

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

S.M., Appellant)	
)	
and)	Docket No. 18-1525
)	Issued: April 12, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Denver, CO, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 8, 2018 appellant filed a timely appeal from July 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$18,486.46 for the period May 16, 2015 through November 11, 2017 because she no

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 2, 2018 decision, OWCP received additional evidence. Appellant also submitted additional evidence with her appeal to the Board. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

longer had an eligible dependent; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On September 13, 1999 appellant, then a 48-year-old quality assurance specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained a stress-related condition while in the performance duty. OWCP accepted the claim for aggravation of preexisting manic depressive illness and post-traumatic stress disorder. Appellant has received wage-loss compensation commencing September 1, 1999.³

In letters dated December 10, 2013 and February 20, 2014, OWCP notified appellant of the requirements regarding her dependent's eligibility for continuing compensation beyond his 18th birthday.⁴ It explained that additional information was needed with regard to whether her son, D.M., continued to be eligible for compensation beyond his 18th birthday.

OWCP explained that compensation may continue to be paid on behalf of an unmarried child age 18 or older who was either a full-time student or incapable of self-support. It explained that compensation was payable for an unmarried child who had reached age 18 and was a student who had not completed four years of education beyond high school. OWCP continued that a student was defined in section 8101(17) of FECA as one who was currently pursuing a full-time course of study at an accredited school, college, or university, or at a technical, trade, vocational, business, or professional school. It explained that compensation was not payable beyond the end of the semester or enrollment period in which the child either completed the fourth year of education beyond high school or reached the age of 23 years.

OWCP advised appellant that it requested verification of student status at least twice each year. To claim compensation for her son as a student, it indicated that appellant must provide a statement and certification of school enrollment using the accompanying forms. OWCP also informed appellant that the law prohibited the acceptance of compensation when a dependent was no longer entitled to it. It explained that, if the dependent was no longer a full-time, unmarried student under the age of 23 who had not completed four years of education beyond high school, then appellant must notify OWCP immediately. Additionally, OWCP informed her that any compensation payment she received after such a change in status of the dependent must be returned to OWCP for cancellation. It indicated that it would be replaced with a payment in the correct amount.

³ Appellant previously filed a June 6, 1999 occupational disease claim (Form CA-2), alleging that factors of her federal employment resulted in respiratory problems. The claim, adjudicated under OWCP File No. xxxxxx900, was accepted for allergic rhinitis and chronic sinusitis, extrinsic asthma, other diseases of vocal cords, chronic asthma, chronic frontal, ethmoidal and sphenoidal sinusitis, other chronic sinusitis, chronic obstructive asthma, and other diseases of nasal cavity and sinuses. OWCP administratively combined File No. xxxxxx900 with the present claim on March 21, 2006, with OWCP File No. xxxxxx900 designated as the master file.

⁴ Appellant has claimed one dependent, a son D.M., whose date-of-birth was in March 1994.

In a response received by OWCP on March 4, 2014, appellant furnished the requested information in which a registrar indicated that appellant's son was enrolled as a full-time undergraduate student at an accredited college, with the semester ending on May 17, 2014.

By letter dated January 15, 2015, OWCP again notified appellant of the requirements regarding her dependent's eligibility for continuing compensation beyond his 18th birthday. Appellant forwarded information in which the registrar at the accredited college again indicated that her son continued to be a full-time student, and that the semester ended on May 15, 2015.

On January 19, 2017 OWCP again asked for verification of her son's continued eligibility for compensation. In a statement dated January 24, 2017, appellant indicated that her son was enrolled in an accredited college. She did not return the requested verification of enrollment.

In correspondence dated November 21, 2017, OWCP informed appellant that, as she had not forwarded the requested information regarding her dependent, her periodic rolls compensation was adjusted, effective November 12, 2017, to reflect payment at the basic (2/3) compensation rate. In telephone calls on December 8 and 19, 2017, and again by letter dated February 8, 2018, OWCP informed appellant of the type of information needed regarding her dependent. It telephoned appellant on February 27, 2018, advising her that it required information in writing regarding her son's college enrollment.

On May 1, 2018 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$18,486.46 for the period May 16, 2015 through November 11, 2017, as she had received wage-loss compensation at the augmented (3/4) rate. It found her to be at fault in the creation of the overpayment because she was aware that she was receiving compensation at a rate to which she was not entitled. OWCP advised appellant of her options, including that she could request a precoupment hearing on the issues of fault and possible waiver of the overpayment. It also provided appellant with an overpayment questionnaire (Form OWCP-20). OWCP afforded appellant 30 days to respond. Attached overpayment computer print-outs noted that, from May 16, 2015 through November 11, 2017, appellant received gross compensation at the augmented rate totaling \$157,145.17 and that compensation at the basic rate would have been \$139,658.71. This would yield an overpayment of compensation of \$17,486.46. An overpayment worksheet indicated that gross compensation for this period at the augment rate was \$157,145.17, but reported that compensation at the basic rate was \$138,658.71, not \$139,658.71 as shown on the computer print-out. By using the latter figures, the worksheet indicated that an overpayment of compensation in the amount of \$18,486.46 had been created.

In response, appellant forwarded a copy of the January 2015 submission from a registrar indicating that D.M. was enrolled as a full-time student for the current semester ending on May 15, 2015. On May 18, 2018 she forwarded an e-mail with two photographs of what appears to be computer screen shots which are illegible. OWCP telephoned appellant on May 22, 2018, notifying her that the attachments were illegible. Appellant indicated that they were her son's college transcripts.

By decision dated July 2, 2018, OWCP finalized the preliminary determination of an \$18,486.46 overpayment of compensation. It determined that appellant was at fault in the creation

of the overpayment and, therefore, precluded from waiver of recovery of the overpayment. OWCP required recovery of the overpayment by deducting \$150.00 every 28 days from appellant's continuing FECA 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.⁵ 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 her monthly pay.⁶ A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁷

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. 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.⁸

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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$18,486.46 for the period May 16, 2015 through November 11, 2017 because she no longer had an eligible dependent.

Appellant received compensation at the augmented rate for the period May 16, 2015 through November 11, 2017, despite the fact that she did not have a qualifying dependent under FECA. Although she forwarded illegible photographs and stated that her son was attending a university, she did not submit corroborating evidence to verify that her son was in fact enrolled in a qualifying school beyond May 15, 2015. Thus, the Board finds that OWCP properly determined that appellant had no eligible dependent after that date.¹⁰

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8106(a).

⁷ *Id.* at § 8110; 20 C.F.R. § 10.405; *see E.M.*, Docket No. 17-1502 (issued February 22, 2019).

⁸ *Id.* at § 8110(a).

⁹ *B.W.*, Docket No. 18-1412 (issued February 8, 2019); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁰ *Supra* note 10.

The attached computer print-out therefore properly indicated that appellant was entitled to compensation at the rate of \$139,658.71. However the overpayment calculation worksheet contains a transposition error indicating that appellant was only entitled to \$138,658.71 in compensation. The Board will, therefore, modify the overpayment to reflect that, as appellant was only entitled to receive computation at the basic rate for the period May 16, 2015 through November 11, 2017, an overpayment of compensation in the amount of \$17,486.46 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “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.”¹¹

Section 10.433(a) of OWCP regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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 in 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; or
- (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).”¹²

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹³

¹¹ 5 U.S.C. § 8129; *see* A.S. Docket No. 17-0606 (issued December 21, 2017).

¹² 20 C.F.R. § 10.433(a); *see* C.Y., Docket No. 18-0263 (issued September 14, 2018); *see also* 20 C.F.R. § 10.430.

¹³ 20 C.F.R. 10.433(b); C.Y., *id.*

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the \$17,486.46 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In letters dated December 10, 2013 and February 20, 2014, OWCP notified appellant of the reporting requirements regarding her son's eligibility for continuing compensation beyond his 18th birthday. This included a statement that compensation received after a change in status must be returned to OWCP. Appellant provided the requested verification of enrollment by a registrar at an accredited college in March 2014 and February 2015 at which time the registrar verified that appellant was enrolled for a semester ending on May 15, 2015. Appellant, therefore, was aware of the requirement to provide proper documentation to support the receipt of continued compensation at the augmented rate and should have known that she was not entitled to compensation at the augmented rate to continue until November 12, 2017.

The Board, therefore, finds that appellant was at fault in the creation of the overpayment, thereby precluding appellant from waiver of recovery of the overpayment.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that when 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 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 hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$150.00 every 28 days from appellant's continuing compensation payments.

Appellant did not submit a completed overpayment recovery questionnaire or other financial documentation that OWCP requested prior to the 30 days allowed. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁶ When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁷ As

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.441; *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

¹⁶ 20 C.F.R. §10.438.

¹⁷ *E.K.*, *supra* note 15; *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 2018).

appellant did not submit financial information to OWCP as requested, the Board finds that there is no evidence in the record to show that OWCP erred in directing recovery of the \$17,486.46 overpayment at the rate of \$150.00 per compensation period.¹⁸

Appellant argues on appeal that she was entitled to compensation at the augmented rate during the period of the overpayment because her son was enrolled in college. As explained above, however, she did not provide the necessary verification from his college to support continued augmented compensation beyond May 15, 2015.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$17,486.46 for the period May 16, 2015 through November 11, 2017 because she received augmented compensation after her son was no longer an eligible dependent. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, not subject to waiver of recovery of the overpayment, and that OWCP properly required repayment at the rate of \$150.00 every 28 days from appellant's continuing compensation payments.

¹⁸ See *L.I.*, Docket No. 18-1103 (issued March 5, 2019).

¹⁹ *Supra* note 9; see also FECA (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Rate*, Chapter 2.901.12 (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 12, 2019
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board