

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

D.B., Appellant)

and)

U.S. POSTAL SERVICE, CURSEEN-MORRIS)
PROCESSING & DISTRIBUTION CENTER,)
Washington, DC, Employer)

Docket No. 08-1197
Issued: November 24, 2008

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 17, 2008 appellant filed a timely appeal from a November 28, 2007 decision of the Office of Workers' Compensation Programs that found she received an overpayment of compensation and a February 28, 2008 decision that established a repayment schedule. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$13,048.35; (2) whether the Office properly determined that she was at fault in accepting the overpayment and was therefore not entitled to waiver; and (3) whether the Office properly required repayment at the rate of \$250.00 per compensation period.

FACTUAL HISTORY

On June 10, 1990 appellant, then a 27-year-old letter sorter machine clerk, sustained a right lower leg laceration and lumbosacral strain when she was hit by a robot wagon at work.

She stopped work that day and was placed on the periodic rolls. Appellant claimed one dependent, a son, Clinton Lee Kilpatrick, III, who was born on November 28, 1984. By decision dated June 30, 1993, her compensation benefits were terminated, effective July 25, 1993. In a July 11, 1994 decision, an Office hearing representative reversed the termination. Appellant was returned to the periodic rolls, effective the date of termination. By decision dated February 9, 1995, the Office again terminated appellant's compensation benefits, effective March 5, 1995. Appellant returned to four hours of limited duty daily on December 24, 1995 and received wage-loss compensation for four hours daily. She again stopped work on August 16, 1996 and did not return. Appellant was returned to the periodic rolls at the augmented rate and was paid by direct deposit.

Beginning on December 8, 1992, appellant signed Office EN1032 forms, attesting that her son was a dependent. She submitted forms dated August 11, 2003, October 9, 2005, July 20, 2006 and August 28, 2007. The forms explained the circumstances under which she would be entitled to augmented compensation for her dependent child. By letters dated September 6, 2007, the Office informed appellant that her augmented compensation rate of 3/4 would be changed to 2/3, effective immediately, because she was claiming an ineligible dependent. It noted that compensation was payable until age 23 for an unmarried child who had reached age 18, had not completed four years of education beyond high school, and was a full-time student. The Office requested that appellant submit verification of her son's student status and provided the appropriate forms.

On September 14, 2007 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$13,048.35 for the period November 30, 2003 to September 1, 2007. It found that she continued to receive disability compensation at the augmented 3/4 rate when there was no evidence that her son was a full-time student for that period. The Office found appellant at fault because she should have reasonably been aware that her son was not an eligible dependent after turning 19 years of age. An overpayment worksheet noted that appellant received compensation at the 3/4 rate totaling \$118,434.65 and that compensation at the 2/3 rate would total \$105,386.30, which yielded an overpayment in the amount of \$13,048.35.

By letter dated November 10, 2007, appellant advised that her son had been a student at Albany State University in Albany, Georgia since 2006, and that she had forwarded the verification forms to the university. She attached records showing that her son had been enrolled in educational institutions from the spring of 2002 through the first term of 2005.

In a November 28, 2007 decision, the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$13,048.35 because she knew or should have known she was not entitled to receive wage-loss compensation at the augmented 3/4 rate. It found the evidence submitted was insufficient to establish that her son had been in a full-time course of study from November 30, 2003 through September 1, 2007.

In a letter dated January 23, 2008, the Office noted that appellant had not responded to the overpayment decision. In a February 28, 2008 decision, it informed her that \$250.00 would be deducted from her continuing compensation each pay period to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.² When an overpayment has been made to an individual 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 the individual is entitled.³

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependent as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.⁴ Section 8110(a)(3) of the Act provides that a child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student, as defined under section 8101(17).⁵ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation to which he or she was entitled at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic rolls in November 1990 and began submitting EN1032 forms at that time. She had only one possible dependent, her son Clinton, who became 18 years old on November 28, 2002. The record contains no evidence that he was disabled due to a mental or physical condition. Clinton would, therefore, not qualify as a dependent unless he was an unmarried student attending an approved full-time course of study, had not completed four years of post high-school education, and had not completed the academic semester in which he became 23 years old.⁷

By letter dated September 6, 2007, the Office informed appellant that additional information was needed to determine whether her son continued to be eligible as a dependent. Appellant was asked to provide a statement and certification of school enrollment using attached

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8110(b).

⁵ 5 U.S.C. § 8110(a)(3). Section 8101(17) defines a student as an individual under 23 years of age who has 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.

⁶ 5 U.S.C. § 8110(a)(3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁷ *Id.*

forms. By letter dated November 10, 2007, she stated that she had forwarded the forms to Albany State University where her son had been enrolled since 2006, and also submitted an academic transcript from Morgan State University for the fall 2002 and spring 2003 terms, periods that preceded her son's 18th birthday. Another transcript showed that Clinton was enrolled for the fall 2003 and spring 2004 semesters, but it is unclear if the transcript is from Chattanooga State or Atlanta Metropolitan College. Furthermore, it is unclear whether he was a full-time student. A Prince Georges Community College unofficial course record shows that Clinton was enrolled part time in the fourth term of 2004 and also enrolled for the first term of 2005, although it is unclear if he was a full-time student for the latter period. An unofficial transcript from Atlanta Metropolitan College shows that Clinton was enrolled part time for the 2005 summer session. There is therefore insufficient evidence to establish that appellant's son was pursuing a full-time course of study as defined under section 8101(17) of the Act for the period of the overpayment in compensation at issue here.⁸

The record supports that appellant continued to receive compensation at the augmented 3/4 rate until September 1, 2007, although she had no qualifying dependent. For this period she received augmented compensation at the 3/4 rate totaling \$118,434.65, when she should have received compensation at the 2/3 rate or \$105,386.30. Thus the \$13,048.35 difference constitutes an overpayment in compensation,⁹ and the Board finds that the Office correctly determined the fact and amount of overpaid compensation in this case.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless "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."¹¹

Section 10.433(a) of the Office's regulation provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

⁸ 5 U.S.C. § 8101(17); *see Denise L. Crouch*, 57 ECAB 161 (2005).

⁹ 5 U.S.C. §§ 8101(17), 8110.

¹⁰ *See Ralph P. Beachum, Sr.*, *supra* note 6.

¹¹ 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

(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 to be incorrect. (This provision applies only to the overpaid individual).”¹²

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office may not deposit compensation into a claimant’s account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹³

Section 10.438(b) of Office regulations provides that failure to submit requested financial information within 30 days shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

In this case, appellant received augmented compensation by direct deposit following her son’s 18th birthday on November 28, 2002 until September 2, 2007. As noted appellant’s son did not remain an eligible dependent after his 18th birthday. The Office found the overpayment period to be November 30, 2003 to September 2, 2007. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit, and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.¹⁵ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period, and the case must be remanded for the Office to determine whether she is entitled to waiver for this period.

The EN1032 forms mailed to appellant by the Office and submitted by her since 1992 clearly explained the circumstances under which she would be entitled to augmented compensation, which would end when a dependent child turned 18 and was no longer a full-time student. The Board finds that after appellant’s receipt of the first direct deposit for which fault may not be imputed to her, under the reasonableness standard delineated above, for the subsequent direct deposits she knew or should have known that the compensation paid by direct

¹² 20 C.F.R. § 10.433 (1999); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹³ *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ 20 C.F.R. § 10.438(b); see *John Skarbek*, 53 ECAB 630 (2002).

¹⁵ See *Karen K. Dixon*, 56 ECAB 145 (2004).

deposits issued by the Office after the first direct deposit subsequent to her son's 18th birthday on November 28, 2002 were in error, and the Board finds that she was at fault under the third standard outlined above for any period after the first direct deposit after her son was no longer eligible. Recovery of the overpayment in compensation may not be waived for this time period, and the decision dated November 28, 2007 is affirmed in this respect. The record in this case, however, does not show when appellant's individual direct deposits were made. Appellant would not be at fault for the first compensation period after her son was no longer an eligible dependent, and she could be entitled to waiver for this brief period. Nonetheless, in this case appellant is not entitled to waiver because Office regulations provide that the failure to submit requested information within 30 days shall result in a denial of waiver and no further request for waiver will be considered until the requested information is provided. Appellant had the responsibility to provide financial information to the Office, and she did not do so.¹⁶

In its preliminary determination dated September 14, 2007, the Office clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. Appellant did not submit a completed overpayment questionnaire within the required 30-day period, or otherwise submit financial information supporting her income and expenses. As a result, the Office did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience. Consequently, as appellant did not submit the financial information required under section 10.438 of Office regulations, which was necessary to determine her eligibility for waiver, she would not be entitled to waiver in this case.¹⁷

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.¹⁸

ANALYSIS -- ISSUE 3

Appellant did not submit an overpayment recovery questionnaire or other financial information that the Office requested prior to the final November 28, 2007 overpayment decision. The February 28, 2008 decision established a repayment schedule. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.¹⁹ When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly

¹⁶ 20 C.F.R. § 10.438.

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.441(a).

¹⁹ 20 C.F.R. § 10.438.

and in full.²⁰ As appellant did not submit any financial information to the Office as requested, the Board finds that there is no evidence in the record to show that a recovery rate of \$250.00 every 28 days was unreasonable. She has not shown that the Office improperly required withholding \$250.00 from her continuing compensation payments every 28 days.

CONCLUSION

The Board finds that an overpayment in compensation of \$13,048.35 occurred because appellant continued to receive augmented compensation after her son was no longer an eligible dependent, that she was not entitled to waiver of the overpayment, and that the Office did not abuse its discretion in setting the rate of recovery at \$250.00 each compensation period.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 28, 2008 and November 28, 2007 be affirmed.

Issued: November 24, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²⁰ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).