

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

E.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
PROVIDENCE VA MEDICAL CENTER,
Providence, RI, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 19-1571
Issued: December 31, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 10, 2019 appellant filed a timely appeal from an April 8, 2019 merit 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 8, 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.*

September 15, 2018 because she improperly received wage-loss compensation at an augmented compensation rate to which she was not entitled; (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 \$478.52 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On July 14, 2011 appellant, then a 49-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on July 8, 2011 she sustained an injury to her right shoulder, when turning a patient while in the performance of duty. OWCP accepted the claim for right shoulder sprain, partial tear of the right supraspinatus tendon, and a neck sprain. It paid appellant wage-loss compensation on the supplemental rolls commencing October 24, 2011 and on the periodic rolls commencing April 8, 2012.

In a letter dated August 1, 2012, OWCP requested that appellant complete an EN1032 form, which included questions regarding appellant's dependents in order to verify that her compensation was paid at the proper rate. It specifically indicated that compensation at the augmented rate of 75 percent of the applicable pay rate may be paid for "an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age." OWCP also advised that if she had no eligible dependents she would be paid at 66 2/3 percent of the applicable pay rate. Appellant completed the form on August 10, 2012 and advised that she was married and her husband lived with her, she also indicated that she had a dependent son who was born on July 11, 1998.

Appellant continued to submit completed and signed EN1032 forms through October 28, 2015, indicating that she had an eligible dependent, her son, and as such, was entitled to receive wage-loss compensation at the augmented rate.

On August 10, 2016 OWCP requested that appellant complete and return an updated EN1032 form. It received the completed form on October 11, 2016. Appellant advised that her son, born on July 10, 1998 had turned 18 and was no longer a dependent. She also noted that she was not married and had no other dependents.

In a September 26, 2018 letter, OWCP advised appellant that on her EN1032 form of August 20, 2018 she had indicated that she had no dependents, as her son born on July 10, 1998 and was thus 18 years of age in July 2016. It explained that she had been paid at the augmented rate of 75 percent rather than at the basic compensation rate of 66 2/3 percent for the period July 11, 2016 through September 15, 2018. OWCP advised that, effective September 16, 2018, she would be paid at the non-augmented compensation rate of 66 2/3 percent.

On December 6, 2018, OWCP advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through September 15, 2018 because she received compensation at the augmented three-fourths rate instead of the two-thirds rate when she had no dependents. It noted that she had received a total of \$31,430.72 for wage-loss compensation at the augmented rate based on an eligible dependent from July 11, 2016 through September 15, 2018. Appellant, however,

was only entitled to receive \$26,844.41 in compensation based on the appropriate two-thirds rate for lack of an eligible dependent, resulting in a \$4,586.21 overpayment.³ OWCP found that she was with fault in the creation of the overpayment because she knew or reasonably should have known that there was no entitlement to compensation at the augmented rate after her son turned 18. It indicated that appellant neglected to provide notification within 90 days of the dependency change and knowingly continued to accept compensation payments at the augmented rate despite such knowledge. OWCP enclosed an overpayment recovery questionnaire (Form OWCP-20) for completion, advised appellant of her appeal rights, and afforded her 30 days to submit additional evidence and respond to its inquiries. No further evidence was received.

By decision dated January 11, 2019⁴ OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through September 15, 2018 because she had improperly received augmented compensation without having eligible dependents. It found her at fault in the creation of the overpayment because she had neglected to provide notification of the dependency change within 90 days, and, she continued to knowingly accept compensation at a rate to which she was not entitled. Therefore, OWCP found that appellant was not entitled to waiver of recovery. It required recovery of the overpayment by withholding \$478.52 every 28 days from her 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.⁵ 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 her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if she has one or more dependents.⁶

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.⁷ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has

³ The record contains a manual adjustment form and worksheets regarding the dates and calculations of the overpayment of compensation.

⁴ OWCP provided appellant copies of the January 11, 2019 decision with appeal rights on April 8, 2019 after appellant informed OWCP by telephone call on April 8, 2019 (Form CA-110) that she had questions about the overpayment issues and always had problems with her mail.

⁵ 5 U.S.C. § 8102(a).

⁶ *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432, 436 (2008); *id.* at §§ 8105(a) and 8110(b).

⁷ *Id.* at § 8110(a).

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.⁸

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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through September 15, 2018 because she received wage-loss compensation at an augmented compensation rate to which she was not entitled.

The evidence of record reflects that appellant continued to receive compensation at the augmented rate from July 11, 2016 through September 15, 2018, despite the fact that her son, who was initially claimed as a dependent, turned 18 years old on July 10, 2016 and, therefore, no longer qualified as a dependent under FECA.

Compensation records confirm that OWCP continued to pay appellant compensation at the augmented rate from July 11, 2016 through September 15, 2018, which amounted to a total of \$31,430.72. Appellant, however, was only entitled to receive \$26,844.51 in compensation at the basic rate, resulting in an overpayment in the amount of \$4,586.21. Accordingly, the Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through September 15, 2018.

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.”¹⁰ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹¹ 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

⁸ *R.G.*, *supra* note 6; *see also E.G.*, 59 ECAB 599, 603 n.10 (2008).

⁹ *S.D.*, Docket No. 17-0309 (issued August 7, 2018; *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

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.¹²

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.¹³

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 may lack the requisite knowledge.¹⁴ 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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation for the period August 21, 2016 through September 15, 2018, thereby precluding waiver of recovery of the overpayment for this period. However, OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period July 11 through August 20, 2016.

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 was aware that she was not entitled to augmented compensation when she no longer had an eligible dependent as of July 11, 2016. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first two electronic direct deposits of compensation covering the period of the

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.* at § 10.433(b); *see also D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹⁴ *See A.B.*, Docket No. 18-0922 (issued January 3, 2019); *S.D.*, *supra* note 9; *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *Tammy Craven*, 57 ECAB 689 (2006).

¹⁵ *See C.H.*, Docket No. 19-1470 (issued January 24, 2020); *Tammy Craven*, *id.*

¹⁶ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *see D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

overpayment from July 11 through August 20, 2016, she knew or should have known the payments were incorrect.¹⁷

Appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that, as of the first and second direct deposits of compensation, she knew or should have reasonably known that she was accepting payments containing monies to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received the direct deposits from OWCP on July 23 and August 20, 2016, collectively covering the period of the overpayment from July 11, 2016 through August 20, 2016, that a portion of the payment was incorrect, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payments. The Board notes that in a number of direct deposit cases the Board has only found the claimant without fault with respect to the period covered by the first direct deposit.¹⁸ However, the particular facts of the present case dictate that appellant be found without fault with respect to the period covered by the first and second direct deposits.¹⁹ The first direct deposit (received on July 23, 2016) only contained improper monies paid for a short period July 11 to 23, 2016 which were paid at the improper augmented rate of 75 percent rate) and OWCP failed to show that appellant knew or should have reasonably known that this payment contained such limited improper monies. Although the second direct deposit (received on August 20, 2016) covered 28 days of compensation paid at the improper augmented rate of 75 percent (July 24 through August 20, 2016), OWCP also failed to show that appellant knew or should have reasonably known that this payment was improper, either through documentation from OWCP or through the passage of time. While appellant untimely submitted the completed the EN1032 form, she properly notified OWCP of the change in her son's dependent status. Therefore, the Board finds that she is not at fault in the acceptance of the direct deposits covering the period of the overpayment from July 11 through August 20, 2016.

Even though 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.²⁰ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP and/or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²¹

By the time appellant received the compensation payment electronically transferred on September 17, 2016 (covering the period August 21 to September 17, 2016), she knew or should have reasonably known both that she was not entitled to receive compensation at the augmented

¹⁷ The first electronic direct deposit covered the period June 26 to July 23, 2016; the second direct deposit covered the period July 24 to August 20, 2016.

¹⁸ See e.g., *Tammy Craven*, *supra* note 14.

¹⁹ See generally *V.S.*, *supra* note 14.

²⁰ *P.B.*, Docket No. 19-0329 (issued December 31, 2019); see *C.G.*, Docket No. 15-0701 (issued December 9, 2015); see also *William E. McCarty*, 54 ECAB 525 (2003).

²¹ See *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *J.W.*, Docket No. 10-1271 (issued February 3, 2011); *Karen Dixon*, 56 ECAB 145 (2004).

rate of 75 percent and that the September 17, 2016 compensation payment contained monies to which she was not entitled. The August 10, 2016 cover letter for the EN1032 form advised that the form must be completed and returned within 30 days of the letter. The Board notes that enough time had passed since appellant's receipt of the August 10, 2016 letter and EN1032 form, with a concurrent opportunity of discovery, that appellant realized or should have reasonably realized that the September 17, 2016 payment contained monies to which she was not entitled (*i.e.*, the difference between the augmented rate (75 percent of her wage loss) and the basic compensation rate (66 2/3 percent)).²² Because she accepted a payment which she knew or should have known to be incorrect for the period August 21, 2016 through September 15, 2018, the Board finds that appellant is not entitled to waiver of recovery of the portion of the overpayment created during this period.²³

Accordingly, the Board will affirm the finding of fault for the remaining August 21, 2016 through September 15, 2018 period of overpayment, thereby precluding waiver of recovery of the overpayment for this period. The Board will set aside the January 11, 2019 decision regarding the issue of fault as to the July 23 and August 20, 2016 direct deposits covering the period July 11 through August 20, 2016 and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the portion of the overpayment covering the period July 23 through August 20, 2016.²⁴

On appeal appellant contends that she was not at fault in the creation of the overpayment of compensation because she had completed the required report advising OWCP that her son had turned 18. She also indicated that she does not know how much money she should be receiving as it is a different amount each month. However, even if the overpayment resulted from negligence on the part of OWCP, this does not excuse appellant from accepting payment which she knew or should have known she was not entitled to.²⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,586.21 for the period July 11, 2016 through September 15, 2018 because she improperly received wage-loss compensation at an augmented compensation rate to which she was not entitled. The Board further finds that she was at fault in the creation of the overpayment for the period August 21, 2016 through September 15, 2018, and that she was without fault in the creation of the overpayment for the period July 11 through August 20, 2016. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period July 11 through August 20, 2016.

²² See *supra* note 9.

²³ See *V.S.*, *supra* note 14.

²⁴ In light of the Board's determination regarding the issues of fault and waiver of recovery of the overpayment, it is premature to address the issue of recovery of the overpayment.

²⁵ *Supra* note 21; *Russell E. Wageneck*, 46 ECAB 653 (1995).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and set aside in part and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 31, 2020
Washington, DC

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

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

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