

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

J.B., Appellant

and

**DEPARTMENT OF THE ARMY, COMBAT
DEVELOPMENTS EXPERIMENTATION
CENTER, Fort Ord, CA, Employer**

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**Docket No. 22-1027
Issued: November 16, 2023**

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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 27, 2022 appellant filed a timely appeal from a March 24, 2022 merit decision and a March 23, 2022 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$169,429.15 for the period November 20, 1998 through April 25, 2020 because he improperly received wage-loss compensation at the augmented rate of 75 percent (or 3/4) to which he was not entitled; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting

¹ 5 U.S.C. § 8101 *et seq.*

\$1,505.61 every 28 days from appellant's continuing compensation payments; and (4) whether OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.² 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 5, 1983 appellant, then a 50-year-old operations research analyst, filed an occupational disease claim (Form CA-2), alleging that he had developed an adjustment disorder caused by factors of his federal employment. He stopped work on May 18, 1983. By decision dated October 2, 1991, OWCP accepted appellant's claim for permanent aggravation of major depression and prolonged depressive reaction. It paid him wage-loss compensation on the periodic rolls as of April 1, 1992.³

In EN-1032 forms dated April 23, 1999, April 11, 2001, May 13, 2002, February 24, 2003, July 1, 2004, March 24, 2005, March 13, 2006, March 12, 2007, March 20, 2008, March 18, 2009, March 12, 2010, March 15, 2011, March 14, 2013, March 13, 2014, March 12, 2015, March 12, 2016, February 16, 2017, March 11, 2018, March 12, 2019, March 25, 2020, appellant indicated that he was married, but his spouse did not live with him, and that he made regular payments for her support. In an EN-1032 form dated March 15, 2012, he indicated that he was married, but his spouse did not live with him.

In a letter dated April 7, 2020, OWCP provided appellant's purported spouse, E.B., with a list of questions regarding her relationship to appellant and whether he regularly provided support to her.

On May 11, 2020 E.B., advised that she and appellant had been divorced since the late 1990's. She was unaware that appellant had been reporting that they were still married.

OWCP subsequently requested that appellant provide a copy of his divorce certificate within 30 days.

In an April 27, 2020 response, E.B. advised that appellant had paid for her medical health insurance, dental insurance, vision insurance, and other medical expenses not covered by insurance since the late 1980's or sometime in the 1990's. She noted that he also paid for other personal expenses.

In a May 18, 2020 response, appellant advised that he had no knowledge of the dissolution of his marriage and that he provided support for his wife including financial support for a separate dwelling when they were apart.

² Docket No. 90-558 (issued November 13, 1990).

³ The record indicates that appellant had received Office of Personnel Management (OPM) retirement benefits prior to April 1, 1992.

In a letter dated June 17, 2020, OWCP informed appellant that it was adjusting his compensation benefits to reflect that he was not entitled to the augmented rate since he was no longer married.

On July 29, 2020 OWCP received a Notice of Entry of Judgment of Dissolution of Marriage from the Superior Court of California, County of Monterey, filed on November 20, 1998. The Court did not require spousal support beyond May 1998.

In a manual adjustment form dated September 1, 2020, OWCP found that appellant had received net compensation during the period November 20, 1998 through April 25, 2020 in the amount of \$1,390,519.32 at the augmented rate, but should have received \$1,221,090.17 at the basic rate, thereby creating an overpayment in the amount of \$169,429.15. The record also contains other OWCP documentation of appellant's receipt of FECA compensation at the augmented rate from November 20, 1998 through April 25, 2020 including a payment history inquiry report.

On September 10, 2020 OWCP advised appellant that it had made a preliminary overpayment determination that he received an overpayment of compensation in the amount of \$169,429.15 for the period November 20, 1998 through April 25, 2020 because he received compensation at the augmented rate, when he had no dependents. It provided detailed findings as to how the overpayment was calculated. OWCP further found appellant did not have any dependent children at the time of the divorce. It found that he was at fault in the creation of the overpayment because he knew or reasonably should have known that there was no entitlement at the augmented rate after the dissolution of his marriage. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including income tax returns, bank account statements, bills, and cancelled checks, pay slips, and any other records to support his reported income and expenses. Additionally, it provided an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a prerecoument hearing.

On October 3, 2020 appellant requested OWCP render a decision based upon review of the written evidence regarding fault and possible waiver of recovery of the overpayment. He contested the finding of fault and requested waiver. In an attached Form OWCP-20, appellant advised that his monthly income was \$280.00 in Social Security benefits. He advised that he supported E.B., whom he identified as his wife, either fully or in part. Appellant further advised that his monthly expenses included: \$1,896.00 for mortgage; \$1,350.00 for food; \$600.00 for clothing; \$475.00 for utilities; \$335.00 in other expenses; \$1,805.00 to a mortgage company; and \$2,269.00 to another mortgage company; for a total of \$8,730.00. He indicated that he had assets of cash on hand of \$400.00; a checking account balance of \$5,000.00; a savings account balance of \$12,000.00; and value of other personal property and other funds of \$1,500.00; for total assets of \$18,900.00. No supporting financial information was received. In an attached statement, appellant asserted that his wife secretly obtained a dissolution of their marriage and that he continued supporting his wife without being aware of the dissolution of his marriage. He alleged that his signature on the document associated with the dissolution of his marriage was a forgery.

On March 7, 2022 OWCP received copies of the overpayment action request form requesting a review of the written evidence and the October 3, 2020 Form OWCP-20.

On March 7, 2022 OWCP received another overpayment action request form, dated March 1, 2022, in which appellant requested a prerecoumment hearing. The accompanying Priority Mail envelope was postmarked March 1, 2022.

By decision dated March 23, 2022, OWCP denied appellant's request for a prerecoumment hearing as untimely filed. It found that, because his request was not filed within 30 days of the September 10, 2020 preliminary overpayment determination, he was not entitled to a prerecoumment hearing as a matter of right.

By decision dated March 24, 2022, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$169,429.15 for the period November 20, 1998 through April 25, 2020 because he improperly received augmented compensation without having an eligible dependent. It found him at fault in the creation of the overpayment because he neglected to provide notification of the dependency change within 90 days, and because he continued to knowingly accept compensation at a rate to which he was not entitled. Therefore, OWCP found that appellant was precluded from waiver of recovery of the overpayment. It required recovery of the overpayment by withholding \$1,505.61 from his continuing compensation payments every 28 days.

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.⁴ 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 dependents.⁵

A dependent includes a husband or wife if: (a) he or she is a member of the same household as the employee; (b) the spouse is receiving regular contributions from the employee for his/her support; or (c) the employee has been ordered by a court to contribute spousal support.⁶

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

⁴ 5 U.S.C. § 8102(a).

⁵ *B.A.*, Docket No. 20-0947 (issued July 15, 2021); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432, 436 (2008); *id.* at § 8105(a) and 8110(b).

⁶ *Id.* at 8110(a)(2); *see B.A., id.*; *O.B.*, Docket No. 19-0034 (issued April 22, 2019); *K.S.*, Docket No. 15-0940 (issued September 9, 2015).

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.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$169,429.15 during the period November 20, 1998 through April 25, 2020, for which he was at fault, because he improperly received wage-loss compensation at the augmented compensation rate to which he was not entitled.

Under section 8110 of FECA,⁸ a former spouse does not come within the meaning of the term “wife.”⁹ A November 20, 1998 Notice of Entry of Judgment from the Superior Court of California, County of Monterey noted appellant’s marriage was dissolved that day. There was no evidence of any dependent children at the time the divorce, nor was he required to pay spousal support beyond May 1998. While appellant alleged that he was unaware of his divorce and that his signature was forged on the divorce decree, he has not submitted any credible evidence substantiating this allegation. As he continued to receive augmented compensation after November 20, 1998, the date that his divorce became final, the Board finds that fact of overpayment is established.

With regard to the amount of the overpayment, the record supports that OWCP erroneously paid appellant compensation based on the augmented rate for the period November 20, 1998 through April 25, 2020. Appellant received \$1,390,519.32 in FECA compensation for that period at the augmented rate, but was entitled to only \$1,221,090.17 at the basic rate. OWCP, therefore, properly determined that the difference yielded an overpayment of compensation in the amount of \$169,429.15.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ provides that [a]djustment 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. Section 10.433 of OWCP’s implementing regulations¹² provides that

⁷ *B.A., id.; E.B.*, Docket No. 19-1571 (issued December 31, 2020); *S.D.*, Docket No. 17-0309 (issued August 7, 2018); *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

⁸ 5 U.S.C. § 8110(a)(1).

⁹ *Raymond Kaufman*, Docket No. 04-0104 (issued March 2, 2004); *Blaine E. Bedeger*, 48 ECAB 418 (1997); *Linda F. Green*, 39 ECAB (1988); *William S. Cappeller*, 28 ECAB 262 (1977).

¹⁰ *B.A., supra* note 5; *O.B., supra* note 6; *W.A.*, Docket No. 18-0070 (issued May 14, 2018); *see D.S.*, Docket No. 17-1224 (issued August 28, 2017).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

Section 10.433(a) of OWCP’s regulations provides that an individual is at fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³ With respect to whether an individual is without fault, section 10.433(b) provides that 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.¹⁴

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first or second time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁵ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁶ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁷

¹³ 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also* 20 C.F.R. § 10.430.

¹⁴ *Id.* at § 10.433(b); *C.L., id.*; *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2020).

¹⁵ *See R.S.*, Docket No. 20-0177 (issued September 3, 2021); *M.J.*, Docket No. 19-1665 (issued July 29, 2020); *Tammy Craven*, 57 ECAB 689 (2006).

¹⁶ *See L.G.*, Docket No. 20-1342 (issued September 3, 2021); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *see also Karen Dixon*, 56 ECAB 145 (2004).

¹⁷ *L.G., id.*; *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period November 20, 1998 through January 2, 1999.

The case record establishes that appellant's divorce was finalized on November 20, 1998, but that he continued to receive compensation at the augmented rate on the periodic rolls through April 25, 2020. The first deposit following his divorce was made by OWCP on December 5, 1998 and covered the period November 8 through December 5, 1998. The second deposit following appellant's divorce was made by OWCP on January 2, 1999 and covered the period December 6, 1998 through January 2, 1999.

As noted above, the Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first or second incorrect deposit since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁸

There is no documentation to demonstrate that appellant had knowledge at the time he received direct deposits from OWCP on December 5, 1998 and January 2, 1999 that the payment amounts were incorrect.¹⁹ The Board thus finds that he was without fault in accepting the two direct deposits covering the period of the overpayment from November 20, 1998 through January 2, 1999.²⁰

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period November 20, 1998 through January 2, 1999, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.²¹ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision regarding waiver.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payment covering the period January 3, 1999 through April 25, 2020.²²

Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.²³

¹⁸ See *M.J.*, *supra* note 15; see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁹ See *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

²⁰ See *L.G.*, *supra* note 16.

²¹ *D.R.*, Docket No. 21-0234 (issued November 17, 2022); *C.C.*, Docket No. 19-1268 (issued April 2, 2021).

²² *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

²³ *B.W.*, *supra* note 19; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, a claimant will be at fault for accepting the payments subsequently deposited.²⁴ By the time of the third payment, appellant should have known that he was not entitled to the same amount of wage-loss compensation as he had received prior to his November 20, 1998 divorce.²⁵ After his receipt of the first two direct deposit following his divorce, he knew or should have known that OWCP had begun to make payments to him in error and that he was not entitled to the benefits of the subsequent direct deposit. The Board therefore finds that OWCP properly found that appellant was at fault in the creation of the overpayment for the period January 3, 1999 through April 25, 2020.²⁶

LEGAL PRECEDENT -- ISSUE 4

OWCP's regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.²⁷ The date of the request is determined by the postmark or other carrier's date marking.²⁸ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.²⁹ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.³⁰

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

OWCP issued a preliminary overpayment determination on September 10, 2020. It afforded appellant 30 days from that date to request a prerecoupment hearing. In an overpayment request form postmarked March 1, 2022, appellant requested a prerecoupment hearing. As his request for a prerecoupment hearing was postmarked March 1, 2022, more than 30 days after the September 10, 2020 preliminary overpayment determination, it was untimely filed. Therefore, OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.³¹

²⁴ *Id.*

²⁵ *Id.*

²⁶ In light of the Board's disposition of Issue 2, it is premature to address Issue 3.

²⁷ 20 C.F.R. § 10.432.

²⁸ *Id.* at §§ 10.439, 10.616(a); *A.B.*, Docket No. 18-1172 (issued January 15, 2019); *see also B.W.*, Docket No. 18-1004 (issued October 24, 2018); *C.R.*, Docket No. 15-0525 (issued July 20, 2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ *See D.R.*, Docket No. 19-1885 (issued April 24, 2020); *A.B.*, *supra* note 28; *see also R.U.*, Docket No. 16-0027 (issued March 24, 2017).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$169,429.15 during the period November 20, 1998 through April 25, 2020 because he improperly received wage-loss compensation at an augmented rate to which he was not entitled. The Board further finds that he was without fault in the creation of the overpayment for the period November 20, 1998 through January 2, 1999, but with fault in the creation of the overpayment for the period January 3, 1999 through April 25, 2020. Additionally, the Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the March 23 and 24, 2022 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 16, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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