

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, DOMINION STATION
POST OFFICE, Bristol, VA, Employer**

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**Docket No. 09-474
Issued: October 2, 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 December 8, 2008 appellant filed a timely appeal from two November 21, 2008 decisions of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly found a \$2,671.43 overpayment of compensation for the period January 29, 2007 to April 12, 2008 as appellant received augmented compensation while having no eligible dependents; (2) whether the Office properly found that appellant was at fault and therefore the overpayment was not subject to waiver; and (3) whether the Office properly directed recovery of the overpayment by deducting \$333.92 from appellant's continuing compensation payments.

On appeal, appellant asserts that the Office should have waived recovery of the overpayment due to financial hardship. He contended that he was not at fault in the creation of the overpayment as he promptly notified the Office of his divorce.

FACTUAL HISTORY

The Office accepted that on November 22, 1999 appellant, then a 45-year-old rural carrier, sustained left shoulder, cervical and lumbar sprain/strains when attacked by a dog. He remained under medical care and received compensation for intermittent work absences. Appellant received compensation at the augmented, three-fourths rate as he was married and had eligible dependents.¹ He was placed on the periodic rolls effective April 20, 2003.

In a February 21, 2007 letter, appellant advised the Office that his divorce became final on January 29, 2007 but he had not received a copy of the decree until the previous week. He stated that he “no longer ha[d] any dependents.” Appellant requested that the Office “make any necessary adjustments in [his] workers’ compensation.” He enclosed a copy of the divorce decree.

In a June 26, 2007 affidavit of earnings and employment (Form CA-1032), appellant advised that he was divorced effective January 29, 2007 and had no eligible dependents. He was not sure whether he was receiving compensation at the correct rate.

In April 16, 2008 memoranda, the Office determined that, from January 29, 2007 to April 12, 2008, appellant received compensation at the 3/4, augmented rate while he had no eligible dependents. Although appellant notified the Office on February 26, 2007 that his divorce was final, it erroneously paid compensation at the augmented rate. From January 29 to March 17, 2007, he received \$2,643.43 but was only entitled to \$2,352.00, a difference of \$291.43. For the period March 18, 2007 to March 15, 2008, appellant received \$20,046.00 but was entitled to only \$17,846.00, a difference of \$2,210.00. For the period March 16 to April 12, 2008, he received \$1,542.00 but was entitled to only \$1,372.00, a difference of \$170.00. The Office then totaled the \$291.43, \$2,210.00 and \$170.00 amounts to equal \$2,673.43. It corrected appellant’s ongoing compensation to the 2/3 rate effective April 13, 2008.

By notice dated April 22, 2008, the Office advised appellant of its preliminary determination that a \$2,671.43 overpayment of compensation was created as he received compensation at the augmented rate from January 29, 2007 to April 12, 2008 although he had no eligible dependents. From January 29, 2007 to April 12, 2008, appellant was paid \$24,231.43 in compensation but was entitled to only \$21,560.00. The Office made the preliminary determination that appellant was at fault in the creation of the overpayment as he accepted payments which he knew or should have known he was not entitled. It afforded 30 days to provide financial information and to request a hearing. Appellant did not respond to the notice of overpayment.²

By decisions dated November 21, 2008, the Office found a \$2,671.43 overpayment for the period January 29, 2007 to April 12, 2008, as appellant received augmented compensation

¹ On affidavits of earnings and employment (Form CA-1032) from June 2002 to July 2007, appellant listed his wife and children as dependents. His children were no longer eligible dependents as of May 12, 2006.

² Appellant submitted a June 16, 2008 Form CA-1032 noting no eligible dependents.

while having no eligible dependents. It found appellant was at fault as he was aware or reasonably should have been aware that the payments were incorrect. As he did not submit financial information, the Office directed recovery of the overpayment by deducting \$333.92 from his continuing compensation, with interest, from December 21, 2008 to August 1, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ 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 his duty.⁴ Section 8129(a) of the Act provides, in pertinent part, that 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."⁵ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation. The record establishes that he was paid wage-loss compensation at the augmented three-quarters rate after he was divorced effective January 29, 2007 and had no other qualifying dependents. Appellant timely informed the Office of his divorce. However, the Office paid him compensation at the augmented three-quarters rate through April 12, 2008.

The Board finds that appellant was not entitled to compensation at the augmented three-quarters rate after his divorce on January 29, 2007. Appellant was only entitled to receive compensation at the statutory two-thirds rate. An overpayment in compensation was created once his divorce was made final.⁷

The Board finds, however, that this case is not in posture for decision regarding the amount of the overpayment. The Office found that appellant received \$24,231.43 in compensation from January 29, 2007 to April 12, 2008 but was only entitled to \$21,560.00. However, the record does not confirm either amount. There are no payment records for any portion of the period in question. The Office based its calculations on summary worksheets but did not provide supporting payment records. The record on appeal is insufficient to establish that appellant received \$24,231.43 in compensation. The Office did not explain how it calculated the

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

⁷ *Id.*

\$21,560.00 amount. The case will be remanded to the Office for further development to determine the amount of the overpayment.

The Board notes that, on appeal, appellant asserted that the Office should have waived recovery of the overpayment due to financial hardship.

ANALYSIS -- ISSUE 2

The Office found appellant at fault in creation of the overpayment as he knew or should have known he received compensation at an incorrect rate from January 29, 2007 to April 12, 2008. On appeal, appellant contends that he was not at fault in creation of the overpayment.

The compensation payment records for the period January 29, 2007 to April 12, 2008 are not of record. Without these forms, it cannot be determined if appellant had proper notice of his compensation rate or that the three-fourths rate continued after his divorce became final. Therefore, it cannot be ascertained if appellant knew or should have known that he received payments at an incorrect rate. It is thus premature for the Board to address the issue of fault on the present appeal.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the amount of the overpayment. The case will be remanded to the Office for additional development. As the case is not in posture regarding the amount of the overpayment, it is premature for the Board to address the issues of waiver and recovery.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 21, 2008 are affirmed as to fact of overpayment. As to amount and fault, the decisions are set aside and the case remanded to the Office for development consistent with this decision.

Issued: October 2, 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