

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

L.S., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
McCLELLAN AIR FORCE BASE, CA,)
Employer)

_____)

**Docket No. 07-1927
Issued: December 26, 2007**

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 July 17, 2007 appellant filed a timely appeal from a June 7, 2007 Office of Workers' Compensation Programs' overpayment decision. 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 the Office properly determined that appellant received a \$32,408.33 overpayment of compensation from October 14, 1989 to January 26, 2002; and (2) whether it properly found that she was not without fault in the creation of the overpayment, thus precluding waiver of the overpayment.

FACTUAL HISTORY

On January 4, 1988 appellant, then a 36-year-old supply technician, filed a traumatic injury claim alleging that she injured her right knee when she fell. In a CA-7 claim for compensation, she indicated that she had one dependant, her husband. On July 28, 1988 the

Office accepted appellant's claim for a right knee contusion. Appellant lost intermittent time from work until July 1, 1988 when she stopped work and did not return. Effective August 14, 1988 she was placed on the periodic compensation rolls for temporary total disability. The Office advised appellant that she would receive wage-loss compensation at the three-fourths augmented pay rate for employees with one or more dependents.

In an Office Form EN1032 dated October 10, 1989, reporting employment and income, appellant indicated that she would not be eligible to receive compensation at the augmented pay rate for an employee with dependants as of October 14, 1989 because her divorce would be final on that date. She answered "no" in answer to the question in Part B of the form as to whether she had any dependants. The record also contains copies of EN1032 forms dated 1992 to 2002. In 1992, appellant submitted a copy of her 1989 divorce decree to the Office.

In an April 23, 2002 memorandum to the file, an Office claims examiner noted that appellant provided notification that her divorce would be final on October 14, 1989. However, the Office failed to change her compensation pay rate from the three-fourths pay rate for employees with dependants to the statutory two-thirds rate. It continued to pay appellant at the three-fourths rate through January 26, 2002.

By letter dated April 23, 2002, the Office advised appellant of its preliminary determination that she received a \$32,408.33 overpayment of compensation. It found that she received the three-fourths compensation rate for wage loss, for employees with dependants, from October 14, 1989 to January 26, 2002, but she was divorced October 14, 1989.¹ The Office calculated the overpayment by subtracting the amount of compensation appellant was entitled to receive, using the proper two-thirds pay rate for an employee without dependants from the compensation she actually received at the three-fourths rate. The Office notified appellant of its preliminary determination that she was not without fault in the creation of the overpayment because she knew or should have known that she was not entitled to receive wage-loss compensation at the augmented three-fourths rate for employees with dependants on and after October 14, 1989, the date of her divorce. It noted that appellant provided notification in October 1989 of her divorce and submitted a copy of her divorce decree in 1992. However, she continued to accept compensation at the incorrect three-fourths rate. Appellant was given 30 days in which to submit additional evidence or argument or request a telephone conference, a precoupment hearing before the Branch of Hearings and Review or a final decision. There was no response from appellant.

By decision dated December 23, 2004, the Office finalized its determination that appellant received an overpayment of \$32,408.33 from October 14, 1989 to January 26, 2002 because she accepted payments at the three-fourths pay rate for employees with dependants but had no dependants after October 14, 1989, the date of her divorce. The Office determined that she was not without fault in the creation of the overpayment because she knew or should have known that she was not entitled to the compensation rate for employees with dependants on and after October 14, 1989. Although appellant notified the Office of her divorce in 1989 and provided a copy of her divorce decree in 1992, she accepted compensation at the three-fourths

¹ Appellant's only dependant was her husband.

rate from October 14, 1989 to January 26, 2002. She knew or should have known that she was entitled to only the two-thirds pay rate as of October 14, 1989.

In a letter dated May 29, 2007, appellant contended that she was not at fault in the creation of the overpayment of compensation because she notified the Office of her divorce in 1989 and provided a copy of her divorce decree. She asserted that she should not have been expected to know that her compensation payments should be reduced at the time of her divorce because she never received notification from the Office.

By decision dated June 7, 2007, the Office found that appellant received a \$32,408.33 overpayment of compensation from October 14, 1989 to January 26, 2002 and that she was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.² The Office stated:

“The fact that you completed and signed the EN[10]32 form and advised this Office [that] your divorce would be finalized October 14, 1989 demonstrates [that] you should have reasonably known your compensation rate is partially reliant on whether or not you have ‘eligible dependents.’ Each EN1032 form, under Part [B]³ -- Dependents, advises that a claimant will be compensated at a dependency rate of 2/3 in the absence of any eligible dependents and at a dependency rate of 3/4 wherein there is at least one eligible dependent. The form further defines an ‘eligible dependent’ as being (a) a husband or wife who lives with you; (b) an unmarried child who lives with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (d) and unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level; (e) a parent who totally depends upon you for support. The EN1032 cover letter also instructs a claimant to ‘READ ALL INSTRUCTIONS CAREFULLY BEFORE FILLING OUT YOUR STATEMENT.’

“Therefore, any reasonable person who completed and signed the EN1032 should have reasonably known that a claimant without an eligible dependent is entitled to compensation based on a dependency rate of 2/3 [percent,] while a claimant with at least one eligible dependent is entitled to compensation based on a dependency rate of ¾ [percent]. It is inferred that you read and understood the Part [B] -- Dependents’ portion of the EN1032 form since you signed and dated the EN1032 form. Furthermore, any reasonable person would have provided the date his/her divorce would be finalized in order to prevent an overpayment of compensation. Lastly, any reasonable person would have realized that the amount of

² Subsequent to the June 7, 2007 Office decision, appellant submitted additional evidence. The Board’s jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ The section regarding dependents in appellant’s EN1032 forms are captioned “Part B,” not C, as indicated by the Office.

compensation should have been reduced following the date of a finalized divorce. [Appellant], however, continued to accept compensation subsequent to October 14, 1989 at the same predivorce compensation rate.”

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees’ Compensation Act provides that 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 Office by decreasing later payments to which the individual is entitled.⁴

The Act 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.⁵ If the disability is total, the United States shall pay the employee monthly monetary compensation equal to 66 2/3 percent of his or her monthly pay, which is known as the basic compensation for total disability.⁶ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependants.⁷ If a claimant receives augmented compensation during a period when 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-fourths rate constitutes an overpayment of compensation.⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly determined that appellant received an overpayment from October 14, 1989 to January 26, 2002. The record shows that she received wage-loss compensation from the Office at the augmented three-fourths rate for employees with dependants in the amount of \$32,408.33, from October 14, 1989 to January 26, 2002. Because appellant was divorced October 14, 1989 and no longer had a dependant, she was not entitled to receive wage-loss compensation at the augmented rate on and after that date. Thus, she received a \$32,408.33 overpayment of compensation from October 14, 1989 to January 26, 2002 based on an incorrect pay rate.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and

⁴ 5 U.S.C § 8129.

⁵ 5 U.S.C. § 8102(a).

⁶ 5 U.S.C. § 8105(a). *See also Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁷ 5 U.S.C. § 8110.

⁸ *See Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment of compensation because she received compensation at the augmented rate during a period when she had no dependants following her divorce).

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁹ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ The regulation further provides that 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.¹¹ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she “[a]ccepted a payment which he or she knew or should have known to be incorrect.”¹² 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.¹³

ANALYSIS -- ISSUE 2

The Office found that appellant was not without fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time she received the compensation checks in question, appellant knew or should have known that the payment was incorrect.¹⁴ With respect to whether an individual is with fault, section 10.433(b) of the Office’s regulations provide that whether or not the Office determines that an individual was with 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.¹⁵

The record in this case establishes that appellant received compensation from the Office for lost wages at the three-fourths compensation rate for employees with dependants from October 14, 1989 to January 26, 2002. As noted, if a claimant receives augmented compensation during a period when 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. The only matter to be determined is whether appellant accepted payments she knew or should have known to be incorrect when she accepted the Office’s compensation checks.

⁹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.*

¹² 20 C.F.R. § 10.433(a)(3).

¹³ 20 C.F.R. § 10.433(b).

¹⁴ See *Otha J. Brown*, 56 ECAB ____ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

¹⁵ 20 C.F.R. § 10.433(b).

The Board finds that appellant was not without fault in creating the overpayment from October 14, 1989 to January 26, 2002. Appellant acknowledged and the record establishes that she received compensation checks for the period October 14, 1989 to January 26, 2002 at the augmented three-fourths rate for employees with dependants. The evidence establishes that she was aware or reasonably should have been aware that she was not entitled to augmented compensation for an employee with dependants on and after October 14, 1989, the date of her divorce from her husband, her sole dependant. As noted in the EN1032 form appellant signed and dated October 10, 1989, she indicated that she would not be eligible to receive the compensation pay rate for an employee with dependants as of October 14, 1989 because her divorce would be final on that date. She also answered “no” in answer to the question in Part B of the form as to whether she had any dependants. The Board finds that appellant is not without fault in the creation of the overpayment from October 14, 1989 to January 26, 2002 because she accepted payments that she knew or should have known to be incorrect. That the Office may have been negligent in issuing the checks does not mitigate this finding.¹⁶ Even if an overpayment resulted from negligence by the Office this does not excuse the employee from accepting payment which the employee knew or should have been expected to know she was not entitled to receive.¹⁷ The Office’s finding that appellant was not without fault in the creation of the overpayment is proper under the facts and circumstances of this case, as she knew or should have known that she was not entitled to accept compensation at the augmented rate for employees with dependants after her divorce on October 14, 1989. As appellant is not without fault in the creation of the overpayment from October 14, 1989 to January 26, 2002, she is not eligible for waiver. The Office is required by law to recover this overpayment.¹⁸

On appeal, appellant asserts that recovery of the overpayment of compensation would create a financial hardship for her. However, as noted, waiver of recovery of an overpayment is not permitted unless a claimant is “without fault” in creating the overpayment.¹⁹ Because appellant was not without fault in the creation of the overpayment, she is not entitled to consideration of waiver of recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$32,408.33 overpayment from October 14, 1989 to January 26, 2002. It further finds that the Office properly found that appellant is not without fault in the creation of the overpayment and is therefore not eligible for waiver of recovery of the overpayment.

¹⁶ See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁷ See *Diana L. Booth*, *supra* note 8.

¹⁸ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments from the Office. 20 C.F.R. § 10.441(a); *see also Bob R. Gilley*, 51 ECAB 377 (2000).

¹⁹ See *Dale Mackelprang*, 55 ECAB 174 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2007 is affirmed.

Issued: December 26, 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