

C5-6 quadriplegia and stenosis of the larynx. The Office entered appellant on the periodic rolls on September 3, 1994.

Appellant completed a form on June 23, 2002 noting that his daughter was born on September 19, 1983 and turned 18 on September 19, 2001. In a letter dated May 5, 2003, the Office issued a preliminary finding of overpayment noting that appellant's only dependent, his daughter, reached 18 on September 19, 2001 and that appellant had continued to receive compensation at the augmented 3/4 rate from September 19, 2001 to February 22, 2003 when he was entitled to compensation at the basic 2/3 rate. The Office found that appellant was not at fault in the creation of the overpayment as he provided timely notification, but that he had received an overpayment in the amount of \$4,046.68 as he received \$36,263.97 in compensation at the augmented rate of 3/4 when he was entitled to receive \$32,217.29 in compensation at the basic rate of 2/3.

Appellant responded on May 24, 2003 and requested that the Office review his claim on the record. He further submitted financial information indicating his total monthly expenses. By decision dated June 17, 2003, the Office finalized the May 5, 2003 preliminary finding of overpayment concluding that appellant was not entitled to waiver as his assets exceeded \$5,000.00 and as his income exceeded his expenses by \$200.00 per month. The Office determined to recover the overpayment by withholding \$100.00 a month from appellant's continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 8105 of the Federal Employees' Compensation Act provides that, if the disability is total, compensation is payable at 66 2/3 percent of the monthly pay or basic compensation for total disability.¹ However, if a disabled employee has a dependent, defined to include an unmarried child under 18 years of age² or a student who is regularly pursuing a full-time course of study,³ then the employee is entitled to have his basic compensation for disability augmented⁴ to 75 percent of the monthly pay.⁵

ANALYSIS -- ISSUE 1

In this case, the record establishes that appellant received augmented compensation based on his sole dependent, his daughter born on September 19, 1983. Appellant's daughter turned 18 on September 19, 2001 and was not regularly pursuing a full-time course of study at that time. Therefore, at the time of his daughter's 18th birthday on September 19, 2001 appellant was no longer entitled to receive compensation at the augmented rate. The Office continued to pay

¹ 5 U.S.C. §§ 8101-8193, § 8105.

² 5 U.S.C. § 8110(a)(3).

³ 5 U.S.C. §§ 8101(17), 8110.

⁴ 5 U.S.C. § 8110(b).

⁵ 20 C.F.R. § 10.403(b).

appellant compensation at the augmented rate from September 19, 2001 to February 22, 2003. Appellant thus received augmented compensation in the amount of \$36,263.97 when he was entitled to receive \$32,217.29 in compensation at the basic rate, resulting in an overpayment the amount of \$4,046.68. Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,046.68 during the period September 19, 2001 to February 22, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of error of fact or law,” adjustment shall be made by decreasing later payments, to which an individual is entitled.⁶ Adjustment or recovery 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.⁷ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

Regarding waiver, section 10.434 of the Office’s regulations provides that, if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery would defeat the purpose of the Act

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”⁸

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all his current income to meet current ordinary and necessary living expenses⁹ and the beneficiary’s assets do not exceed a specified amount as determined by the Office.¹⁰ Section 10.437 provides that recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.¹¹

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.434.

⁹ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB 659, 661 (2000).

¹⁰ 20 C.F.R § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Jan K. Fitzgerald*, *supra* note 9.

¹¹ 20 C.F.R § 10.437.

ANALYSIS -- ISSUE 2

Appellant completed an overpayment recovery questionnaire and provided financial information indicating that his monthly income was \$1,558.26 with monthly interest of \$5.00 for a total of \$1,563.26. He indicated that he paid monthly expenses of \$40.00 in automobile insurance, \$10.00 in automobile taxes, \$1,150.00 in a divorce settlement and \$30.00 for his telephone bill for a total of \$1,200.00 in household expenses, with an additional expenditure of \$100.00 per month on his credit card. Appellant's total monthly expenses were \$1,330.00. Therefore, appellant's monthly income exceeded his monthly expenditures by \$233.26. Appellant also indicated that he had a checking account balance of \$6,100.00.

The Office properly determined that waiver was not appropriate in this case as recovery would not defeat the purposes of the Act as appellant did not need substantially all his current income to meet current ordinary and necessary living expenses as his monthly income exceeded his monthly expenditures by over \$200.00¹² and his assets exceeded \$6,100.00. The Office further concluded that recovery of the overpayment would not be against equity and good conscience as appellant would not experience severe financial hardship in attempting to repay the debt due to his monthly excess and his asset base and as there was no evidence that appellant, in reliance on such payments, gave up a valuable right or changed his position for the worse. Therefore, as appellant's assets exceeded the Office's limitations and as he did not rely on the payments to his detriment, the Office properly denied waiver of the overpayment under the circumstances of this case.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of the Office's regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made [the Office] shall decrease later payments of compensation, taking into account the probably extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹³

ANALYSIS -- ISSUE 3

In the present case, in determining the rate of repayment by deduction from appellant's continuing compensation payments, the Office considered the factors set forth by the applicable regulation. The Office noted appellant's financial circumstances as well as the amount, by which his income exceeded his debts and determined that, as appellant's income exceeded his debts by over \$200.00 per month, recovery of \$100.00 per month would not create a financial hardship. As the record establishes that appellant can repay the \$4,046.68 overpayment through a

¹² *Jan K. Fitzgerald, supra* note 9 at 662.

¹³ 20 C.F.R. § 10.441(a).

deduction of \$100.00 from his continuing compensation checks, the Office properly required repayment at this rate.

CONCLUSION

The Board finds that appellant received a \$4,046.68 overpayment of compensation as a result of the change in status of his dependent. The Board further finds that appellant was not entitled to waiver as his income exceeded his monthly expenses by over \$200.00 per month and as he did not rely on this amount to his detriment. Additionally, the Board finds that the Office properly determined that appellant should repay the overpayment by deducting \$100.00 from each of appellant's continuing compensation checks until the overpayment is recovered.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2003 is affirmed.

Issued: February 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member