

<sup>2</sup> The Board notes that, following the February 21, 2023 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.*

through December 3, 2022, because she improperly received wage-loss compensation at the augmented rate; (2) whether OWCP properly determined that appellant was 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 deducting \$847.28 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On April 3, 2010 appellant, then a 51-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 2, 2010 she injured her lower back when she struck her back on the edge of a computer table while in the performance of duty. She stopped work on April 4, 2010. On June 7, 2010 OWCP accepted appellant's claim for a lumbar sprain. It later expanded the acceptance of the claim to include other intervertebral disc degeneration of the lumbar spine. OWCP paid appellant wage-loss compensation at the augmented rate of 75 percent (or  $\frac{3}{4}$ ) on the supplemental rolls, effective May 18, 2010, and on the periodic rolls, effective July 4, 2010.<sup>3</sup>

In a November 27, 2017 financial disclosure statement (Form EN-1032), appellant indicated that she was married and that her spouse lived with her. On a November 26, 2018 Form EN-1032, she indicated that she was married, but her spouse did not live with her, and she did not make regular direct payments for his support. On a November 30, 2019 Form EN-1032, appellant indicated that she was married, but her spouse had not lived with her since 2017. On a December 4, 2020 Form EN-1032, she indicated that she was married, but her spouse had not lived with her since August 2018. On a January 10, 2022 Form EN-1032, appellant indicated that she was no longer married and had not lived with her former husband since August 2018. She noted that she had no other dependents on all of her EN-1032 forms.

In a December 7, 2022 letter, OWCP requested that appellant clarify the date that she stopped living with her former husband.

On January 9, 2023 OWCP received an undated statement by appellant, who related that she and her former husband separated in 2017, but shared the same address until 2018. Appellant attached a final divorce decree dated October 22, 2021, which indicated that she and her former husband had lived separate and apart without cohabitation and without interruption since September 17, 2017. The record reflects that the first direct deposit appellant received after September 17, 2017 was made on October 14, 2017, and covered the period September 17 through October 14, 2017.

In a January 17, 2023 manual adjustment form, OWCP determined that an overpayment of compensation occurred because appellant was paid at the augmented  $\frac{3}{4}$  rate, but did not have any dependents. It showed that, from September 17, 2017 through December 3, 2022, OWCP paid her a total of \$244,053.46 in net wage-loss compensation, when she was only entitled to \$214,522.57.

---

<sup>3</sup> On June 16, 2010 and March 17, 2015 appellant authorized OWCP to deposit her compensation payments into her bank account *via* electronic funds transfer (EFT).

OWCP therefore determined that appellant received an overpayment of compensation in the amount of \$29,530.89.

In a January 19, 2023 preliminary overpayment determination, OWCP advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$29,530.89 for the period September 17, 2017 through December 3, 2022. It stated that she received compensation at the augmented rate when she should have been paid at the basic rate of 66 2/3 percent (or 2/3) as she no longer had an eligible dependent. OWCP explained that, during the relevant period, appellant was not entitled to receive wage-loss compensation at the augmented rate as she and her former husband were separated without cohabitation and that there was no evidence to support that she made any regular direct payments for his support. It further explained that the overpayment was calculated by subtracting the total net compensation of \$214,522.57 that she was entitled to receive for this period from the net compensation of \$244,053.46 that she received, which resulted in an overpayment in the amount of \$29,530.89. OWCP further found that appellant was at fault in the creation of the overpayment because she knowingly continued to receive compensation at the augmented rate, to which she was not entitled, and for providing contradictory information on the EN-1032 forms. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written record or request a prerecoumpment hearing. No response was received.

By decision dated February 21, 2023, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$29,530.89 for the period September 17, 2017 through December 3, 2022, for which she was at fault. It required recovery of the overpayment by deducting \$847.28 from appellant's continuing wage-loss compensation every 28 days.

### **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 dependents.<sup>6</sup> 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

---

<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *See* 5 U.S.C. § 8110(b).

for his/her support; or (c) the employee has been ordered by a court to contribute spousal support.<sup>7</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>8</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,530.89 for the period September 17, 2017 through December 3, 2022, because she improperly received wage-loss compensation at the augmented compensation rate.

OWCP paid appellant wage-loss compensation on the supplemental and periodic rolls at the augmented rate. Appellant, however, informed OWCP *via* EN-1032 forms beginning in November 2018 that she and her former husband had separated and he was no longer living with her. A final divorce decree dated October 22, 2021, confirmed that she and her former husband had lived separate and apart without cohabitation and without interruption since September 17, 2017. As appellant continued to receive wage-loss compensation at the augmented rate through December 3, 2022 when she no longer had an eligible dependent, OWCP properly determined that an overpayment of compensation for the period September 17, 2017 through December 3, 2022 was created.

With regard to the amount of the overpayment, the record supports that OWCP explained that it had paid her a total of \$244,053.46 in net wage-loss compensation for the period September 17, 2017 through December 3, 2022 at the augmented rate of 75 percent, when she was only entitled to a total of \$214,522.57 at the basic rate of 66 2/3 percent. The Board has reviewed OWCP's calculations and finds it properly determined an overpayment of compensation in the amount of \$29,530.89.

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

Section 8129 of FECA provides that 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

---

<sup>7</sup> *Id.* at 8110(a)(2); *see O.B.*, Docket No. 19-0034 (issued April 22, 2019); *K.S.*, Docket No. 15-0940 (issued September 9, 2015).

<sup>8</sup> *See V.R.*, Docket No. 20-0571 (issued July 6, 2021); *see Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

conscience.<sup>9</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>10</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>11</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 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>12</sup>

The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>13</sup> 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.<sup>14</sup> Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>15</sup>

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

The Board finds that OWCP improperly determined that appellant was at fault in creation of the overpayment for the period September 17 through October 14, 2017.

OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known to be incorrect as she did not have an eligible dependent as of September 17, 2017. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first compensation payment *via* EFT covering the period

---

<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> See *C.C.*, Docket No. 19-1268 (issued April 2, 2021); *J.S.*, Docket No. 19-1363 (issued April 10, 2020); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> *Id.* at § 10.433(b); see also *C.C.*, *supra* note 10; *M.P.*, Docket No. 20-1035 (issued December 1, 2020).

<sup>13</sup> See *C.C.*, *id.*; *A.B.*, Docket No. 18-0922 (issued January 3, 2019); see also *Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> See *Tammy Craven*, *id.*; see also *S.D.*, Docket No. 17-0309 (issued August 7, 2018).

<sup>15</sup> See *C.C.*, *supra* note 10; *C.H.*, Docket No. 19-1470 (issued January 24, 2020).

September 17 through October 14, 2017, she knew or should have known the payment was incorrect.

The first direct deposit appellant received after September 17, 2017, the date she and her former husband began to live separate and apart without cohabitation and without interruption, was made on October 14, 2017 and covered the period September 17 through October 14, 2017. There is no documentation or other evidence to demonstrate that she had knowledge at the time her bank received the October 14, 2017 EFT that the payment was incorrect.<sup>16</sup> The Board thus finds that appellant was without fault in accepting the initial compensation payment covering the period of the overpayment from September 17 through October 14, 2017.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payments covering the period October 15, 2017 through December 3, 2022.<sup>17</sup>

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.<sup>18</sup> By the time of the second payment, appellant should have known that she was not entitled to the same amount of wage-loss compensation that she had received prior to her separation from her former husband on September 17, 2017.<sup>19</sup>

The Board therefore finds that OWCP properly found appellant at fault in the creation of the overpayment for the period October 15, 2017 through December 3, 2022.<sup>20</sup>

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period September 17 through October 14, 2017, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period. On remand, OWCP shall request updated financial information from appellant to evaluate her current financial situation. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding waiver of recovery of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$29,530.89, because she improperly received wage-loss compensation at the augmented rate for the period September 17, 2017 through December 3, 2022.

---

<sup>16</sup> See *M.P.*, *supra* note 12; *K.K.*, 19-0978 (issued October 21, 2019).

<sup>17</sup> See *M.P.*, *id.*; *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

<sup>18</sup> See *G.H.*, Docket No. 22-0890 (issued January 9, 2023); *D.R.*, Docket No. 21-0234 (issued November 17, 2022).

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

<sup>20</sup> See *B.N.*, Docket No. 22-1337 (issued November 7, 2023).

The Board further finds that appellant was without fault in the creation of the overpayment for the period September 17 through October 14, 2017, but at fault in the creation of the overpayment for the period October 15, 2017 through December 3, 2022.<sup>21</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2025  
Washington, DC

Alec J. Koromilas, 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

---

<sup>21</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.