

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

_____)	
S.B., Appellant)	
)	
and)	Docket No. 20-1043
)	Issued: August 17, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Estill, SC, Employer)	
_____)	

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 April 16, 2020 appellant filed a timely appeal from a December 5, 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,881.13 for the period March 10, 2016 through February 2, 2019 because she improperly received wage-loss compensation to which she 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; and (3) whether OWCP properly required recovery of the overpayment by withholding \$608.11 from appellant's continuing compensation payments every 28 days.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 1, 2002 appellant, then a 37-year-old distribution window clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained post-traumatic stress disorder (PTSD) due to an armed robbery at work. She noted that she first became aware of her condition and realized its relation to her federal employment on October 18, 2001. Appellant stopped work on October 22, 2001. OWCP subsequently accepted the claim for acute PTSD. In a letter dated March 26, 2002, it informed appellant that it had converted her claim to a claim for traumatic injury rather than an occupational disease as the accepted incident occurred during one work shift. OWCP paid her wage-loss compensation on the supplemental rolls commencing October 22, 2001 and on the periodic rolls commencing July 14, 2002.

The record contains a completed EN-1032 form dated February 5, 2003. The EN-1032 form contains questions regarding such matters as appellant's employment activities, earnings, and dependency in order to verify that the appropriate compensation payments were made. It specifically indicated that compensation at the augmented rate of 75 percent of the applicable pay rate may be paid for "an unmarried child between 18 and 23 who is a full-time student even if that person does not live with [appellant,] as long as you make regular direct payments for his or her support." The EN-1032 form also advised that, if appellant had no eligible dependents, she would be paid at the basic rate of 66 2/3 percent. Appellant completed this form on February 25, 2003 and advised OWCP that she had a dependent daughter who was born on December 1, 1986 and a dependent son born on March 10, 1993.

Appellant continued to submit completed and signed EN-1032 forms through January 28, 2016, indicating that she had at least one eligible dependent, and as such, was entitled to receive wage-loss compensation at the augmented rate.

The record indicates that on April 2, 2016 OWCP paid appellant wage-loss compensation in the amount of \$2,671.42 *via* direct deposit for the period March 6 through April 2, 2016. The record further indicates that on April 30, 2016 it paid her wage-loss compensation in the amount of \$2,671.42 *via* direct deposit for the period April 3 through 30, 2016.

In a letter dated May 10, 2016, appellant informed OWCP that her son was no longer a dependent as he turned 23 years old on March 10, 2016. She also advised that he had been a full-time student, but that his schooling ended on May 3, 2016.

In a June 13, 2016 letter, OWCP acknowledged appellant's May 10, 2016 letter and advised that it had adjusted her compensation accordingly.

On June 25, 2016 OWCP paid appellant wage-loss compensation on the periodic rolls at the augmented rate for the period May 29 through June 25, 2016 in the net amount of \$2,671.42.

On July 1, 2016 OWCP paid appellant wage-loss compensation on the supplemental rolls at the basic rate for the period May 29 through June 25, 2016 in the net amount of \$2,320.42.

Beginning January 25, 2017, appellant submitted annual EN-1032 forms indicating that she no longer had any eligible dependents and was, therefore, no longer entitled to receive compensation at the augmented rate.

By letter dated February 13, 2019, OWCP advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$12,796.04 for the period May 10, 2016 through February 2, 2019 because she received compensation at the augmented rate instead of the basic rate when she had no dependents. It continued to pay her compensation at the augmented rate from May 10, 2016 through February 2, 2019, which amounted to a total of \$115,294.93 in compensation. However, appellant was only entitled to receive \$102,498.89 in compensation at the basic rate, resulting in a \$12,796.04 overpayment. OWCP found that she was at 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 as she had no eligible dependents. It further found that appellant continued to accept compensation payments at the augmented rate despite such knowledge. OWCP requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method. It further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP provided an overpayment action request form and further notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a prerecoumment hearing.

The record contains appellant's pay rate history and a memorandum regarding the dates and calculations of the overpayment of compensation.

In a form dated February 19, 2019, postmarked March 6, 2019, appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 29, 2019, the hearing representative conducted a preliminary review and determined that appellant's case was not in posture for a decision. The hearing representative found that the overpayment was incorrectly calculated with respect to the period of the award and the amount as her son turned 23 on March 10, 2016. Thus, appellant was no longer entitled to receive compensation at the augmented rate as of March 10, 2016. Additionally, the hearing representative found that OWCP failed to consider that she had been paid at both the basic rate and the augmented rate for the period May 29 through June 25, 2016. Thus, the hearing representative set aside the February 13, 2019 preliminary overpayment determination and remanded the case for further development.

By letter dated June 3, 2019, OWCP advised appellant that it had made a preliminary determination that an overpayment of compensation in the amount of \$15,881.13 was created for the period March 10, 2016 through February 2, 2019 because she received compensation to which she was not entitled. It explained that it continued to pay her compensation at the augmented rate from March 10, 2016 through February 2, 2019, including that she was paid twice for the period May 29 through June 25, 2016, which amounted to a total of \$124,506.17 in compensation. However, appellant was only entitled to receive \$108,625.04 in compensation at the basic rate, resulting in a \$15,881.13 overpayment. OWCP found that she was at fault in the creation of the overpayment. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, it provided an overpayment action request form and further notified her that, within 30 days of the

date of the letter, she could request a final decision based on the written evidence, or a prerecoupment hearing.

On June 20, 2019 appellant requested a prerecoupment hearing.

A hearing was held on October 2, 2019. The hearing representative advised appellant to submit additional argument, a completed Form OWCP-20, and supporting financial documentation, and noted that waiver could not be considered since she was found at fault in the creation of the overpayment. No response was received.

By decision dated November 29, 2019, the hearing representative finalized OWCP's preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount \$15,881.13 for the period March 10, 2016 through February 2, 2019 because she improperly received wage-loss compensation to which she was not entitled. OWCP found her at fault in the creation of the overpayment and, thereby precluded her from waiver of recovery of the overpayment. It required recovery of the overpayment by withholding \$608.00 from appellant's continuing compensation payments every 28 days.

By decision dated December 5, 2019, OWCP formally found an overpayment of compensation in the amount of \$15,881.13 for the period March 10, 2016 through February 2, 2019. It found appellant at fault in the creation of the overpayment. OWCP also noted that she had not returned a completed Form OWCP-20. OWCP required recovery of the overpayment by deducting \$608.11 from appellant's 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.² 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.³

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.⁴ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has

² *Id.* § 8102(a)

³ *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432, 436 (2008); *id.* at §§ 8105(a) and 8110(b).

⁴ *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.⁵

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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,881.13 for the period March 10, 2016 through February 2, 2019 because she improperly received wage-loss compensation to which she was not entitled.

The evidence of record reflects that appellant continued to receive compensation at the augmented rate from March 10, 2016 through February 2, 2019 despite the fact that her son who was initially claimed as a dependent, had reached the age of 23 on March 10, 2016 and, therefore, was no longer a qualifying dependent under FECA.⁷ The evidence of record also establishes that OWCP paid her twice for the period May 29 through June 25, 2016. The Board finds that fact of overpayment is, therefore, established.

OWCP properly determined that an overpayment of compensation in the amount of \$15,881.13 was created for the period March 10, 2016 through February 2, 2019, because appellant received compensation to which she was not entitled. It explained that it continued to pay her compensation at the augmented rate from March 10, 2016 through February 2, 2019, including that OWCP paid her twice for the period May 29 through June 25, 2016, which amounted to a total of \$124,506.17 in compensation. However, appellant was only entitled to receive \$108,625.04 in compensation at the basic rate, resulting in a \$15,881.13 overpayment.

Accordingly, the Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$15,881.13 for the period March 10, 2016 through February 2, 2019.

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.”⁸ A claimant who is at fault in the creation of the overpayment is not entitled to

⁵ *R.G.*, *supra* note 3; *E.G.*, 59 ECAB 599 (2008).

⁶ *R.G.*, *id.*; *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁷ *Id.*

⁸ *Supra* note 1 at § 8129(b).

waiver.⁹ 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.¹⁰

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.¹¹

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment of compensation for the period March 10 through April 2, 2016. The Board further finds, however, that she was at fault in the creation of the overpayment of compensation for the period April 3, 2016 through February 2, 2019 and, therefore, is ineligible for waiver of recovery of the overpayment for this remaining period.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.¹² 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 incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹³ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic funds transfer is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁴ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁵ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has

⁹ See *R.G.*, *supra* note 3; *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b); see also *R.G.*, *supra* note 3; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹² *R.K.*, Docket No. 20-1322 (issued May 27, 2021); *S.N.*, Docket No. 19-1018 (issued November 12, 2019). See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹³ *R.K.*, *id.*; *K.K.*, Docket No. 19-0978 (issued October 21, 2019); see *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ *Id.*

¹⁵ *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁶

When OWCP issued the next compensation payment on April 30, 2016 appellant should have known that she was no longer entitled to receive compensation at the augmented rate as her son turned 23 on March 10, 2016. Therefore, the Board finds that she was at fault in the creation of the remaining period of the overpayment for the period April 3, 2016 through February 2, 2019 as she knew or should have known at the time of the second incorrect payment that she was no longer entitled to additional wage-loss compensation at the augmented rate.

Accordingly, the Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment for the period April 3, 2016 through February 2, 2019, as she reasonably knew or should have known that the payments she received from OWCP were in error. The Board further finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the initial direct deposit made on April 2, 2016.

The Board will set aside the November 29, 2019 decision regarding the issue of fault as to the initial April 2, 2016 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for that period of the overpayment.¹⁷ Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision in the case.¹⁸

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$15,881.13 for the period March 10, 2016 through February 2, 2019. The Board further finds that appellant was without fault in the creation of the overpayment for the period March 10 through April 2, 2016, but at fault in the creation of the overpayment for the period April 3, 2016 through February 2, 2019.

¹⁶ *R.K.*, *supra* note 12; *S.N.*, *supra* note 12; *see K.H.*, Docket No. 06-0191 (issued October 30, 2006).

¹⁷ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

¹⁸ *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 17, 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