

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

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B.W., Appellant )  
and ) Docket No. 18-1412  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: February 8, 2019  
Cincinnati, OH, Employer )  
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)

*Appearances:*

Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 13, 2018 appellant, through counsel, filed a timely appeal from a June 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that it would have had jurisdiction over an April 4, 2018 merit decision of OWCP which found that appellant had received an overpayment of compensation in the amount of \$14,896.43, for the period November 1, 2016 to September 17, 2017, as she received a prohibited dual benefit, that she was at fault in the creation of the overpayment, and that the overpayment should be repaid in full. However, counsel has only sought appeal from the June 21, 2018 merit decision relating to an overpayment in the amount of \$1,833.50 due to improper receipt of compensation benefits under the augmented rate following the death of appellant's husband. Thus, the Board will not review the April 4, 2018 OWCP decision. See 20 C.F.R. § 501.3.

## ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,833.50 for the period April 17, 2017 through January 6, 2018; and (2) whether OWCP properly determined that she was at fault in the creation of the \$1,833.50 overpayment, thereby precluding waiver of recovery.

## FACTUAL HISTORY

On October 13, 2003 appellant, then a 55-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained an employment injury due to walking on concrete surfaces and ascending and descending stairs. OWCP accepted her claim for permanent aggravation of bilateral knee osteoarthritis.

Appellant stopped work on October 15, 2003 and returned to limited-duty work without wage loss on April 16, 2004. She again stopped work on September 24, 2010 and OWCP paid her disability compensation on the daily rolls commencing September 29, 2010.

In a December 10, 2010 letter, OWCP advised appellant that she was placed on the periodic rolls commencing November 21, 2010 and that she would automatically receive a compensation check every 28 days for her disability.<sup>4</sup> It advised appellant that, if she had one or more dependents, and the status of any dependent changed, she was to notify OWCP of the name of the dependent whose status changed, the effective date of the change, and the nature of the change in status. If appellant only claimed one dependent, she should not cash any checks received after the change in status of this dependent. Otherwise, an overpayment of compensation might result. OWCP advised appellant to promptly return any checks received under such circumstances.

Appellant returned to limited-duty work with partial wage loss on June 5, 2014 and OWCP paid her partial disability compensation on the daily rolls commencing that date. She stopped work again on July 26, 2015. In an August 18, 2015 letter regarding appellant's receipt of total disability on the periodic rolls commencing July 26, 2015, OWCP provided the same advice regarding changes in dependent status as it had provided in its December 10, 2010 letter.

OWCP periodically required appellant to complete EN1032 forms which contained extensive language advising her what types of employment activities and earnings that she was required to report for each 15-month period prior to the time she signed each form. The forms contained certification clauses which informed appellant of the consequences of not accurately reporting her employment activities and earnings, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits. The forms also contained detailed information about eligible dependents, noting that a claimant who had no eligible dependents was paid compensation at the 66 2/3 percent of the applicable pay rate and that a claimant who had one or more eligible dependents was paid at 75 percent of the applicable pay rate. Appellant was advised that she could claim augmented compensation for a dependent if she had a spouse who

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<sup>4</sup> Appellant did, in fact, begin receiving disability compensation on the periodic rolls commencing November 21, 2010.

lived with her or a spouse who did not live with her if a court had ordered her to pay support for that person.<sup>5</sup>

In an EN1032 form she signed on July 11, 2017, appellant indicated that her husband had passed away on April 16, 2017 and that she could not claim augmented compensation on account of other dependents, such as children.<sup>6</sup>

In an April 4, 2018 notice, OWCP advised appellant that it had made a preliminary determination that she had received an overpayment of compensation in the amount of \$1,833.50 for the period April 17, 2017 through January 6, 2018 because she was not entitled to receive augmented compensation for this period. It noted that her husband had passed away on April 16, 2017 and she did not have an eligible dependent after that date. OWCP also advised appellant of its preliminary determination that she was at fault in the creation of the overpayment because she knew or should have known that she could not accept such augmented compensation. It advised her that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. OWCP also provided information about options for holding hearings and the need to submit financial information.

By decision dated June 21, 2018, OWCP finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$1,833.50 for the period April 17, 2017 through January 6, 2018. It also finalized its determination that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the \$1,833.50 overpayment. In an attached Form EN2223, OWCP provided appellant with a schedule for repaying the \$1,833.50 overpayment.<sup>7</sup>

### **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.<sup>8</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 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.<sup>9</sup>

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<sup>5</sup> The certification portion of each EN1032 form indicated that the person signing the form was making the following declaration, "I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs."

<sup>6</sup> In an EN1032 form with the same instructions, completed by appellant on January 8, 2018 and received by OWCP on January 17, 2018, she again noted that her husband had passed away on April 16, 2017 and that she could not claim augmented compensation on account of other dependents.

<sup>7</sup> With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007). As appellant was not in receipt of continuing compensation at the time of OWCP's determination of a \$1,833.50 overpayment, the Board does not have jurisdiction over the method of recovery of the \$1,833.50 overpayment in this case.

<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> See *O.R.*, 59 ECAB 432, 436 (2008). See also 5 U.S.C. §§ 8105(a) and 8110(b).

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.<sup>10</sup>

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.<sup>11</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$1,833.50 for the period April 17, 2017 through January 6, 2018.

As noted above, a disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.<sup>12</sup> However, appellant received augmented compensation for the period April 17, 2017 through January 6, 2018 despite the fact that she had no eligible dependent and was not entitled to receive augmented compensation after the death of her spouse on April 16, 2017.<sup>13</sup> The record contains documents showing that the difference between augmented and nonaugmented compensation for the period April 17, 2017 through January 6, 2018 was \$1,833.50. Therefore, the Board finds that appellant received a \$1,833.50 overpayment of compensation for the period April 17, 2017 through January 6, 2018.<sup>14</sup>

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

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>15</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."<sup>16</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>17</sup>

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<sup>10</sup> 5 U.S.C. § 8110(a)(2).

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

<sup>12</sup> See *supra* note 9.

<sup>13</sup> See *supra* note 10.

<sup>14</sup> See *supra* note 11.

<sup>15</sup> 5 U.S.C. § 8129(a).

<sup>16</sup> 5 U.S.C. § 8129(b).

<sup>17</sup> L.J., 59 ECAB 264 (2007).

In determining whether an individual is not “without fault” or alternatively “at fault” in the creation of an overpayment, section 10.433(a) of OWCP’s regulations provides in relevant part:

“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; 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....”<sup>18</sup>

Section 10.433(b) of OWCP’s regulations provides:

“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>19</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the \$1,833.50 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

In forms dated December 10, 2010 and August 18, 2015, OWCP advised appellant that, if she had one or more dependents, and the status of any dependent changed, she was to notify OWCP of such a change. It also informed appellant that, if she only claimed one dependent, she should not cash any checks received after the change in status of this dependent in order to avoid an overpayment of compensation. OWCP advised appellant to promptly return any checks received under such circumstances. Moreover, in several EN1032 forms, appellant had been advised that a claimant who had no eligible dependents was paid compensation at the 66 2/3 percent of the applicable pay rate and that a claimant who had one or more eligible dependents was paid at 75 percent of the applicable pay rate. Appellant was advised that she could claim augmented compensation for a dependent if she had a spouse who lived with her or a spouse who did not live with her if a court had ordered her to pay support for that person.

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 her husband passed away on April 16, 2017, she should have received compensation at the 66 2/3 percent basic rate. Given the above-described documents explaining the conditions under which she could receive augmented compensation, appellant knew or reasonably should have

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<sup>18</sup> 20 C.F.R. § 10.433(a).

<sup>19</sup> *Id.* at 10.433(b).

known that the 75 percent augment rate of compensation she received for the period April 17, 2017 through January 6, 2018 was incorrect.

The Board thus finds that appellant is at fault in the creation of the \$1,833.50 overpayment and therefore not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,833.50 for the period April 17, 2017 through January 6, 2018, and that OWCP properly determined that she was at fault in the creation of the \$1,833.50 overpayment, thereby precluding waiver of recovery.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2019  
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

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<sup>20</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).