

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

S.A., Appellant)	
)	
and)	Docket No. 20-0279
)	Issued: June 8, 2021
U.S. POSTAL SERVICE, ST. LOUIS)	
NETWORK DISTRIBUTION CENTER,)	
Hazelwood, MO, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 20, 2019 appellant, through counsel, filed a timely appeal from an October 21, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 21, 2019 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 \$11,239.79 for which she was not at fault, for the period May 12, 2017 through April 26, 2020 because she improperly received wage-loss compensation at an augmented compensation rate; and (2) whether it properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 3, 2011 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained left hip and knee conditions when her foot caught on the grate of the loader and she fell forward while in the performance of duty. OWCP accepted the claim for left lower leg joint effusion, left lateral collateral ligament knee sprain, and left lateral meniscal knee tear. Appellant underwent OWCP-authorized left knee arthroscopic surgery, which was performed on October 16, 2012.⁵ OWCP expanded acceptance of appellant's claim to include: secondary left leg to left ankle lymphedema; post-traumatic edema-swelling of the left lower extremity (including left ankle) and aggravation of right knee arthritis; and right lower leg shin laceration without foreign body by decisions dated June 20, 2016, July 17, 2017, and January 17, 2018, respectively. The record reflects that OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls from February 13, 2012 to November 20, 2017, and by a schedule award as of November 21, 2017.

The record contains a claim for a schedule award (Form CA-7) dated April 24, 2013 in which appellant listed her two daughters as dependents with birth dates of March 16, 1990 and March 27, 1995.

In a February 26, 2015 letter, OWCP advised appellant that it required additional information to determine continuing eligibility for compensation for her claimed dependent daughter beyond her 18th birthday. It asked appellant to provide a statement and certification of school enrollment using attached forms to verify her daughter's student status. OWCP afforded appellant 30 days to submit additional evidence. Appellant did not respond to OWCP's request.

Appellant filed a Form CA-7 claim for wage-loss compensation on May 10, 2017. She did not list any dependents on this claim form. On October 10, 2017 appellant filed a claim for a schedule award (Form CA-7). She did not list any dependents on the claim form.

⁴ Docket No. 15-1268 (issued December 10, 2015).

⁵ OWCP assigned this claim OWCP File No. xxxxxx499. On October 25, 2013 it administratively combined OWCP File No. xxxxxx499 with OWCP File No. xxxxxx614, with the latter serving as the master file. Under OWCP File No. xxxxxx614, OWCP accepted that appellant sustained a left knee strain as the result of a February 2, 2003 traumatic injury.

By decision dated March 21, 2018, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right lower extremity (knee) and an additional 18 percent permanent impairment of the left lower extremity (knee), resulting in a total 21 percent left lower extremity permanent impairment. The award covered a period of 362.88 weeks for the left lower extremity and 524.16 weeks for the right lower extremity from November 21, 2017 to April 26, 2020. This decision noted that the schedule award would be paid at the 66 2/3 compensation rate for employees without an eligible dependent.

On May 11, 2018 OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls for the period May 12 through November 20, 2017. Appellant's weekly pay rate of \$1,070.08 was multiplied by a compensation rate of 75 percent for employees with an eligible dependent, which was multiplied by 29.95 hours of time lost,⁶ yielding a net payment of \$626.52.

The record reflects that appellant received schedule award payments from November 21, 2017 through April 26, 2020. These payments were made at the 75 percent rate for employees with an eligible dependent.

In a lump-sum schedule award calculation form dated February 5, 2019, OWCP utilized the four-week compensation schedule award amount appellant was receiving at the 75 percent rate, to compute the remaining schedule award due appellant.

On February 11, 2019 appellant signed an agreement to accept lump-sum settlement of schedule award. She agreed to accept the sum of \$46,784.96 in payment of compensation for the commuted value of further installments of compensation for the remainder of the schedule award payable from March 31, 2019 through April 26, 2020.

In a September 6, 2019 preliminary overpayment determination, OWCP informed appellant of its preliminary determination that an overpayment of compensation in the amount of \$11,239.79 had been created for the period May 12, 2017 through April 26, 2020 because she had been paid compensation at the augmented rate of 3/4 when she should have been paid compensation at the 2/3 rate of her weekly pay. It found that she had been paid intermittent wage-loss compensation of \$626.52 for the period May 12 through November 20, 2017 when she should have been paid \$556.88, resulting in an overpayment of \$69.64. OWCP found that appellant had been paid for a schedule award in the amount of \$60,281.47 for the period November 21, 2017 through March 30, 2019 when she should have been paid \$53,569.64, resulting in an overpayment of \$6,711.83. Lastly, it found that she received a lump-sum payment of \$46,784.96 for a schedule award payable for the period March 31, 2019 through April 26, 2020 when she should have been paid \$42,326.64, resulting in an overpayment of \$4,458.32. OWCP then added these amounts resulting in a total overpayment of \$11,239.79.

⁶ This computation was based on intermittent wage loss for 1.84 hours on May 12, 2017, 1.37 hours on May 15, 2017, 1.90 hours on June 2, 2017, 1.37 hours on August 14, 2017, 2.00 hours on September 7, 2017, 1.97 hours on September 18, 2017, 1.91 hours on September 25, 2017, 1.96 hours on October 2, 2017, 3.74 hours on October 5, 2017, 3.41 hours on October 19, 2017, 1.71 hours on October 30, 2017, 1.94 hours on December 4, 2017, 1.77 hours on December 11, 2017, and 3.06 hours on January 4, 2018. OWCP changed the end date from January 4, 2018 to November 20, 2017 because the system would not allow payment that went into the schedule award period.

OWCP further found that appellant was without fault in the creation of the overpayment. It advised appellant that, if she disagreed with the fact or amount of the overpayment, she had the right to submit new evidence and to request a precoupment hearing before a representative of OWCP's Branch of Hearings and Review. OWCP also requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20), and attach supporting documents including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records, which supported the income and expenses listed. It advised that, under 20 C.F.R. § 10.438, failure to submit the requested information within 30 days would result in denial of waiver of recovery of the overpayment.

On September 19, 2019 appellant completed Form OWCP-20, contesting fact and amount of the overpayment and requesting waiver. She asserted that her youngest daughter had been her dependent and in school full time. Appellant submitted a college transcript for the year 2014. On the Form OWCP-20 she reported \$2,600.00 in monthly income, \$2,243.00 in monthly expenses and \$3,200.00 in assets. Appellant did not submit any supporting financial documentation.

By decision dated October 21, 2019, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$11,239.79 for the period May 12, 2017 through April 26, 2020⁷ because she had improperly received augmented compensation without having eligible dependents. It found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP found the financial information appellant provided established that she was able to repay the overpayment. It instructed appellant to submit monthly payments of \$300.00.

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.⁸ 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 she has one or more dependents.⁹

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.¹⁰ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who

⁷ The Board notes a typographical error in the decision where OWCP notes the period of the overpayment as "May 12, 2017 through April 6, 2020." In the body of the decision, OWCP correctly notes the period as May 12, 2017 through April 26, 2020 in calculating the overpayment.

⁸ 5 U.S.C. § 8102(a).

⁹ *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432, 436 (2008); *id.* at §§ 8105(a) and 8110(b).

¹⁰ *Id.* at § 8110(a).

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.¹¹

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.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,239.79 for the period May 12, 2017 through April 26, 2020 because she improperly received wage-loss compensation at an augmented compensation rate to which she was not entitled.

While appellant has alleged that her youngest daughter, who was over the age of 18 at the time, continued to qualify as a dependent as a full-time student, appellant only submitted a 2014 college transcript, which preceded the period of the overpayment in question. The Board, therefore, finds that OWCP properly determined that appellant was not entitled to the augmented compensation rate as of May 12, 2017.

Compensation records confirm that OWCP paid appellant intermittent wage-loss compensation at the augmented rate from May 12 through November 20, 2017, which amounted to a total of \$626.52. Appellant, however, was only entitled to receive \$556.88 in compensation at the basic rate, resulting in an overpayment in the amount of \$69.64. For the period November 21, 2017 through March 30, 2019, OWCP paid appellant for a schedule award in the amount of \$60,281.45. Appellant, however, was only entitled to receive \$53,569.64 for her schedule award compensation at the basic rate resulting in an overpayment of \$6,711.83. Lastly, OWCP found appellant received a lump-sum payment of \$46,784.96 for her schedule award payable for March 31, 2019 through April 26, 2020 when she was only entitled to receive \$42,326.64 resulting in an overpayment of \$4,458.32. OWCP then combined these amount to find a total overpayment of \$11,239.79. Accordingly, the Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$11,239.79 for the period May 12, 2017 through April 26, 2020.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³

Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as

¹¹ *R.G., supra* note 9; *E.G.*, 59 ECAB 599 (2008).

¹² *R.G., supra* note 9; *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹³ *Supra* note 2 at § 8129.

specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁴

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹⁵ Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁶ For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁷ 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 \$50.00.¹⁸

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 conscience.¹⁹ Appellant, however, had the responsibility to provide supporting financial information to OWCP,²⁰ but she did not do so.

Consequently, as appellant did not submit the supporting financial information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.²¹

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Id.* at §§ 10.434-10.437.

¹⁶ *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that 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. Chapter 6.400.4a(2).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 8129.

²⁰ 20 C.F.R. § 10.438.

²¹ *Id.* at § 10.438; *see also M.B.*, Docket No. 19-1108 (issued October 19, 2020).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,239.79 for the period May 12, 2017 through April 26, 2020 because she improperly received wage-loss compensation at an augmented compensation rate to which she was not entitled. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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