

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

V.R., Appellant	)	
	)	
and	)	Docket No. 20-0571
	)	Issued: July 6, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Los Angeles, CA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On January 16, 2020 appellant filed a timely appeal from a January 7, 2020 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 to consider the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant timely requested an oral argument. However, in a letter dated January 21, 2010, he noted that he was withdrawing the request for an oral argument.

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

<sup>3</sup> The Board notes that, following the January 7, 2020 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 appellant received an overpayment of compensation in the amount of \$1,493.14 for the period July 1 through October 12, 2019, for which he was not at fault, because he was paid at an incorrect compensation rate; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$50.00 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On March 17, 2010 appellant, then a 56-year-old modified letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed right carpal tunnel syndrome caused by factors of his federal employment. He realized that his condition was caused or aggravated by his employment on August 3, 2001. The employing establishment indicated that appellant was last exposed to conditions alleged to have caused the disease or illness on March 24, 2010. On June 22, 2010 OWCP accepted the claim for right carpal tunnel syndrome.

OWCP paid appellant wage-loss compensation on the supplemental rolls effective December 4, 2010, and the periodic rolls effective July 3, 2011, at the augmented rate of 75 percent.

On July 11, 2019 appellant wrote to OWCP and advised that his son, D.R., had graduated from high school in June, and was 18 years old. He related that his son had not decided whether or not to attend college.

By letter dated October 10, 2019, OWCP advised appellant that compensation was payable for an unmarried child who had reached the age of 18 and was a full-time student who had not completed four years of education beyond high school. It provided him a form to complete if he was continuing to claim augmented compensation for D.R. as a student.

In a letter to OWCP dated November 15, 2019, appellant related that his son, D.R., had turned 18 on April 3, 2019 and had graduated from high school on June 7, 2019. He acknowledged that he should be receiving wage-loss compensation at the 2/3 rate, and no longer at the 3/4 rate.

In a letter dated November 21, 2019, appellant informed OWCP that his son had graduated from high school on June 7, 2019. He noted that he was aware that an overpayment had occurred from June 7 through October 1, 2019, and he requested a repayment plan.

In a December 4, 2019 memorandum, OWCP noted that appellant's son turned 18 on April 3, 2019, and that appellant informed OWCP that his son had graduated from high school on June 7, 2019. It further noted that he received compensation from July 1 to October 12, 2019, at the 75 percent rate in the amount of \$12,920.37, and he should have been paid at the 66 2/3 rate in the amount of \$11,427.23. OWCP subtracted this amount and determined a net difference of \$1,493.14.

On December 5, 2019 OWCP issued a preliminary determination that an overpayment in the amount of \$1,493.14 had been created for the period July 1 through October 12, 2019, because

appellant did not have a dependent within the meaning of FECA during this period which would qualify him to receive compensation at the augmented rate of 75 percent. It provided a calculation of the overpayment and found appellant at fault in the creation of the overpayment because he accepted a payment that he knew, or reasonably should have known, was incorrect. OWCP forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. Additionally, OWCP informed him that, within 30 days, he could request a telephonic conference, a final decision based on the written evidence, or a precoupment hearing. It requested that he complete the overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP afforded appellant 30 days to respond.

On December 17, 2019 appellant requested that OWCP make a decision based on the written record regarding fault and possible waiver of the overpayment.

Appellant completed a Form OWCP-20, in which he indicated that he had monthly income of \$4,327.00, comprised of \$2,018.60 in social security benefits and \$2,308.40 in OWCP compensation and listed expenses. He indicated that he had monthly expenses of \$4,444.68, including \$3,386.65 for mortgage and property tax, \$400.00 per month for food, \$250.00 for clothing, \$215.00 for utilities, \$20.00 for trash, \$195.00 for insurance, and he summarized other miscellaneous monthly debts. With regard to assets, appellant advised that he had \$40.00 cash on hand, between \$300.00 to \$509.11 in a checking account, and \$1,944.00 in a savings account. He also indicated that he had a retirement annuity, but he did not disclose its value.

By decision dated January 7, 2020, OWCP overturned the finding of fault because appellant promptly notified it of the change of his dependent's status upon his son's graduation from high school. However, it denied waiver of recovery of the overpayment because the evidence of record was insufficient for waiver. OWCP noted that the value of the retirement annuity was not disclosed and that the amount spent on food and clothing was higher than average for an individual. It found that appellant failed to establish that recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. Because appellant did not disclose the value of his retirement annuity, he failed to establish that his assets were less than the allowable resource base of \$6,200.00 for an individual with no dependents. OWCP determined that it would recover the overpayment by deducting \$50.00 every 28 days from his continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>4</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</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 or her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> 5 U.S.C. § 8102(a).

dependents.<sup>6</sup> Under FECA a dependent includes an unmarried child, while living with the employee or receiving regular contributions from the employee toward their support, who is under 18 years of age.<sup>7</sup> FECA further provides that compensation payable for a child that would otherwise end at the time he or she reaches 18 years of age shall continue if he or she is a student as defined therein.<sup>8</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>9</sup>

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

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$1,493.14 for the period July 1 to October 12, 2019, 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's son turned 18 on April 3, 2019, and remained enrolled in high school until June 7, 2019. As such, the record supports that OWCP erroneously paid appellant compensation based on the augmented rate of 75 percent for the period July 1 to October 12, 2019. Appellant was paid \$12,920.37 in FECA compensation for that period at the augmented rate of 75 percent, but was entitled to \$11,427.23 at the 66 2/3 basic rate. OWCP properly determined that the difference yielded an overpayment of compensation in the amount of \$1,493.14. The Board thus finds that OWCP properly determined the fact and amount of the overpayment in this case.<sup>10</sup>

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

Section 8129 of FECA provides that an overpayment of 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."<sup>11</sup> Section 10.438 of OWCP regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>12</sup>

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<sup>6</sup> See 5 U.S.C. § 8110(b).

<sup>7</sup> *Id.* at § 8110(a)(3).

<sup>8</sup> *Id.* at § 8101.

<sup>9</sup> See *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

<sup>10</sup> See *O.B.*, Docket 19-0034 (issued April 22, 2019); *W.A.*, Docket No. 18-0070 (issued May 14, 2018); *D.S.*, Docket No. 17-1224 (issued August 28, 2017).

<sup>11</sup> 5 U.S.C. § 8129.

<sup>12</sup> 20 C.F.R. § 10.438.

To establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current, ordinary, and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP procedures.<sup>13</sup>

An 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.<sup>14</sup> Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.<sup>15</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>16</sup> Non-liquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.<sup>17</sup>

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

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscious.<sup>18</sup>

Appellant provided an overpayment recovery questionnaire indicating that he had an income of \$4,327.00 per month, monthly expenses of \$4,444.68, and assets of \$40.00 cash on hand, between \$300.00 and \$500.00 in checking and \$1,944.40 in savings. However, OWCP noted that appellant's listed monthly food and clothing expenses of \$400.00 for food and \$250.00 for clothing, were higher than average for an individual. It explained that average monthly expense for food would be expected to be approximately \$350.00, and approximately \$60.00 for clothing. Furthermore, OWCP related that it could not determine whether appellant had assets above the \$6,200.00 asset base as appellant did not report his non-liquid retirement account asset.<sup>19</sup> Thus, it properly determined that the evidence of record did not demonstrate that repayment of the

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<sup>13</sup> 20 C.F.R. § 10.436.

<sup>14</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>15</sup> See *supra* note 14 at Chapter 6.400.4.a(2) (September 2018).

<sup>16</sup> *Id.* at Chapter 6.400.4.b(3).

<sup>17</sup> *Id.* at Chapter 6.400.4b(3)(a), (b).

<sup>18</sup> See *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.S.*, 59 ECAB 350 (2008).

<sup>19</sup> *Id.*

overpayment would be against equity and good conscience. Moreover, appellant submitted no evidence or argument that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Thus, the Board finds properly denied waiver of recovery of the overpayment.<sup>20</sup>

### **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.<sup>21</sup> 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.<sup>22</sup>

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

The Board finds that OWCP properly determined that the overpayment would be recovered by deduction of \$50.00 from appellant's continuing compensation payments every 28 days.

OWCP took into account the amount of compensation and the financial circumstances of appellant to minimize hardship, as well as the factors set forth in section 10.441 of its regulations. It found that this method of recovery would minimize any resulting hardship. The Board finds that OWCP properly required recovery of the overpayment by deducting \$50.00 every 28 days from appellant's continuing compensation.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,493.14 for the period July 1 through October 12, 2019, for which he was not at fault, because he was paid at the incorrect compensation rate. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and required recovery of the overpayment by deducting \$50.00 from appellant's continuing compensation payments every 28 days.

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<sup>20</sup> *Id.*

<sup>21</sup> 20 C.F.R. § 10.441.

<sup>22</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board