

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

E.M., Appellant)

and)

U.S. POSTAL SERVICE, SOUTHERN)
MARYLAND GENERAL MAIL FACILITY,)
Capital Heights, MD, Employer)

Docket No. 17-1502
Issued: February 22, 2019

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 26, 2017 appellant filed a timely appeal from a June 5, 2017 merit decision and a May 9, 2017 nonmerit 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 \$32,775.66 for the period September 27, 2009 through February 4, 2017; (2) whether OWCP properly found appellant at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment; (3) whether OWCP properly deducted \$225.00 every 28 days

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant filed a timely request for oral argument before the Board. By order dated November 2, 2017, the Board, after exercising its discretion, denied her request, finding that the case could be adjudicated based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1502 (issued November 2, 2017).

from appellant's continuing compensation; and (4) whether OWCP properly denied appellant's request for a hearing.

FACTUAL HISTORY

On March 21, 1995 appellant, then a 51-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 1994, a coworker, J.B., grabbed her from behind and inappropriately touched her body. That same coworker subsequently approached her after learning that she had reported the alleged sexual harassment. Appellant requested that the employing establishment assign her to a different shift/tour than J.B. because she feared for her safety. She also alleged that, in August 1994, someone slashed her tires in the parking lot. On August 31, 2014 J.B. allegedly kept walking up and down the aisle looking at appellant. Appellant noted that he smelled of alcohol and "appeared to be out of control."

By decision dated June 20, 1995, OWCP accepted appellant's claim for acute post-traumatic stress disorder.

Appellant claimed a recurrence of disability beginning February 22, 2000, which OWCP initially denied. A representative of OWCP's Branch of Hearings and Review set aside the March 20, 2001 decision, and remanded the case for further development. By decision dated February 28, 2002, OWCP accepted appellant's claim for recurrence of disability beginning February 22, 2000. Appellant received wage-loss compensation for temporary total disability retroactive to February 22, 2000, and OWCP placed her on the periodic compensation rolls, effective June 16, 2002. She received augmented (75 percent) wage-loss compensation based on the status of her dependent daughter.³

In a letter dated November 24, 2008, OWCP notified appellant regarding her dependent's eligibility for continuing compensation beyond her 18th birthday. It explained that additional information was needed with regard to whether her daughter continued to be eligible for compensation beyond the 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 explained that a student was defined in 5 U.S.C. § 8101(17) 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 completes the fourth year of education beyond high school or reaches 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 daughter 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

³ In a March 18, 2002 claim for compensation (Form CA-7), appellant identified her then 15-year-old daughter (born September 27, 1986) as her sole dependent.

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.

On December 2, 2008 appellant indicated that her daughter was born on September 27, 1986. She responded “no” with regard to whether her daughter completed four years of education beyond high school and “no” with regard to whether her daughter was married. Appellant responded “yes” with regard to whether her daughter was attending school on a full-time basis and indicated that she had been since August 2004. She denied applying for or receiving any benefits from the Department of Veterans Affairs.

A school official registrar indicated that appellant’s daughter was currently enrolled at Morgan State University for the present year as August 25 to December 22, 2008. He indicated that she would complete her course of study in May 2010 and that she was attending an accredited institution.

Appellant’s daughter turned age of 23 on September 27, 2009.

On January 21, 2010 appellant completed an EN1032 form. In the section related to dependents, the form explained that a dependent included 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.” Appellant responded “yes” with regard to whether she was claiming any dependents. She identified her daughter and filled in that her date of birth was September 27, 1986. Appellant responded “no” with regard to whether she was receiving compensation that she was no longer entitled to receive.

In a February 16, 2011 EN1032 form, appellant indicated that she was no longer entitled to receive compensation at the augmented rate, as her daughter had graduated from college on May 15, 2010.

For several years thereafter, OWCP continued to pay appellant wage-loss compensation at the augmented rate (3/4).⁴ Prior to June 1, 2013, appellant regularly received her 28-day periodic rolls payments *via* check.⁵

Effective February 5, 2017, OWCP adjusted appellant’s 28-day period rolls payments to reflect payment at basic (2/3) compensation rate.

On March 13, 2017 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$32,775.66 for the period September 27, 2009 through February 4, 2017, as she received wage-loss compensation at the augmented 3/4 rate. It found her to be at fault because she was aware that she was receiving compensation at a rate to

⁴ The record also contains an April 12, 2012 benefit statement, which reflects that appellant was being paid at the augmented rate. This benefit statement was returned to OWCP and marked “unable to forward.”

⁵ OWCP payments *via* check are routinely accompanied by a benefit statement identifying, *inter alia*, the date of the check, the period covered by the payment, the applicable pay rate, as well as the compensation rate. Payments disbursed on or after June 1, 2013 were *via* direct deposit.

which she was not entitled. OWCP advised appellant of her options, including that she could request a prerecoupment hearing on the issues of fault and a possible waiver of the overpayment with the Branch of Hearings and Review. It also provided appellant with an overpayment questionnaire (Form OWCP-20). Appellant was given 30 days to respond.

OWCP's overpayment worksheet noted that, from September 27, 2009 through February 4, 2017, she received gross compensation at the augmented rate totaling \$295,900.88 for the period September 27, 2009 through February 4, 2017, and that compensation at the basic rate would total \$263,125.22, which resulted in an overpayment of compensation in the amount of \$32,775.66.

In a memorandum of telephone call dated April 4, 2017, OWCP noted that appellant requested an extension because her mother had passed away. The claims examiner noted that an extension was granted until April 21, 2017.

In an April 25, 2017 decision, OWCP finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$32,775.66, because she no longer had an eligible dependent when her daughter, who had been enrolled in college, turned 23 on September 27, 2009. It found that she was at fault in the creation of the overpayment, because she was aware that she was receiving compensation to which she was not entitled. OWCP also noted that appellant was given an extension of time to submit the requested OWCP-20 form and/or Overpayment Action Request form, through April 21, 2017. However, no additional evidence or arguments was received. OWCP found that the preliminary finding that appellant was at fault was correct because she was aware that she was receiving compensation at a rate to which she was not entitled. It determined that \$425.00 would be deducted from her continuing compensation payments, effective April 30, 2017, to recover the overpayment.

In correspondence dated April 18, 2017, received by OWCP's Branch of Hearings and Review on April 27, 2017, appellant requested a prerecoupment hearing. Her request was postmarked April 24, 2017. Appellant contended that she did not claim a dependent after May 15, 2010, and provided proof that she notified OWCP. She also submitted a completed overpayment recovery questionnaire, which she dated April 18, 2017. Appellant indicated that she had no monthly income. She listed monthly expenses of rent \$1,375.00; food \$350.00, clothing \$40.00, and \$26.00 for utilities for a total of \$1,791.00. No documentation of appellant's expenses was submitted. Appellant provided a notice on a form letter from OWCP dated April 18, 2017, that her address should be written as "10005 Mill Centre #571 not 1000 5!" She indicated that the incorrect address delayed her mail.

By decision dated May 9, 2017, OWCP's hearing representative denied appellant's hearing request, finding that she did not request a hearing on the preliminary overpayment determination and that the final overpayment determination was not subject to the hearing provision found in 5 U.S.C. § 8124(b) of FECA.

In a memorandum of telephone call dated May 31, 2017, OWCP noted that appellant indicated that the amount they were deducting "was causing her hardship."

By decision dated June 5, 2017, OWCP modified the April 25, 2017 decision as a result of a verbal appeal to the district director in a telephone conversation on May 31, 2017, asking that it

consider reducing the amount of the deductions required for recovery of the overpayment. It explained that they had taken action to reduce the required deductions from \$425.00 to \$225.00 from her continuing compensation payments every 28 days. OWCP explained that the remainder of the decision was similar in format as the April 25, 2017 final determination, which it superseded.⁶

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.⁷ 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. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁸

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.⁹ 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.¹⁰

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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$32,775.66. Appellant received compensation at the augmented rate of 75 percent for the period September 27, 2009 through February 4, 2017, despite the fact that she did not have any qualifying dependents under FECA. She no longer had an eligible dependent when her daughter, who had been enrolled in college, turned 23 on September 27, 2009. The record contains evidence which shows that she received \$295,900.88 in compensation for the period September 27, 2009 through February 4, 2017, at the improper augmented rate. OWCP calculated that appellant was only entitled to receive \$263,125.22 at the basic rate of 66 2/3 percent during this period. Therefore, the record establishes that appellant received an overpayment in the amount of \$32,775.66.

⁶ The gross amount of her FECA payment was listed as \$2,902.00 every 28 days.

⁷ 5 U.S.C. § 8102(a).

⁸ See *O.R.*, 59 ECAB 432, 436 (2008). See also 5 U.S.C. §§ 8105(a) and 8110(b).

⁹ 5 U.S.C. § 8110(a).

¹⁰ See *E.G.*, 59 ECAB 599, 603 (2008).

¹¹ See *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹² These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."¹³ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it has determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.433(a) of OWCP's 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)."¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found appellant at fault in the creation of the overpayment, as she accepted a payment that she knew to be incorrect and, therefore, is not entitled to waiver of recovery.

According to the regulations, "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."¹⁵ Appellant signed an EN1032 form on January 21, 2010. She indicated that she was claiming a

¹² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹³ 5 U.S.C. § 8129(b).

¹⁴ 20 C.F.R. § 10.433(a); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹⁵ *Id.*

dependent and identified her daughter. The form clearly explains that a dependent student must be under 23 years of age and a full-time student. The Board notes that appellant's daughter turned 23 on September 27, 2009 and was 24 years old at the time appellant completed the January 21, 2010 EN1032 form. As her daughter was no longer under 23 years of age and a full-time student, appellant's EN1032 form was incorrect. As a result, appellant, "[m]ade an incorrect statement as to a material fact which [she] knew or should have known to be incorrect,"¹⁶ And, "[f]ailed to provide information which [she] knew or should have known to be material."¹⁷ When appellant continued to accept the compensation payments based on augmented rate, as opposed to the basic rate, she accepted payments she knew or should have known were incorrect.¹⁸

The record reflects that she completed an EN1032 form on February 16, 2011. At that time, appellant indicated that she was no longer entitled to receive compensation at the augmented rate, as her daughter had graduated from college on May 15, 2010. While she notified OWCP, appellant's notification was neither timely nor accurate, as her daughter turned 23 on September 27, 2009. Furthermore, her notification shows that she was aware she was no longer entitled to compensation at the augmented rate, yet she continued to accept it. When appellant continued to accept the compensation payments based on augmented rate, as opposed to the basic rate, she accepted payments she knew were incorrect based on her own February 16, 2011 EN1032 form.¹⁹

The finding of fault is not based solely 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 September 27, 2009.²⁰ The Board has held that a claimant is not excused from accepting payments that she knew or should have been expected to know were incorrect, notwithstanding that OWCP was provided with accurate information regarding dependents on the EN1032 forms.²¹ 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 accepted payments that she knew or should have known were incorrect.²²

Therefore, the Board finds appellant at fault as she accepted compensation payments which she knew or should have known she was not entitled to receive and, as such, recovery of the

¹⁶ 20 C.F.R. § 10.433(a)(1).

¹⁷ *Id.* at § 10.433(a)(2).

¹⁸ 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). See also *E.R.*, Docket No. 16-1591 (issued December 2, 2016) (Form EN1032 provided information regarding dependents being under 23 and full-time students and appellant should have known that she could not receive augmented compensation as her daughter was not under 23 years of age and a full-time student).

¹⁹ 20 C.F.R. § 10.433(a)(2).

²⁰ *Id.*

²¹ See, e.g., *K.S.*, Docket No. 15-0940 (issued September 9, 2015); *T.B.*, Docket No. 12-0844 (issued September 19, 2012).

²² *Id.*

overpayment of compensation in the amount of \$32,755.66 may not be waived. The Board will affirm OWCP's decision regarding fault.²³ Because she was at fault in the creation of the overpayment, OWCP properly determined that she was not entitled to waiver of the recovery of the overpayment.²⁴

Appellant maintains on appeal that she was without fault in the creation of the overpayment because she informed OWCP of her daughter's status. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.²⁵

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁶ Section 10.441(a) of the regulations provides:

“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 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 any other relevant factors, so as to minimize any hardship.”²⁷

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. The Board also notes that she did not provide any documentation to support her expenses. OWCP did not abuse its discretion in setting the rate of recovery from \$425.00 to \$225.00 from each of her continuing compensation payments. The Board finds that OWCP properly determined the recovery of the overpayment in this case.²⁸

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.²⁹ Failure to request the prerecoupment hearing within 30 days shall

²³ 20 C.F.R. § 10.441(a).

²⁴ *Id.* at § 10.433(a).

²⁵ *Id.* at § 10.435(a); *D.C.*, Docket No. 17-0559 (issued June 21, 2018); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

²⁶ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁷ 20 C.F.R. § 10.441(a).

²⁸ *See D.S.*, Docket No. 17-1224 (issued August 28, 2017).

²⁹ 20 C.F.R. § 10.432.

constitute a waiver of the right to a hearing.³⁰ The only right to a review of a final overpayment decision is with the Board.³¹ The hearing provisions of section 8124(b) of FECA³² do not apply to final overpayment decisions.³³

ANALYSIS -- ISSUE 4

The March 13, 2017 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. As noted, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing.³⁴ When the final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a request. The only right to appeal is with the Board.³⁵

By letter dated April 18, 2017, appellant requested a prerecoupment hearing. The request was postmarked on April 24, 2017, and received by OWCP on April 27, 2017. Appellant had 30 days from the March 13, 2017 preliminary overpayment determination to request a prerecoupment hearing.³⁶

Additionally, the Board notes that OWCP's Branch of Hearings and Review granted appellant's request for an extension of time until April 21, 2017. However, as appellant's hearing request was not postmarked until April 24, 2017, her hearing request was untimely filed. Once OWCP issued the final overpayment decision on June 5, 2017, her only appeal right was to the Board.³⁷ The Board finds that appellant's request was properly denied as she was not entitled to a hearing with respect to a final overpayment decision.³⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$32,775.66 because she received augmented compensation after her daughter was no longer an eligible dependent. The Board further finds that appellant was at fault in the creation of the overpayment, and therefore not entitled to waiver of recovery of the overpayment. The Board also

³⁰ *Id.*

³¹ *Id.* at § 10.440(b).

³² 5 U.S.C. §§ 8101-8193.

³³ 20 C.F.R. § 10.440(b).

³⁴ *Id.* at § 10.432.

³⁵ *Id.* at § 10.440(b).

³⁶ *Supra* note 7.

³⁷ As noted in the facts, the June 5, 2017 decision superseded the April 25, 2017 decision, in order to accommodate appellant's request for a lower repayment rate to alleviate her hardship.

³⁸ *Id.* at § 10.440(b).

finds that OWCP properly deducted \$225.00 every 28 days from appellant's continuing compensation payments. Additionally, OWCP properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the June 5 and May 9, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 22, 2019
Washington, DC

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

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

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