

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELI T. EMRICK and DEPARTMENT OF AGRICULTURE,  
FOOD SAFETY INSPECTION SERVICE, Dallas, Tex.

*Docket No. 96-2111; Submitted on the Record;  
Issued July 7, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$16,813.64; (2) whether appellant was at fault in the creation of the overpayment; (3) whether the Office of Workers' Compensation Programs properly determined that the overpayment should be repaid at the rate of \$400.00 per month.

In the present case, the Office accepted that appellant, a supervisory veterinary medical officer, sustained a fracture of the right heel and bruise of both knees as a result of an automobile accident, which occurred in the performance of duty on June 8, 1984. The record reflects that appellant did not return to work following the injury and was in receipt of temporary total disability benefits. On March 6, 1996 the Office issued a preliminary determination that an overpayment of compensation had occurred in appellant's case in the amount of \$16,813.64 because appellant continued to receive compensation benefits at the augmented three quarters rate after he no longer had eligible dependents. Appellant was further advised that a preliminary finding had been made that he was at fault in this matter because he accepted and cashed payments, which he knew or reasonably should have known were in error. Appellant was advised that he had 30 days within which to submit evidence or arguments if he disagreed with the preliminary determination or to request a precoupment hearing. Finally, appellant was advised that he should complete an overpayment questionnaire and attach supporting financial documents, which would assist the Office in determining whether or not to waive the overpayment and in the event that the preliminary determination was upheld or waiver not granted, this information would assist the Office in deciding how to recover the overpayment. Appellant did not respond to the preliminary determination and did not complete the overpayment questionnaire.

By decision dated April 11, 1996, the Office finalized the preliminary determination finding that an overpayment of compensation had been created in the amount of \$16,813.64 because appellant continued to receive compensation benefits at the augmented rate after he no longer had eligible dependents; that appellant was at fault in the matter because he accepted and

cash payments, which he knew or reasonably should have known were in error; and that the overpayment would be recovered by withholding of \$400.00 from continuing compensation payments, every four weeks, effective April 28, 1996.

The Board finds that the Office properly determined that an overpayment exists in this case in the amount of \$16,813.64.

The basic rate of compensation payable pursuant to the Federal Employees' Compensation Act<sup>1</sup> is 66 2/3 percent of the injured employee's monthly pay.<sup>2</sup> When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at the rate of 8 1/3 percent of his monthly pay.<sup>3</sup> The record establishes that until his wife's death on November 20, 1991, appellant was entitled to receive compensation at the augmented rate of 75 percent ( *i.e.*, 66 2/3 plus 8 1/3 = 75). The record further establishes that subsequent to his wife's death, from November 20, 1991 until October 16, 1995, the date the Office terminated payment of augmented benefits, appellant continued to receive compensation at the augmented rate, thereby creating an overpayment in the amount of \$16,813.64, the difference between \$150,287.49, the amount appellant was paid for the period and \$133,473.85, the amount he should have been paid for this period. Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of \$16,813.64.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," the overpayment "shall" be recovered unless the "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of th[e] subchapter or would be against equity and good conscience."<sup>4</sup>

In deciding whether an individual is "without fault," what constitutes " fault" is determined by Section 10.320 of Title 20 of the Code of Federal Regulations which was promulgated pursuant to the Act.<sup>5</sup>

Section 10.320 states in pertinent part:

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> 5 U.S.C. § 8105.

<sup>3</sup> 5 U.S.C. § 8110.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> 20 C.F.R. § 10.320.

“(a) ... Although the Office may have been at fault in making the overpayment that fact does not relieve the overpaid individual ... from liability for repayment if such individual is not without fault.

“(b) ‘With fault.’ In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. An individual is with 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; or (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.”

The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment as he accepted payments of compensation, which he knew or should have been expected to know were incorrect. The Board notes that under Part B of the form CA-1032 regarding dependents the following statement appeared: “The basic rate of compensation is 66 percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents. You must, therefore, answer the questions below to ensure that your compensation is paid at the correct rate.” Appellant completed forms CA-1032 with this admonition on September 4, 1985, September 22, 1986, September 15, 1987, September 20, 1989, September 18, 1990, January 9, February 11 and August 23, 1992, August 23, 1994 and September 14, 1995. Appellant should have known upon completion of these forms on practically an annual basis that he was not entitled to receipt of augmented compensation if he had no dependents. While appellant properly completed the CA-1032 forms from January 9, 1992 indicating that he was no longer claiming additional compensation because of dependents as his wife had died on November 20, 1991, the record does not reflect that appellant independently informed the Office that he continued to receive augmented compensation and was no longer was entitled to receipt of augmented benefits after his wife’s death. The record does reflect that appellant accepted compensation checks after his wife’s death on November 20, 1991 that he knew or should have known were incorrect.<sup>6</sup> The Board finds that appellant was at fault in the creation of the overpayment and that the overpayment can not, therefore, be waived.

The Board also finds that the Office did not abuse its discretion in its determination that the overpayment would be recovered by withholding \$400.00 from appellant’s continuing compensation benefits every four weeks.

Title 20 C.F.R. § 10.321(a) states in pertinent part: “Whenever an overpayment has been made to an individual who is entitled to further 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.”

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<sup>6</sup> *Madge H. Gurr*, 39 ECAB 1124 (1988).

The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence, from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits and did not request a prerecoupment hearing prior to finalization of the overpayment decision on April 11, 1996.

Section 10.321(h) provides that if additional financial information is not submitted, or a prerecoupment hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require.<sup>7</sup> The Office, therefore, considered the total amount of compensation appellant was receiving and determined that a \$400.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. The Board finds that the Office did not abuse its discretion in this calculation.

The decision of the Office of Workers' Compensation Programs dated April 11, 1996 is hereby affirmed.

Dated, Washington, D.C.  
July 7, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> *Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).