

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

G.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 09-606
Issued: December 18, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2009 appellant filed a timely appeal of the October 30 and 31, 2008 merit decisions of the Office of Workers' Compensation Programs finding she received overpayments of compensation for which she was at fault and directing their recovery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,091.21 for the period June 1, 2007 to June 15, 2008 and \$1,223.25 for the period June 1, 2007 to January 19, 2008 due to the payment of augmented compensation; (2) whether the Office properly determined that she was at fault in creating the overpayments and, therefore, ineligible for waiver; and (3) whether the Office properly directed recovery of the \$2,091.21 overpayment at the rate of \$319.00 every four weeks from appellant's continuing compensation payments.

FACTUAL HISTORY

On August 6, 2002 appellant, then a 39-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that on June 7, 2002 she first became aware of ganglion tendinitis in her left thumb and wrist and cervical disease caused by her federal employment.¹ She claimed one dependent son, who was born on June 21, 1987. By decision dated November 8, 2002, the Office accepted that appellant sustained left thumb ganglion and left wrist tendinitis due to her employment activities. The evidence, however, was insufficient to establish that she sustained cervical or shoulder conditions due to her work duties. In a December 3, 2003 decision, an Office hearing representative affirmed the November 8, 2002 decision.²

On July 16, 2005 appellant filed a CA-2 form alleging that on June 13, 2005 she first became aware of shoulder, neck and bilateral hand conditions and realized that they were caused by her federal employment.³ By letter dated October 7, 2005, the Office accepted her claim for right thumb metacarpo-carpal joint (MCC) and wrist sprain.

By letter dated November 7, 2005, the Office advised appellant that she was being paid compensation for temporary total disability from June 16 to November 11, 2005 as a result of her employment-related left thumb ganglion and left wrist tendinitis following her return to work four hours per day. Appellant was being paid at the statutory two-thirds rate as her son had turned 18 years old on June 21, 2005. She would receive a separate compensation check for the difference between the two-thirds and three-fourths rates for the period June 16 to 20, 2005 in which she was entitled to augmented benefits.

On November 7, 2005 the Office requested that appellant submit a statement and certification of her son's enrollment in school to determine whether he was an eligible dependent beyond his 18th birthday. If appellant's son was incapable of self-support, it advised appellant that she could claim continuing compensation by submitting a medical report from an attending physician which fully described the mental or physical disability that caused such incapacity and estimated its probable duration. The Office advised appellant that the law prohibited her acceptance of compensation when a dependent was no longer eligible. If the dependent was no longer a full-time, unmarried student under the age of 23 who had not completed four years of education beyond high school, then appellant was instructed to notify the Office immediately. Any compensation payment she received after such a change in status of the dependent must be returned to the Office for cancellation. The payment would be replaced with a payment in the correct amount.

On November 8, 2005 appellant completed a Form EN1618 claiming her son as a dependent. The vice principal of West Contra Costa Adult Education Center, an accredited

¹ OWCP File No. xxxxxx106.

² In an April 27, 2004 order, the Board dismissed appellant's appeal of the December 3, 2003 decision as no duly authorized representative filed an application for review on her behalf. Docket No. 04-714 (issued April 27, 2004).

³ OWCP File No. xxxxxx898.

school, signed the form on November 10 and 17, 2005 and stated that appellant's son was enrolled from September 6, 2005 to June 1, 2006. The date he was expected to complete his course of study was unknown.

In a January 24, 2007 letter, the Office requested verification that appellant's son was a student by providing a statement and certification of school enrollment using accompanying EN1618 forms. Appellant was instructed to fill out Part A and send both Parts A and B to the school so that an official at the school could fill out both Parts A and B. The Office advised appellant that she was prohibited by law from accepting compensation when a dependent was no longer eligible. Appellant was required to notify the Office immediately if her son was no longer a full-time, unmarried student under the age of 23 who had not completed four years of education beyond high school. The Office noted that any compensation check received after a change in dependency status must be returned to the Office.

On February 8, 2007 appellant completed a Form EN1618 and again claimed her son as a dependent. The registrar of Pensacola Christian College signed the form on February 14, 2007 and indicated that appellant's son was enrolled from January 22 to May 9, 2007. Appellant's son was expected to complete his course of study on December 17, 2010. However, the registrar stated that the college was not an accredited or a licensed institution.

By letter dated December 28, 2007, the Office advised appellant that additional information was required in connection with the augmented compensation she was receiving. It requested that she complete Part A of the enclosed EN1618 form and that an official at the school complete Part B of the form after reviewing Part A. Appellant was instructed to return the form to the Office within 30 days or her compensation may be suspended.

On January 16, 2008 appellant completed a Form EN1618, reporting that her son was enrolled at a U.S. Navy technical school from July 3, 2007 to June 2008.

In a January 25, 2008 letter, the Office advised appellant that her compensation was being reduced to the statutory two-thirds rate because there was no evidence to establish that she had any eligible dependents. It had not received any information from a school official as to whether her son was enrolled as a full-time student. The Office noted that the Pensacola Christian College was not an accredited school. It advised appellant that, if her son had not continued to be a full-time student in an accredited institution since his 18th birthday, then she received an overpayment. Appellant was afforded 60 days to submit evidence establishing that her son's eligibility as a dependent.

By letter dated March 21, 2008, appellant submitted a transcript from Pensacola Christian College which stated that her son was enrolled from January 22 to February 23, 2007.

On June 21, 2008 appellant completed a Form EN1618, reporting that her son was enrolled at West Contra Costa Adult Education Center from September 2005 to April 3, 2006. Her son completed his education on April 3, 2006. In a second Form EN1618 completed that date, appellant reported that her son was enrolled at Contra Costa College during the fall of 2005, fall of 2006 and spring of 2007 (August 2005 to May 2007). Her son also attended summer

school from June 16 to July 24, 2008. The Director of Admissions and Records signed the form on June 23, 2008 and confirmed attendance during the claimed period.

On July 31, 2008 appellant returned to part-time work four hours per day.

On September 10, 2008 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,223.25 for the period June 1, 2007 to January 19, 2008 under OWCP File No. xxxxxx898. There was also an overpayment in the amount of \$2,091.21 for the period June 1, 2007 to June 15, 2008 under OWCP File No. xxxxxx106. She continued to claim her son, who was over 18 years old, as a dependent when there was no evidence establishing his full-time student status from May 2007 to June 15, 2008. The Office noted that the Pensacola Christian College was not an accredited school and that enrollment in a U.S. Navy technical school had not been verified. The beginning date of the overpayment period in both claims began on June 1, 2007. Although there was no ending date listed for appellant's son's enrollment at Contra Costa College in May 2007, the Office determined that the ending date was May 31, 2007. It determined that January 19, 2008 was the ending date of the overpayment period under OWCP File No. xxxxxx898 as the reduction of appellant's compensation to the two-thirds rate became effective on January 20, 2008. The Office determined that June 15, 2008 was the ending date of the overpayment period under OWCP File No. xxxxxx106 as there was no verification of appellant's son's full-time student status prior to his enrollment as a full-time student during the summer at Contra Costa College.⁴ An overpayment worksheet stated that, under OWCP File No. xxxxxx898, appellant received compensation at the three-fourths rate totaling \$10,951.00 when she should have received compensation at the two-thirds rate totaling \$9,727.75. This resulted in a \$1,223.25 overpayment. Under OWCP File No. xxxxxx106, appellant received compensation at the three-fourths rate totaling \$18,935.28 when she should have received compensation at the two-thirds rate totaling \$16,844.07. This resulted in a \$2,091.21 overpayment. The Office found that appellant was at fault in creating the overpayments because she failed to provide evidence to establish that her son was a full-time student during the periods in question. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a precoupment hearing within 30 days if she disagreed that the overpayment occurred with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents. Appellant did not respond.

By decision dated October 30, 2008, the Office finalized the overpayment in the amount of \$2,091.21 and fault for the period June 1, 2007 to June 15, 2008 under OWCP File No. xxxxxx106. It ordered repayment by deducting \$319.00 every four weeks from appellant's continuing compensation.

In an October 31, 2008 decision, the Office finalized the overpayment in the amount of \$1,223.25 and fault for the period June 1, 2007 to January 19, 2008 under OWCP File No. xxxxxx898. It ordered repayment in full.

⁴ The Office noted that appellant's compensation was reduced to the two-thirds rate effective August 3, 2008.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act⁵ 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.⁶ 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.⁷

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁸ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of her weekly pay if she has one or more dependents. 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 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 at an accredited institution.⁹ If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received overpayments in the amount of \$2,091.21 under OWCP File No. xxxxxx106 and \$1,223.25 under OWCP File No. xxxxxx898. Appellant received compensation for her accepted employment-related left thumb ganglion and left wrist tendinitis and right thumb MCC and wrist sprain. The Office paid compensation benefits at the statutory three-fourths rate as she claimed a dependent son. Appellant continued to receive compensation at this rate after her son turned 18 years old on June 21, 2005. The record contains no evidence that he was disabled due to a mental or physical condition. Appellant's son would 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.¹¹

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

⁹ *Id.* at §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405.

¹⁰ *Id.* at § 8110(a)(3); *see Ralph P. Beachum, Sr.*, *supra* note 8.

¹¹ *Id.*

EN1618 forms signed by the vice principal of West Contra Costa Adult Education Center on November 10 and 17, 2005 and appellant's June 21, 2008 EN1618 form documented that her son was enrolled in school from September 6, 2005 to June 1, 2006 following his 18th birthday. Appellant's June 21, 2008 EN1618 form which stated that her son was enrolled at Contra Costa College from August 2005 to May 2007 and that he attended summer school from June 16 to July 24, 2008 as a full-time student was confirmed on June 23, 2008 by the director of admissions and records. The EN1618 form signed by the registrar of Pensacola Christian College on February 14, 2007 and a transcript from the school reported that her son was enrolled from January 22 to May 9, 2007. However, the registrar stated that the school was not an accredited or a licensed institution. Appellant's January 16, 2008 EN1618 form which reported her son's enrollment in a U.S. Navy technical school from July 3, 2007 to June 2008 has not been verified. The Board finds that, as appellant's son was no longer a full-time college student as of June 1, 2007, she was not entitled to receive compensation at the augmented three-fourths rate under either of the accepted claims.¹²

The Office, however, continued to pay appellant compensation at the augmented three-fourths rate through January 19, 2008 under OWCP File No. xxxxxx898. It reduced her compensation to the two-thirds rate effective January 20, 2008. The Office paid augmented compensation through June 15, 2008 under OWCP File No. xxxxxx106, one day prior to appellant's son's enrollment in summer school at Contra Costa College. It paid her \$10,951.00 from June 1, 2007 to January 19, 2008 instead of \$9,727.75 for a claimant without dependents under OWCP File No. xxxxxx898. The Office paid appellant \$18,935.28 from June 1, 2007 to June 15, 2008 instead of \$16,844.07 for a claimant without dependents under OWCP File No. xxxxxx106. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board finds that appellant received overpayments of \$1,223.25 under OWCP File No. xxxxxx898 and \$2,091.21 under OWCP File No. xxxxxx106, the difference between the amount of compensation that she actually received and the amount of compensation that she was entitled to as she received compensation at the augmented rate from June 1, 2007 to January 19, 2008 and June 1, 2007 to June 15, 2008, respectively.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹³ provides that an overpayment of 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.¹⁴ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.¹⁵ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁶

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

¹³ 5 U.S.C. § 8129(b).

¹⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁶ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”¹⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”¹⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayments of \$2,091.21 and \$1,223.25 because she failed to provide information regarding her son's student status during the periods June 1, 2007 to June 15, 2008 under OWCP File No. xxxxxx106 and June 1, 2007 to January 19, 2008 under OWCP File No. xxxxxx898. The Board finds that appellant knew or should have known that this information was material to her receipt of compensation benefits.

The Office sent appellant requests on November 7, 2005 and December 28, 2007 for documentation regarding her son's student status and provided the appropriate form to fill out to verify his student status since June 21, 2005, the date he turned 18 years old. The letters made clear that the Office would use the information requested on the enclosed forms to decide whether she was entitled to receive compensation for a dependent or whether her benefits should be adjusted.

On January 25, 2008 the Office sent appellant a letter explaining the deficiency in her claim for augmented compensation and afforded her 60 days to provide such documentation. Again, the Office informed appellant that her compensation would be adjusted to the two-thirds basic rate if such documentation was not received. Warnings that changes in her compensation would occur if her son failed to qualify as a student underscored the importance of this information and appellant's responsibility to disclose it. Appellant only submitted verified information regarding her son's status as a student prior to June 1, 2007. The Board finds that she was at fault in creating the overpayments that arose from her failure to furnish information which she knew or should have known to be material. Appellant's fault in the matter precludes

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ *Id.* at § 10.433(b); *Diana L. Booth, supra* note 16.

any consideration of waiver of recovery of the overpayment. The law requires the Office to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.¹⁹

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 the same. If 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.²⁰

ANALYSIS -- ISSUE 3

With respect to the recovery of an overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.²¹ Regarding the recovery of the \$2,091.21 overpayment under OWCP File No. xxxxxx106 from appellant's continuing compensation, the Board notes that she did not provide any financial information which would assist the Office in determining the amount to deduct from future compensation payments in order to recoup the overpayment. The Office set the rate of recovery as \$319.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.²² Regarding the recovery of the \$1,223.25 overpayment under OWCP File No. xxxxxx898, the Board notes that appellant is no longer receiving wage-loss compensation. The Board finds, therefore, that it does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.²³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,091.21 for the period June 1, 2007 to June 15, 2008 and \$1,223.25 for the period June 1, 2007 to January 19, 2008 due to the payment of augmented compensation. The Board further

¹⁹ 20 C.F.R. § 10.438.

²⁰ *Id.* at § 10.441(a).

²¹ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

²² On appeal, appellant submitted a listing of her current bills. As the Board's review is limited to evidence in the case record at the time the Office made its decision over which the Board has jurisdiction, the Board cannot review this evidence submitted for the first time on appeal. *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); 20 C.F.R. § 501.2(c).

²³ *Cheryl Thomas*, *supra* note 21.

finds that the Office properly determined that appellant was at fault in creating the overpayments and, therefore, ineligible for waiver. The Board also finds that the Office properly directed recovery of the \$2,091.21 overpayment at the rate of \$319.00 every four weeks from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 31 and 30, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 18, 2009
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