left arm and leg on October 18, 2013 when her postal vehicle was struck by a personal vehicle while in the performance of duty. She stopped work on the date of the injury. OWCP accepted appellant's claim for sprain of the back, lumbar region, and sprain of neck. Appellant began receiving wage-loss compensation for temporary total disability on December 3, 2013. OWCP later expanded the acceptance of the claim to include a lumbar disc protrusion at L5-S1.

By letter dated February 18, 2014, OWCP informed appellant that she would be paid disability compensation on the periodic rolls every 28 days and advised her about the effect of dependency on her receipt of compensation by noting:

“CHANGE IN STATUS OF DEPENDENT. If you have one or more dependents, and the status of any dependent changes, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the name of the dependent whose status changed, the effective date of the change, and the nature of the change in status. Your signature must appear on the letter.

“If you claimed only one dependent, DO NOT CASH CHECKS RECEIVED AFTER THE CHANGE IN STATUS of this dependent. Otherwise, an overpayment of compensation may result. Return the checks promptly to this office.”

Appellant completed CA-1032 and EN1032 forms on June 4, 2014, June 20, 2015, June 23, 2016, and June 20, 2017. The EN1032 forms provided information notifying her as to the status of dependents for augmented compensation. Appellant was advised as to the requirements for claiming a spouse as a dependent and informed that a claimant with no dependents was paid at the 66 2/3 percent basic rate, not the 75 percent augmented rate. On EN1032 forms completed on June 4, 2014 and June 20, 2015, under “Part C-Dependents,” she indicated that her status was married and that she was not claiming “compensation on account of other dependents, such as children.” These forms contained text which advised appellant that a claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate and that a claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. Appellant could claim augmented compensation for a dependent if she had one or more of the following: (a) a spouse (including a same sex spouse) who lived with her; (b) an unmarried child, including an adopted child or stepchild, who lived with her and was under 18 years old; (c) an unmarried child who was 18 years old or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years old who was a full-time student and had not completed four years of school beyond the high school level; or (e) a parent who totally depended upon her for support.

In a Form EN1032 completed on June 23, 2016, appellant advised OWCP that she was married, but not living with or supporting her husband. In a Form CA-1032 completed on June 20,

2017, she indicated that she had stopped living with and supporting her husband since May 2016. Appellant noted that her husband stopped being a dependent as they had “separated.”

On June 30, 2017 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,141.43 because she received payment at the augmented rate, but should have been paid at the statutory rate. It found that she was not entitled to compensation at the 75 percent augmented rate from May 29, 2016 through May 27, 2017. Appellant was at fault in the creation of the overpayment as she was not entitled to augmented compensation because her marital status and living arrangements did not meet the criteria for three-fourths compensation. In an accompanying memorandum, OWCP explained how it arrived at the amount of the overpayment.² It sent appellant instructions for appealing the overpayment or to request waiver of recovery, together with financial forms.

Appellant responded to the preliminary determination by completing the overpayment recovery questionnaire (Form OWCP-20) and requested a telephone conference, which was held on July 27, 2017. She listed expenses of \$1,320.00 and assets of \$1,100.00. During the conference, appellant argued that she was unfamiliar with the rules, as she was new to the country and only lived here for about five years. She stated that she was unaware that the compensation rate was to be reduced due to no dependents and if she had been aware, she would certainly have discussed the matter with her claims examiner. Appellant also indicated that her husband ceased living with her on May 29, 2016.

OWCP’s claims examiner reviewed appellant’s expenses and noted that she was receiving OWCP benefits in the amount of \$1,333.00 every 28 days or \$1,444.08 per month. He confirmed that appellant had no other income and appellant confirmed this monthly amount. Regarding expenses, the claims examiner found that she had the following expenses: food, \$350.00; rent, \$650.00; electricity/gas, \$120.00; telephone, \$30.00; other, \$200.00 (total-\$1352.00) (Income of \$1,444.08 - \$1352.00 = \$92.08). He asked appellant to advise him of her transportation expenses, which she did not have at the time of the hearing. The claims examiner further noted that she had a Discover card with a balance of \$3,500.00 and a monthly payment of \$79.00 and a bill for a biopsy in the amount of \$700.00 dollars and a \$47.00 dollar physician charge. He also explained that additional documentation was needed to support her expense claims and afforded appellant an additional 15 days to submit the documentation.

On August 7, 2017 OWCP received documentation from appellant regarding her expenses, which were generally in alignment with the expenses she noted from the telephone conference. A small discrepancy was noted with regard to her food expenses as the receipts totaled approximately \$200.00 per month as opposed to \$350.00 per month. Appellant’s transportation expenses included rides costing \$6.53, \$12.03, and \$11.14.

² OWCP noted that appellant’s gross compensation for the period May 29, 2016 (the date appellant’s spouse ceased to be an eligible dependent) through May 27, 2017, the difference between payment of compensation at a 3/4 rate (\$19,214.15) and the 2/3 rate (\$17,072.72) was \$2,141.43 (\$19,214.15 minus \$17,072.72). It found that the total amount of the overpayment was \$2,141.43.

By decision dated August 18, 2017, OWCP finalized the overpayment of compensation in the amount of \$2,141.43, for which it found appellant was at fault in the creation and not eligible for waiver of recovery of the overpayment. It explained that CA-1032 forms which appellant completed on June 4, 2014, June 20, 2015, June 23, 2016 and June 20, 2017, clearly explained the rates of compensation based upon qualified dependents. OWCP explained that the benefits statements issued for each periodic rolls payment clearly indicated the rate at which compensation was paid. It concluded that appellant should have reasonably been aware that the compensation she received after May 29, 2016 was incorrect. OWCP found that the findings of overpayment and fault were correct. It indicated that they would deduct \$45.42 from future compensation payments. OWCP found that appellant had not provided information to refute the amount of the overpayment or the finding of fault. It found that the evidence of record supported a final decision of overpayment with fault because she knowingly accepted wage-loss compensation to which she was not entitled.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of FECA provides that, 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 OWCP by decreasing later payments to which the individual is entitled.³

FECA provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ If the disability is total, the United States shall pay the employee monthly monetary compensation for total disability.⁵ Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependents.⁶ If a claimant receives augmented compensation during a period when he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁷

A husband is considered an employee's dependent if he is a member of the same household, is receiving regular contributions from the employee for his support or if the employee has been ordered by a court to contribute to his support.⁸ In determining dependency under FECA, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee,

³ 5 U.S.C. § 8129

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁶ *Id.* at § 8110.

⁷ *See Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment because she received compensation at the augmented rate during a period when she had no dependents following her divorce).

⁸ 5 U.S.C. § 8110(a)(2).

in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation for the period from May 29, 2016 through May 27, 2017. The evidence establishes that she received wage-loss compensation at the 75 percent augmented rate for employees with dependents during this period. In a Form EN1032 completed on June 23, 2016, appellant advised OWCP that she was married, but not living with or supporting her husband. In a CA-1032 completed on June 20, 2017, she indicated that, since May 2016, she stopped living with and supporting her husband because they were separated. During the telephone conference she explained that she stopped living with him on May 29, 2016. The Board finds that, as none of the three individual criteria for a dependent under 5 U.S.C. § 8110(a)(2) may be applied in appellant's circumstances, she was not entitled to augmented compensation after May 29, 2016. OWCP provided a detailed accounting of the amount of compensation she should have received at the basic 66 2/3 percent rate (\$17,072.72), since there were no qualified dependents, *versus* the amount she actually received under the augmented compensation rate of 75 percent (\$19,214.15). The Board finds that OWCP's calculation of a \$2,141.43 overpayment was correct.¹⁰ Accordingly, OWCP properly determined the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 10.433 of the implementing regulations specifically provides that OWCP may consider waiving an overpayment if the individual to whom it was made was without fault in accepting or creating the overpayment.¹¹ On the issue of fault, 20 C.F.R. § 10.433(a) 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.¹² 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.¹³

For OWCP to establish that a claimant was at fault in the creation of the overpayment, it must show that, when he or she received the compensation in question, he or she knew or should

⁹ See *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

¹⁰ See *supra* note 3.

¹¹ *Id.* at § 10.433(a).

¹² *Id.*

¹³ *Id.* at § 10.433(b).

have known that the payment was incorrect.¹⁴ With respect to whether an individual is with fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was with fault with respect to the receipt 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 was being overpaid.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation for the period May 29, 2016 through May 27, 2017. The CA-1032 and EN1032 forms advised appellant as to who qualifies as a dependent for purposes of augmented compensation. Additionally, by letter dated February 18, 2014, OWCP outlined appellant's entitlement to compensation benefits and her responsibility to return to work in connection with the injury. It explained what would happen if there was a change in the status of her dependents. For example, appellant was advised to notify OWCP at the address shown on the front of their letter; include her file number, the name of the dependent whose status changed, the effective date of the change, the nature of the change in status and her signature. Furthermore, she was advised that if she claimed only one dependent, she must not cash checks received after the change in status of the dependent; otherwise, an overpayment of compensation may result. OWCP indicated that appellant must return the checks promptly. Additionally, appellant was advised as to the requirements for claiming a spouse as a dependent and informed that a claimant with no dependents was paid at the 66 2/3 percent basic rate, not the 75 percent augmented rate.

The evidence establishes that, when placed on compensation, appellant was married and she received compensation at the augmented 75 percent augmented rate. The Board finds that, when she ceased living with her husband, she should have received compensation at the 66 2/3 percent basic rate and that she knew or reasonably should have known that the 75 percent augmented rate of compensation she was receiving was incorrect. The Board notes that OWCP informed appellant on February 18, 2014 and on an annual basis as to her receipt of compensation and the basis on which dependents were determined. The record reflects that she initially asked for the increased rate when she was married. Therefore, appellant received compensation at the 75 percent augmented rate for approximately three years after. After her separation from her husband, she knew or should have known that the payments made at the augmented rates were incorrect. 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.¹⁶ The Board finds that appellant is at fault in the creation of the overpayment and therefore not eligible for waiver of recovery. OWCP is required by law to recover the overpayment.

¹⁴ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁵ 20 C.F.R. § 10.433(b).

¹⁶ See for example, *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).

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.¹⁷ 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.¹⁸”

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 10.441.¹⁹ As appellant’s monthly income was \$1,444.08 and her monthly expenses were \$1,352.00, OWCP did not abuse its discretion in requiring recovery by deducting \$45.42 every 28 days from each of her continuing compensation payments. The Board finds that OWCP properly required recovery of the overpayment in this case.²⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,141.43 for the period May 29, 2016 through May 27, 2017. The Board also finds that OWCP properly determined that she was at fault in creation of the overpayment and ineligible for waiver of recovery of the overpayment. Additionally, the Board further finds that OWCP properly required recovery of the overpayment by deducting \$45.42 from appellant’s continuing compensation payments.

¹⁷ 5 U.S.C. § 8129(a).

¹⁸ 20 C.F.R. § 10.441.

¹⁹ *Id.*

²⁰ *See T.M.*, Docket No. 17-1482 (issued May 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2018
Washington, DC

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

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

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