

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DANNY L. DELANO and U.S. POSTAL SERVICE,  
POST OFFICE, Fredericksburg, Va.

*Docket No. 96-119; Submitted on the Record;  
Issued April 21, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$9,183.70 for the periods January 1, 1990 to July 31, 1992 and June 1, 1993 to May 30, 1994; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$165.00 every 4 weeks from his continuing compensation.

On March 20, 1985 appellant, then a 46-year-old letter carrier, sustained an employment-related back injury for which he later underwent authorized laminectomy. He was placed on the period roll, effective August 2, 1987 at the augmented, three-quarters rate for disabled employees, as he claimed dependency of a minor child, his son Derek whose birthdate was October 17, 1971.

The record contains Office Forms CA-1032 submitted by appellant on August 21, 1989 and September 19, 1990 in which he continued to claim his son as a dependent. In a CA-1032 form submitted on March 29, 1991, appellant indicated that he no longer had a dependent as his son had joined the Navy on April 30, 1990. In CA-1032 forms submitted by appellant on October 14, 1992, October 20 and November 10, 1993, he indicated that his son was again a dependent. In a Form CA-1032 submitted on June 20, 1994, appellant advised that, while his son was a student, he had moved out of the house in April 1994. By letter dated July 13, 1994, the Office informed appellant that his compensation would be reduced to the two-thirds, unaugmented rate because his dependency status had changed. In a September 14, 1994 letter, Germanna Community College advised that Derek Delano had been a full-time student during the periods August through December 1992, January through May 1993 and May through December 1994.

On February 16, 1995 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$9,193.70 which arose because

during the periods January 1, 1990 to July 31, 1992 and June 1, 1993 to June 25, 1994 he had received compensation at the augmented rate for disabled employees with one or more dependents yet his son was not a full-time student or had not resided in appellant's household during these periods. The Office calculated the amount of the overpayment by subtracting the amount appellant should have received for this period at the two-thirds rate for no dependents, \$73,300.58, from the amount actually paid, \$82,484.58. The Office also preliminarily found that appellant was at fault in the creation of the overpayment.

On March 9, 1995 appellant submitted an Office overpayment recovery questionnaire in which he indicated that his monthly income was \$1,605.54 and listed an asset worth \$3,000.00, cash on hand of \$23.00 and a checking account balance of \$1,035.88 "prior to receiving bills." His monthly expenses totaled \$1,562.75. By decision dated September 22, 1995, the Office found that appellant received an overpayment of compensation in the amount of \$9,183.70, that he was without fault in the creation of this overpayment, and that recovery of the overpayment would not defeat the purposes of the Federal Employees' Compensation Act, as appellant's monthly income exceeded his monthly expenses by \$137.63. The Office informed appellant that \$165.00 would be withheld each payment period from his continuing compensation. By letter dated October 24, 1995, the Office informed appellant that a mathematical error had been made in the memorandum attached to the September 22, 1995 decision, that as his monthly income was \$1,789.17, his monthly income exceeded his expenses by \$226.42.

The Board finds that appellant received an overpayment of compensation in the amount of \$9,183.70.

The Act provides that a disabled employee is entitled to receive compensation at a rate of 75 percent of his pay if he has a dependent.<sup>1</sup> Among the persons defined as a dependent under the Act is an unmarried child living with the employee who is under 18 years of age. The Act further provides that compensation payments that would otherwise end for a child who has reached 18 years of age shall continue if he is a student by the time he reaches 18 years of age for so long as he continues to be a student or until he marries.<sup>2</sup> A student is defined under the Act as a person under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study.<sup>3</sup>

The evidence in this case shows that appellant's son became 18 years old on October 17, 1989 and attended college full time for the periods August through December 1992, January through May 1993 and May through December 1994. He therefore could not be considered a dependent under the Act for the periods January 1, 1990 to July 31, 1992 and June 1, 1993 to May 30, 1994 during which appellant received augmented compensation on the basis that he had a dependent. Appellant therefore received an overpayment of compensation for these periods because he received compensation at an augmented rate when he was not entitled to it. Furthermore, the Office properly calculated the amount of the overpayment by subtracting the

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<sup>1</sup> 5 U.S.C. § 8110.

<sup>2</sup> 5 U.S.C. § 8110(a)(3).

<sup>3</sup> 5 U.S.C. § 8101(17).

amount appellant should have received at the two-thirds rate for the periods January 1, 1990 to July 31, 1992 and June 1, 1993 to May 30, 1994, when his son no longer qualified as a dependent under the Act,<sup>4</sup> from the amount actually paid at the three-fourths rate during these periods. An overpayment of compensation in the amount of \$9,183.70 was, therefore, created.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act<sup>5</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b):

"Adjustments 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 [the Act] or would be against equity and good conscience."<sup>6</sup>

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office's regulations<sup>7</sup> provides:

"Recovery of an overpayment is considered to be inequitable and against good conscience when an individual in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.... To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss."

In this case, the Office found that appellant was not at fault in the creation of the overpayment of compensation. Regarding waiver, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment.

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<sup>4</sup> 5 U.S.C. § 8110(a)(3).

<sup>5</sup> 5 U.S.C. § 8129(a).

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.323(b).

Section 10.322(a) of the Office's regulations<sup>8</sup> provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent: (1) the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment. Section 10.322(d) states:

*"Assets -- cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like; and (2) Nonliquid Assets -- the fair market value of property such as a camper, second home, extra automobile, jewelry, etc. Assets for these purposes shall not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the primary family domicile or income producing property if the income from such property has been included in comparing income and expenses."*

Appellant's financial records provided to the Office establish that he had assets worth more than \$3,000.00.<sup>9</sup> The Office, therefore, did not abuse its discretion by refusing to waive the overpayment of compensation.

The Board also finds that the Office properly required repayment by withholding \$165.00 from appellant's continuing compensation every 4 weeks.

Section 10.321(a)<sup>10</sup> provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, "having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual."

At the time of the September 22, 1995 decision, appellant received \$1,651.54 in compensation every 4 weeks. The monthly amount of compensation would be greater by 1/12 or the \$1,789.17 indicated by the Office in its October 24, 1995 letter. Appellant therefore had approximately \$226.42 in monthly household income above his monthly expenses. Thus, the Office did not abuse its discretion under the standard noted above in determining that repayment

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<sup>8</sup> 20 C.F.R. § 10.322(a).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.321(a).

of the overpayment could be accomplished by withholding \$165.00 every 4 weeks from appellant's compensation.<sup>11</sup>

The decision of the Office of Workers' Compensation Programs dated September 22, 1995 is hereby affirmed.

Dated, Washington, D.C.  
April 21, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> The Board notes that on appeal appellant contends that his expenses have increased and the value of his assets have decreased. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).