

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

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**R.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Capitol Heights, MD, Employer**

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**Docket No. 18-1251  
Issued: November 26, 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 6, 2018 appellant filed a timely appeal from a December 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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> Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated April 19, 2019, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-1251 (issued April 19, 2019).

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

<sup>3</sup> The Board notes that following the December 8, 2017 decision, OWCP received additional evidence. 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.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017 because he improperly received wage-loss compensation at an augmented compensation rate; (2) whether it 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 withholding \$200.00 every 28 days from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On July 19, 2000 appellant, then a 46-year-old Express Mail driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his head and neck on September 6, 1998 when attempting to avoid a motor vehicle accident while driving in the performance of duty. OWCP initially accepted the claim for cervical strain and later expanded the acceptance of the claim to include aggravation of cervical myofasciitis.<sup>4</sup> Appellant returned to part-time work on January 6, 1998. In 2001, he underwent a regimen of Botulinum treatments and has not returned to work. OWCP placed him on the periodic compensation rolls effective December 2, 2001.

In a letter dated September 17, 2002, OWCP requested that appellant complete an EN1032 form, which included questions regarding such matters as his employment activities, earnings and dependency in order to verify that the appropriate compensations were made. It specifically indicated that compensation at the augmented rate of 75 percent of the applicable pay rate may be paid for "an unmarried child between 18 and 23 who is a full-time student even if that person does not live with you, as long as you make regular direct payments for his or her support." OWCP also advised that if he had no eligible dependents he would be paid at 66 2/3 percent of the applicable pay rate. Appellant completed this form on September 18, 2002 and advised OWCP that he had a dependent daughter who was born on October 7, 1982 and a dependent son born on July 5, 1983.

Appellant continued to submit completed and signed EN1032 forms through October 10, 2008, indicating that he had at least one eligible dependent, and as such, was entitled to receive wage-loss compensation at the augmented rate.

Beginning October 7, 2009, appellant submitted annual EN1032 forms indicating that he no longer had any eligible dependents and, therefore, was no longer entitled to receive compensation at the augmented rate.

In a January 17, 2017 development letter, OWCP advised that it had received appellant's EN1032 form dated September 20, 2016 where he indicated that he had no dependents. It explained that he had been paid at the augmented rate of 75 percent rather than at the basic

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<sup>4</sup> Appellant had a previously accepted claim for a December 20, 1997 cervical sprain and multiple injuries to his head, right shoulder, cervical spine, lumbosacral spine, and right leg on August 25, 1992. OWCP assigned File No. xxxxxx568. It has administratively combined File Nos. xxxxxx568 and xxxxxx087 with the latter serving as the master file.

compensation rate of 66 2/3 percent. OWCP enclosed an EN1032 form for completion and afforded appellant 30 days to submit additional evidence and respond to its inquiries.

Appellant subsequently submitted Part A of a Student Dependency form dated January 26, 2017 indicating that he was not claiming any dependents.

In a February 10, 2017 development letter, OWCP advised appellant that he had not completed Part B of the Student Dependency form and afforded him 30 days to complete it.

On February 27, 2017 appellant completed Part B of the Student Dependency form indicating that his daughter had attended Bowie State University in Bowie, Maryland from June 2, 2003 to May 23, 2007.

By letter dated March 21, 2017, OWCP advised appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017 because he received compensation at the augmented three-fourths rate instead of the two-thirds rate when he had no dependents. Its payroll records established that it continued to pay him compensation at the augmented rate from May 24, 2007 to January 7, 2017, which amounted to a total of \$391,186.75. Appellant, however, was only entitled to receive \$347,553.54 in compensation at the basic two-thirds rate, resulting in a \$43,633.21 overpayment.<sup>5</sup> OWCP found that he was with fault in the creation of the overpayment because he knew or reasonably should have known that there was no entitlement to compensation at the augmented rate after his daughter graduated from college on May 23, 2007. It further found that appellant continued to accept compensation payments at the augmented rate despite such knowledge.

The record contains appellant's pay rate history and a memorandum regarding the dates and calculations of the overpayment of compensation.

On April 10, 2017 appellant requested a prerecoumpment hearing with a representative of OWCP's Branch of Hearings and Review on the issues of fault and a possible waiver of this overpayment.

A prerecoumpment hearing was held before an OWCP hearing representative on August 30, 2017. The hearing representative advised appellant that it would review his financial records prior to issuing its final overpayment decision.

In an overpayment recovery questionnaire (Form OWCP-20) dated September 20, 2017, appellant reported a total monthly income of \$2,592.12. He indicated that he did not support, either fully or in part, anyone other than himself. Appellant reported approximately \$2,210.00 in monthly household expenses (\$300.00 for rent, \$300.00 for food, \$100.00 for clothing, \$185.00 for utilities, and \$400.00 other miscellaneous expenses) and \$925.00 in monthly credit card debts.

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<sup>5</sup> OWCP indicated that, during the period May 24, 2007 through January 7, 2017, it paid appellant at a weekly pay of \$763.92 at three-fourths of the pay rate, effective September 6, 1998, totaling \$391,186.75. However, it indicated that for the same period it should have paid him at two-thirds of his weekly pay \$763.92 for a total of \$347,553.54. OWCP concluded that the difference between \$391,186.75 and \$347,553.53 = \$43,633.21, the amount of the overpayment.

He reported the following assets: \$0.00 cash on hand, \$250.00 in a checking account, \$36.15 in a savings account, \$6,290.15 in stocks and bonds, and a \$53.32 value of other personal property/funds totaling \$6,629.62. Appellant submitted a number of financial documents in support of his claim.

By decision dated December 8, 2017, OWCP's hearing representative finalized OWCP's preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017 because he had improperly received augmented compensation without having any dependents. It adjusted appellant's compensation payments to the basic compensation rate and found that he was overpaid \$43,633.21 for the period May 24, 2007 through January 7, 2017. OWCP found him at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery. It further found that appellant's monthly income exceeded his monthly expenses by \$382.12 per month (\$2,592.12 monthly income - \$2,210.00 in monthly expenses). OWCP required recovery of the overpayment by withholding \$200.00 every 28 days from his continuing 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.<sup>6</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 his monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he has one or more dependents.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</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>10</sup>

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *O.R.*, 59 ECAB 432, 436 (2008); *id.* at §§ 8105(a) and 8110(b).

<sup>8</sup> *Id.* at § 8110(a).

<sup>9</sup> *E.G.*, 59 ECAB 599, 603 n.10 (2008).

<sup>10</sup> *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017 because he received wage-loss compensation at the augmented rate even though he did not have an eligible dependent under FECA.

The evidence of record reflects that appellant continued to receive compensation at the augmented rate from May 24, 2007 through January 7, 2017, despite the fact that his daughter, who was initially claimed as a dependent, had graduated from college on May 23, 2007 and, therefore, was no longer a qualifying dependent under FECA.

In a January 17, 2017 development letter, OWCP notified appellant that it received his Form EN1032 dated September 20, 2016 where he reported that he had no qualifying dependents, although it had been paying him at the augmented rate. It included an EN1032 form for his completion and requested that he provide a statement and certification of school enrollment for any dependents using the attached forms. On February 27, 2017 appellant completed a Student Dependency form indicating that his daughter had attended Bowie State University in Bowie, Maryland from June 2, 2003 through May 23, 2007.

Payroll records also confirm that OWCP continued to pay appellant compensation at the augmented rate from May 24, 2007 to January 7, 2017, which amounted to a total of \$391,186.75. Appellant, however, was only entitled to receive \$347,553.54 in compensation at the basic rate, resulting in an overpayment in the amount of \$43,633.21. Accordingly, the Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017.

### **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.”<sup>11</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>12</sup> 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.<sup>13</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide that whether or not OWCP determines that an individual was at fault with

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<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>13</sup> 20 C.F.R. § 10.433(a).

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>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly found appellant at fault in the creation of the overpayment and therefore not entitled to waiver of recovery.

OWCP found that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known to be incorrect as he was aware that he was not entitled to augmented compensation when he no longer had an eligible dependent.

Appellant acknowledges that his daughter graduated from college on May 23, 2007 and thereafter was no longer a qualified dependent and as such, he was no longer entitled to augmented compensation at the three-fourths rate beginning May 24, 2007. Moreover, beginning October 7, 2009, he reported on annually submitted EN1032 forms that he did not have an eligible dependent, further demonstrating that he was aware that he was no longer entitled to the augmented compensation rate.

On appeal appellant contends that he was not at fault in the creation of the overpayment of compensation because he had completed the required report advising OWCP that his dependents had reached the age of maturity. However, even if the overpayment resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payment which he knew or should have known he was not entitled to.<sup>15</sup>

Accordingly, the Board finds that OWCP properly found appellant at fault in the creation of the overpayment, as he reasonably knew or should have known that the payments he received from OWCP for the period May 24, 2007 through January 7, 2017, which contained an overpayment in the amount of \$43,633.21, were in error.

As appellant was at fault under the third standard outlined above,<sup>16</sup> recovery of the overpayment of compensation in the amount of \$43,633.21 may not be waived.

### **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.<sup>17</sup> When an overpayment of compensation has been made to an individual who is entitled to further payments, the individual shall refund to

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<sup>14</sup> *Id.* at § 10.433(b); *see also D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>15</sup> *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>16</sup> *See supra* note 13.

<sup>17</sup> 5 U.S.C. § 8129(a).

OWCP the amount of the overpayment as soon as the error is discovered or his 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 any hardship.<sup>18</sup>

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.<sup>19</sup>

The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by withholding \$200.00 every 28 days from appellant's continuing compensation payments.

In an overpayment recovery questionnaire (Form OWCP-20) dated September 20, 2017, appellant reported a total monthly income of \$2,592.12. He indicated that he did not support, either fully or in part, anyone other than himself. Appellant also reported approximately \$2,210.00 in monthly household expenses (\$300.00 for rent, \$300.00 for food, \$100.00 for clothing, \$185.00 for utilities, and \$400.00 other miscellaneous expenses) and \$925.00 in monthly credit card debts. Moreover, he reported a total of \$6,629.62 in additional assets. Thus, the Board finds that appellant did not need substantially all of his income to cover ordinary and necessary living expenses as his discretionary income exceeded \$50.00 a month. Appellant's total monthly income was \$2,592.12, with \$2,210.00 in allowable monthly ordinary and necessary living expenses, leaving \$382.12 in discretionary income per month,<sup>21</sup> well above the \$50.00 amount used to determine this criterion.<sup>22</sup>

OWCP's procedures provide that, if a claimant is being paid compensation or is due accrued benefits, the debt should be recovered from such benefits as quickly as possible.<sup>23</sup> Accordingly, the Board finds that OWCP reasonably concluded that a repayment schedule of

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<sup>18</sup> 20 C.F.R. § 10.441.

<sup>19</sup> *Id.* at § 10.438(a).

<sup>20</sup> See *J.B. (J.B.)*, Docket No. 16-0707 (issued November 1, 2016); *Howard R. Nahikian*, 53 ECAB 406 (2002).

<sup>21</sup> \$2,592.12 - \$2,210.00 = \$382.12.

<sup>22</sup> See *N.S.*, Docket No. 14-2081 (issued February 12, 2015); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009) provides that "[a]n individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50[.00]. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50[.00])."

<sup>23</sup> See *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

\$200.00 every 28 days would minimize any resulting hardship while effecting recovery of the overpayment.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$43,633.21 for the period May 24, 2007 through January 7, 2017 because he improperly received augmented compensation. The Board also finds that OWCP properly found him at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by withholding \$200.00 every 28 days from appellant's continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 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