

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARYANN E. FRAILEY and U.S. DEPARTMENT OF TRANSPORTATION,  
JOHN F. KENNEDY INTERNATIONAL AIRPORT, Jamaica, NY

*Docket No. 99-488; Submitted on the Record;  
Issued June 16, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$6,966.11 was created due to the payment of augmented compensation during a period when appellant had no dependents; (2) whether appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by withholding \$250.00 from appellant's continuing compensation.

On March 12, 1991 appellant, then a 40-year-old air traffic control specialist, slipped and fell down a flight of stairs during the performance of her federal duties. The Office accepted the claim for herniated cervical disc, cerebral concussion and fractured thoracic vertebra. Appellant stopped work the same day and has not returned. The Office began payment of compensation at the augmented rate of three-fourths of appellant's pay,<sup>1</sup> on the basis that she had eligible dependents.

By letter dated May 20, 1998, the Office advised appellant that compensation for her youngest daughter, born June 8, 1979, was to stop as soon as she became 18 years old. The Office advised appellant that compensation could continue after her 18<sup>th</sup> birthday only if the dependent was unmarried and either incapable of self-support or a student.

By EN1615-0189 form dated May 23, 1998, appellant notified the Office that her youngest daughter was not regularly pursuing a full-time course of study or training. She further indicated that she did not know whether her daughter intended to go to school. In a separate letter dated June 6, 1998, appellant wrote that she had no idea that a dependent ends at age 18. She also requested the Office to advise her in advance if she was going to be penalized.

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<sup>1</sup> See 5 U.S.C. § 8110.

By letter dated June 12, 1998, the Office advised appellant that it would be taking action to reduce her compensation benefits from the three-fourths rate for dependents to the statutory two-thirds rate for no dependents. The Office indicated that this action would take effect as of June 21, 1998. The Office further advised that additional information was needed to determine exactly when the reduction in compensation should have taken effect. The Office noted that since appellant's youngest daughter would qualify as a dependent until age 18 (June 8, 1997), the period in question was from June 9, 1997 to the present. Information pertaining to full-time student status was requested for any time after June 8, 1997. The Office further noted that appellant's oldest daughter could also qualify as a dependent after age 18, if she was a full-time student. The Office requested information for the period June 8, 1997 until her marriage on April 4, 1998. The Office noted that appellant had 30 days to submit the requested evidence or action would be taken to declare an overpayment of compensation from June 9, 1997 through June 20, 1998.

In a July 18, 1998 letter, appellant advised the Office that neither of her daughters attended school during the period June 1997 through June 1998, although they had intentions to do so. Appellant stated "I know I owe back money because of this, but I would appreciate if there were no penalties and if I could pay back in minimum payments."

By letter dated July 28, 1998, the Office informed appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$6,966.11 for the period June 9, 1997 through June 20, 1998 due to her change in dependent status. The Office further found that appellant was at fault in the creation of the overpayment as she knew or reasonably could be expected to have known that she was responsible for reporting the change in dependency status at the time. The Office informed appellant that the overpayments may be waived "when it can be shown that [she] was not at fault and that recovery of the overpayments would defeat the purpose of the Federal Employees' Compensation Act or the recovery would be against equity and good conscience" and described the circumstances under which recovery may be considered to defeat the purpose of the Act or would be against equity and good conscience. The Office also informed appellant that information regarding her financial circumstances was important and requested that she complete and submit the enclosed "Overpayment Recovery Questionnaire" with supporting documents, as well as any other relevant information.

By decision dated October 14, 1998, the Office found that appellant received an overpayment of compensation in the amount of \$6,966.11 for the period June 9, 1997 through June 20, 1998 and that the circumstances did not change the preliminary finding of fault. The Office stated that the sum of \$250.00 would be withheld from appellant's continuing compensation starting November 7, 1998 and that interest would start accruing on October 14, 1998, the date of the decision, at the rate of the U.S. Treasury Note.

The Board finds that appellant received an overpayment of \$6,966.11 in compensation.

In its June 12, 1998 letter, the Office found that the period of overpayment was from June 9, 1997 through June 20, 1998 due to a change in appellant's dependent status. The Office found that appellant was not entitled to augmented compensation for the above period as she had no qualifying dependents. The evidence in this case shows that appellant's younger daughter

retained dependent status until her 18<sup>th</sup> birthday on June 8, 1997 and appellant's oldest daughter got married on April 4, 1998. Inasmuch as neither daughter attained a full-time student status on or after June 8, 1997, appellant no longer had an eligible dependent for augmented compensation but she continued to receive augmented compensation at the 75 percent rate. Appellant, therefore, received an overpayment of compensation for the period June 9, 1997 through June 20, 1998 because she received compensation at the augmented rate when she was not entitled to it.

A review of the overpayment calculations in this case indicates that for the period commencing June 9, 1997 through June 20, 1998, appellant had received a total of \$62,673.50 in compensation at the three-quarters rate, while she should have received \$55,707.39 at the statutory two-thirds rate appropriate for a claimant with no dependents. The difference between the augmented rate and the corrected two-thirds rate equates to \$6,966.11. Accordingly, an overpayment of \$6,966.11 was created.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," the overpayment "shall" be recovered unless the "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of th[e] subchapter or would be against equity and good conscience."<sup>2</sup>

In deciding whether an individual is "without fault," what constitutes "fault" is determined by section 10.320 of Title 20 of the Code of Federal Regulations which was promulgated pursuant to the Act.<sup>3</sup>

Section 10.320 states in pertinent part:

"(a) ... Although the Office may have been at fault in making the overpayment that fact does not relieve the overpaid individual ... from liability for repayment if such individual is not without fault.

"(b) 'With fault.' In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who: (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) Failed to furnish information which the individual knew or should have known to be material; or (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> 20 C.F.R. § 10.320.

The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment as she accepted payments of compensation, which she knew or should have been expected to know were incorrect. The Board notes that under Part C of the Form CA-1032 regarding dependents the following statement appeared: "A claimant who has no eligible dependents is paid compensation at 66 2/3 [percent] of the applicable pay rate. A claimant who has one or more eligible dependents is paid compensation at 75 [percent] of the applicable pay rate. You must answer the questions below to ensure your compensation is paid at the correct rate. You may claim compensation for a dependent if you have one or more of the following: (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of a mental or physical disability; (d) an 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." Appellant completed Forms CA-1032 with this admonition on May 10, 1997 and April 30, 1998 Appellant should have known upon completion of these forms on a practically annual basis that she was not entitled to receipt of augmented compensation if she had no dependents. The record reflects that appellant properly notified the Office when her older daughter got married on April 4, 1998 and further acknowledged she was not entitled to augmented compensation in her July 18, 1998 letter to the Office when she stated that she knew she owed back money because her daughters did not attend school during the above period. The Board finds that appellant was at fault in the creation of the overpayment and that the overpayment cannot be waived.

The Board also finds that the Office properly determined the rate of recovery of the overpayment.

Title 20 C.F.R. § 10.321(a) states in pertinent part: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual."

The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence, from which the Office could determine what amount appellant could afford to repay out of her continuing compensation benefits and did not request a prerecoupment hearing prior to finalization of the overpayment decision on October 14, 1998.

Section 10.321(h) provides that, if additional financial information is not submitted, or a prerecoupment hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require.<sup>4</sup> The Office, therefore, considered the total amount of compensation appellant was receiving and determined that a \$250.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. The Board finds that the Office did not abuse its discretion in this calculation.

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<sup>4</sup> *Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).

The decision of the Office of Workers' Compensation Programs dated October 14, 1998 is hereby affirmed.

Dated, Washington, D.C.  
June 16, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member