



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated March 20, 2000, the Board adopted a January 2, 1998 decision of an Office hearing representative which found that the position of cashier fairly and reasonably represented the employee's wage-earning capacity.<sup>1</sup> The law and the facts of the previous Board decision are incorporated herein by reference.<sup>2</sup>

By decision dated November 14, 2000, the Office accepted that the employee's diagnosed dysthemic disorder was a consequence of his employment injury. The wage-earning capacity finding was set aside and he received compensation for total disability. The employee died on September 14, 2003. On March 24, 2005 the administratrix of his estate, his former wife and the mother of both appellants, filed a death claim. On April 18, 2005 the Office issued a payment of \$18,549.48 to the appellants at the augmented 3/4 rate for the period September 15, 2003 to April 16, 2005 and they were placed on the periodic rolls. On September 6, 2005 the Office issued a formal decision accepting that the employee's death was caused by his employment injuries and awarded compensation to appellants, as his dependent children.

On October 26, 2005 the Office issued preliminary findings to each appellant, noting that an overpayment in compensation in the amount of \$4,997.39 had been created for C.M. and in the amount of \$4,997.38 for J.M. The Office explained that the overpayments resulted because, for the period September 15, 2003 to April 16, 2005, they were paid compensation at an incorrect rate of 3/4 or 75 percent when they were only entitled to a total 55 percent compensation rate. The Office found that the appellants were not at fault in the creation of the overpayments.

By letter dated October 28, 2005, through counsel, Appellants C.M. and J.M. requested a hearing that was held on March 21, 2006. They also submitted overpayment questionnaires and additional financial information. This showed that Appellant J.M. had a deferred student loan of \$11,000.00, an additional student loan of \$500.00 a semester, for the fall of 2005 semester and school expenses not covered by grants of \$4,845.00. On her overpayment questionnaire Appellant J.M. stated that she had monthly income of \$250.00 in earnings, \$654.00 in compensation benefits, monthly rent expenses of \$2,050.00, food \$250.00, clothing of \$300.00 and tuition of \$9,750.00. A January 2006 college invoice showed that Appellant J.M. had a credit balance of \$3,380.00 and her 2005 income tax return showed gross income of \$2,800.00. Appellant C.M. submitted financial information showing that he had deferred loans totaling \$56,540.12, Stafford loans of \$2,750.00 per semester. On his overpayment questionnaire Appellant C.M. stated that he received \$144.00 a month in Veterans Administration (VA) benefits, \$654.00 a month in compensation benefits and had earnings of approximately \$330.00 a month, with monthly rent expenses of \$3,050.00, food of \$275.00, clothing \$150.00, utilities \$150.00, miscellaneous expenses of \$330.00 and tuition of \$12,940.00.

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<sup>1</sup> Docket No. 98-794 (issued March 20, 2000).

<sup>2</sup> On February 26, 1986 the employee, then a 31-year-old equipment cleaner, sustained employment-related cervical and lumbar strains and a herniated disc at C6-7 for which he underwent surgery in April 1991. He did not return to work.

At the hearing, Appellant C.M., J.M. and their mother testified that each appellant was a full-time college student. C.M. testified that he received income of \$200.00 from an on-campus job, \$144.00 from the VA and \$654.00 in compensation benefits and that he had both signature and Stafford loans to cover expenses for each semester, including summer school. He testified that his rent was \$3,050.00 per semester, food \$275.00 a month, clothing \$100.00 a month and that he gave his mother \$150.00 a month for miscellaneous household expenses such as his cell phone and car insurance. Appellant C.M. also stated that he had a \$30.00 cable expense. Appellant J.M. testified that she received no income from the VA and \$250.00 a month teaching dance and that she had deferred student loans. She stated that she was then living at home but was on the meal plan at school and had monthly expenses of \$250.00 for food, \$200.00 to her mother for rent and other expenses, and \$150.00 to \$200.00 a month for clothing and dance costumes.

By decision dated May 18, 2006, an Office hearing representative finalized the overpayment decision. She denied waiver and found that the overpayments would be recovered at a rate of \$75.00 each payment period from each appellants' continuing compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act<sup>3</sup> provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>4</sup>

Office regulations at section 10.410(c) provide that “if there is a child entitled to compensation and no surviving spouse, compensation for one child will equal 40 percent of the employee's monthly pay. Fifteen percent will be awarded for each additional child, not to exceed 75 percent, the total amount to be shared equally among all children.”<sup>5</sup>

Section 8133 provides that compensation in case of death from an injury sustained in the performance of duty is payable to a child until the child has reached 18 years of age, but shall continue if he or she is a student as defined by section 8101 of the Act at the time he or she reaches 18 years of age for so long as he or she continues to be such student or until he or she marries.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> 20 C.F.R. § 10.410(c).

<sup>6</sup> 5 U.S.C. § 8133; *see Grady Lewis (Vanessa Lewis)*, 55 ECAB 306 (2004).

### **ANALYSIS -- ISSUE 1**

The record, in this case, reflects that on April 18, 2005 appellants received a lump-sum payment of \$37,098.95 at the argued 3/4 (75 percent) rate for the period September 15, 2003 to April 16, 2005, with C.M. receiving \$18,549.48 and J.M. receiving \$18,549.47. As reflected on an Office overpayment worksheet for this period, both appellants should have received compensation at the 55 percent rate of total compensation or \$27,104.18, which created an overpayment in compensation of \$9,994.77. In this case, as there is no surviving spouse,<sup>7</sup> section 10.410(c) of Office regulations provides that, compensation for one child will equal 40 percent of the employee's monthly pay with 15 percent awarded for each additional child and the total amount to be shared equally among all children.<sup>8</sup> The Office properly determined that an overpayment of compensation in the amount of \$9,994.77 had been created or an overpayment of \$4,997.39, for C.M. and \$4,997.38, for J.M., for which they were found not at fault.

### **LEGAL PRECEDENT -- ISSUE 2**

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>9</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>10</sup>

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.<sup>11</sup> Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.<sup>12</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>13</sup>

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<sup>7</sup> Appellants' mother and the employee were divorced.

<sup>8</sup> 20 C.F.R. § 10.410(c).

<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> 20 C.F.R. § 10.434.

<sup>11</sup> 20 C.F.R. § 10.436.

<sup>12</sup> 20 C.F.R. § 10.437(a).

<sup>13</sup> 20 C.F.R. § 10.437(b).

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Office determined that each appellant was without fault in the creation of the overpayments. Because they were not at fault, the Office may adjust later payments only if the adjustments would not defeat the purpose of the Act or be against equity and good conscience.<sup>15</sup> Appellant C.M. furnished the Office with an overpayment questionnaire and he testified at the hearing regarding his finances. He had monthly expenses totaling \$767.00.<sup>16</sup> Appellant C.M. stated and the record supports that his periodic compensation is \$654.00 for each four-week period or \$708.50 per month. He also testified that he received \$144.00 a month from the VA and had a monthly salary of about \$200.00, for a total monthly income of \$1,052.50. Appellant's monthly expenses, however, should be decreased because much of his university expenses for room and board are covered by grants and deferred loans. When this amount is deducted, his monthly expenses are \$330.00 a month. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.<sup>17</sup> Even without the deduction for expenses covered by deferred loans and grants, Appellant C.M.'s monthly income of \$1,052.50, exceeds his monthly expenses of \$767.00 by \$285.50, in excess of the \$50.00 base provided in Office procedures.<sup>18</sup> The Board, therefore, finds that the Office properly concluded that recovery at the rate of \$75.00 a month from continuing compensation would not cause financial hardship to Appellant C.M. or defeat the purpose of the Act. Furthermore, he made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office properly determined that recovery would not be against equity and good conscience. The Board finds that the Office properly denied waiver of the

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<sup>14</sup> 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>15</sup> 20 C.F.R. §§ 10.436, 10.437; *see Keith A. Mapes*, 56 ECAB \_\_\_\_ (Docket No. 03-1747, issued October 20, 2004).

<sup>16</sup> This included monthly expenses of university housing rental of \$162.00, food \$275.00, clothing \$100.00, payment to his mother for telephone and insurance expenses \$150.00, cable \$30.00 and miscellaneous \$50.00. It is noted that Office procedures provide that miscellaneous expenses should not exceed \$50.00 per month. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6200.6(a)(3)(3) (October 2004).

<sup>17</sup> Federal (FECA) Procedure Manual, *id.*

<sup>18</sup> When the expenses covered by deferred loans and grants are deducted, appellant's monthly income exceeds his expenses by \$722.50.

overpayment for Appellant C.M. and is required by law to recover the debt by decreasing later payments to which Appellant C.M. is entitled.<sup>19</sup>

Appellant J.M. furnished the Office with an overpayment questionnaire and testified at the hearing regarding her finances and that she was living at home. She indicated that her monthly expenses totaled \$650.00.<sup>20</sup> Appellant J.M. stated that and the record supports that her periodic compensation is \$654.00 for each four-week period or \$708.50 per month. She also testified that she had monthly income of \$250.00, for a total income of \$958.50 a month. As discussed above, Appellant J.M.'s monthly expenses should be decreased because she was enrolled in the food plan at her university which was covered by grants and deferred loans. When this amount is deducted, her monthly expenses are \$400.00 per month. Even without the deduction for expenses covered by deferred loans and grants, Appellant J.M.'s monthly income of \$958.50 exceeds her monthly expenses of \$650.00 by \$308.50, well in excess of the \$50.00 base provided in Office procedures.<sup>21</sup> The Board finds that the Office properly concluded that recover of the overpayment would not cause financial hardship to Appellant J.M. or defeat the purpose of the Act. Furthermore, she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office properly determined that recovery would not be against equity and good conscience. The Board finds that the Office properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which Appellant J.M. is entitled.<sup>22</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Office's implementing regulation provides that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$75.00 per compensation period from each appellant. The record indicates that Appellant C.M. had adjusted discretionary income of at least \$285.50, per month and that Appellant J.M. had adjusted discretionary income of at least \$308.50. The Office did

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<sup>19</sup> 5 U.S.C. § 8129(a).

<sup>20</sup> This included monthly expenses of \$250.00 for food, \$200.00 for clothing and \$200.00 given to her mom for additional expenses.

<sup>21</sup> When the expenses covered by deferred loans and grants are deducted, appellant's monthly income exceeds her expenses by \$558.50.

<sup>22</sup> 5 U.S.C. § 8129(a).

<sup>23</sup> 20 C.F.R. § 10.441(a).

not abuse its discretion in finding that each appellant should repay their overpayments at the rate of \$75.00 per compensation period.

### **CONCLUSION**

The Board finds that Appellant C.M. received an overpayment in compensation in the amount of \$4,997.39 and Appellant J.M. received an overpayment in compensation in the amount of \$4,997.38 because each received compensation at an incorrect rate for the period September 15, 2003 to April 16, 2005, that the Office properly denied waiver of the overpayments and that the Office properly required repayment of the overpayment by deducting \$75.00 every four weeks from each appellant's continuing compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 18, 2006 be affirmed.

Issued: May 8, 2007  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board