

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

CHARLES R. McDANIEL, Appellant

and

**DEPARTMENT OF THE NAVY, MARE
ISLAND NAVAL SHIPYARD, Vallejo, CA,
Employer**

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**Docket No. 04-51
Issued: February 24, 2004**

Appearances:
Charles R. McDaniel, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

Appellant filed an appeal on October 6, 2003 of February 13 and March 11, 2003 decisions of the Office of Workers' Compensation Programs finding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.¹

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$17,614.32 as he was paid compensation at the augmented rate for the period April 30, 1996 to September 7, 2002 while he had no dependents; (2) whether the Office properly found appellant at fault in the creation of the

¹ Following issuance of the March 11, 2003 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final merit decision in the case. 20 C.F.R. § 501.2(c).

overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$150.00 from appellant's continuing compensation payments every four weeks.

FACTUAL HISTORY

On September 16, 1983 appellant, then a 50-year-old warehouseman, sustained a lumbar strain, herniated L4-5 disc and acute sciatica of the right leg when he lifted a refrigerator. His claim was accepted by the Office. In a June 8, 1984 letter, the Office advised appellant that, beginning on January 21, 1984, his compensation for total disability would be paid at the augmented or 75 percent rate as he had 1 or more dependents. The Office instructed appellant to report immediately any change in the status of his dependents.

Appellant filed periodic affidavits of earnings and employment (Form EN-1032) which advised that "a claimant who has one or more dependents is paid compensation at 75 percent of the applicable rate" and that he might claim compensation for a dependent spouse who lived with him, or to whom he paid regular support if she did not live with him. In forms dated through June 25, 1988 and on May 22, 1994, appellant claimed his wife as a dependent for compensation purposes.² In March 17, 1995 and May 23, 1996 forms, he indicated that he was no longer living with his wife but was making regular support payments. In forms from July 5, 1997 to August 4, 2002, with the exception of May 21, 1999, appellant indicated that he was no longer married but making regular support payments.

In a September 11, 2002 letter, the Office adjusted appellant's compensation to the statutory basic 66^{2/3} rate as he was no longer married and, therefore, had no dependents. The Office requested documentation of his separation, divorce and any court-ordered support. Appellant responded that he was separated on June 29, 1989, divorced in June 1994 and had paid spousal support since the separation. He enclosed a January 2002 military pension statement showing garnishment of \$690.04, which he asserted was for spousal support.

By notice dated December 18, 2002, the Office advised appellant of its preliminary finding of a \$22,278.88 overpayment in compensation as he was paid augmented compensation from June 26, 1994 through September 7, 2002 although he had no dependents. The Office determined that appellant was at fault in creation of the overpayment as he should have known that he could not claim his wife as a dependent while separated, unless he made regular support payments or at any time after their divorce. The Office afforded appellant 30 days in which to submit arguments, evidence and financial information and to request a telephone conference or prerecoupmment hearing.

Appellant completed an overpayment recovery questionnaire on January 15, 2003 showing a monthly income of \$760.00 and no assets. He listed monthly expenses of \$1,000.00 for food, \$25.00 for clothing, \$500.00 for utilities, \$600.00 for miscellaneous items and \$250.00 in debt repayment. Appellant asserted that he was not at fault in creation of the overpayment as

² Appellant also claimed his son Charles Robert McDaniel, Jr., born on September 21, 1960, as a dependent on forms dated July 31, 1986 and July 23, 1987 as he was incapable of self-support due to a mental disability. Appellant did not claim his son as a dependent on any subsequent forms.

his former wife was a dependent as he paid her court-ordered support. He also claimed to support five individuals unrelated to him. Appellant requested a telephone conference.

In a January 22, 2003 letter, the Office stated that it had been unable to reach appellant by telephone as he was out of state for the winter. The Office found that the record showed \$2,815.56 in net monthly income (\$1,824.00 in compensation; \$620.00 in Social Security; \$371.56 in military retirement) and monthly expenses of \$2,375.00, leaving \$440.56 in disposable income. The Office requested that appellant submit his divorce decree, support order, income verification, a detailed explanation of his expenses and his current telephone number within 30 days.

By decision dated February 13, 2003, the Office finalized its preliminary determination that a \$22,227.88 overpayment of compensation had been created. The Office found appellant at fault in creation of the overpayment and directed recovery through withholding \$150.00 from appellant's continuing compensation payments every four weeks.

In a February 19, 2003 letter, appellant stated that he spent \$1,750.00 per month for food, clothing and necessities for himself and five infant children. He enclosed court documents showing he was separated on March 21, 1988, divorced on April 30, 1996 and ordered to pay \$700.00 per month support. Appellant also submitted his former wife's application for garnishment of his military pension, a January 2002 military pension statement showing a garnishment of \$609.04 to his former wife and a Social Security statement showing a monthly gross income of \$682.70 as of January 8, 2003.

By decision dated March 11, 2003, the Office modified the February 13, 2003 decision to find that appellant was overpaid \$17,614.32 between April 30, 1996 and September 7, 2002. The Office found that the divorce documents established appellant's entitlement to augmented compensation from June 26, 1994 through April 29, 1996. The Office modified the February 13, 2003 decision by directing the withholding of \$150.00 every 4 weeks from appellant's continuing compensation payments from February 2003 to January 2013.

LEGAL PRECEDENT -- ISSUE 1

The basic statutory rate of compensation under the Federal Employees' Compensation Act³ is 66^{2/3} percent of the injured employee's monthly pay.⁴ Under section 8110 of the Act, a claimant is entitled to augmented compensation at 75 percent of his weekly pay if he has one or more dependents.⁵ Under the Act, a wife may be a dependent if she is a member of the same household as the employee or receives regular contributions from the employee for her support or the employee has been ordered by a court to contribute to her support.⁶

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8105(a).

⁵ 5 U.S.C. § 8110.

⁶ 5 U.S.C. § 8110(a)(2).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant was not entitled to augmented compensation after his divorce became final on April 30, 1996 as he had no qualifying dependents. His former wife is no longer considered a qualifying dependent under section 8110(a)(2) of the Act even though he was under court order to provide monthly financial support.⁷ Appellant continued to receive compensation at the augmented 75 percent rate until September 7, 2002. Since he no longer had any dependents as defined under the Act, the Office reduced appellant's compensation to the two-thirds rate as of September 8, 2002. The Office calculated that an overpayment in the amount of \$17,614.32 was created, representing the difference between the \$158,934.62 he was paid at the 75 percent rate and the \$141,320.32 at the 66^{2/3} percent rate to which he was entitled. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$17,614.32 as he was paid compensation at the augmented rate for the period April 30, 1996 to September 7, 2002, when he had no dependents.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁸ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁹ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹⁰

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.433 of Title 20 of the Code of Federal Regulations states, in pertinent part, that an individual is with fault in creation of an overpayment who: "(1) [m]ade an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) [f]ailed to furnish information which the individual knew or should have known to be material; or (3) [a]ccepted a payment which he or she knew or should have known to be incorrect."¹¹ Whether or not the Office determines that an individual was at fault with respect to the creation of an

⁷ See *Blaine E. Bedeger*, 48 ECAB 418(1997); *Linda F. Green*, 39 ECAB 636 (1988).

⁸ 5 U.S.C. § 8129(a).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002).

¹¹ 20 C.F.R. § 10.433(a) (2003).

overpayment depends on the circumstances surrounding the overpayment. In applying the tests to determine fault, the Office applies a “reasonable person” test.¹²

ANALYSIS -- ISSUE 2

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. In its preliminary determination of December 18, 2002 and its March 11, 2003 decision, the Office found that appellant should have been aware that his wife could no longer be considered a dependent after finalization of their divorce. The relevant part of the annual EN-1032 forms and the June 8, 1984 payment letter defined a dependent as a “husband or wife,” not a former spouse. Appellant completed 18 EN-1032 forms between July 1985 and August 4, 2002. Each of the forms indicated that the basic statutory rate of compensation was 66^{2/3} percent of the applicable pay rate if the claimant had no eligible dependents or 75 percent of the applicable pay rate if one or more dependents were eligible for compensation. The forms indicated that the claimant might claim additional compensation for a dependent, including a spouse who was a member of his household or to whom regular support payments were made.

Following the April 30, 1996 divorce, appellant initially stated on a May 23, 1996 Form EN-1032 that he was still married. On six subsequent forms signed from July 5, 1997 to August 4, 2002, appellant noted that he was no longer married. Yet, despite the notice regarding dependents on each form, appellant continued to accept compensation payments at the augmented rate through September 7, 2002. The Board finds that the Office properly found appellant at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Office’s implementing regulations provide 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.¹³

ANALYSIS -- ISSUE 3

In this case, the Office carefully reviewed appellant’s financial information, noted that he had a monthly income of \$2,815.56 and monthly expenses of \$2,375.00 and determined that this resulted in \$440.56 a month of discretionary income. The Board finds that the Office reasonably concluded that a repayment schedule of \$150.00 every 4 weeks would minimize any resulting hardship while effecting recovery of the overpayment. The Board finds that the Office did not

¹² William E. McCarty, 54 ECAB ____ (Docket No. 03-308. issued April 14, 2003).

¹³ 20 C.F.R. § 10.441(a).

abuse its discretion in deciding to withhold \$150.00 a month from appellant's continuing compensation in order to facilitate recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$17,614.32 as he was paid compensation at the augmented rate for the period April 30, 1996 to September 7, 2002 when he had no dependents. The Board further finds that appellant was at fault in creation of the overpayment and that the Office properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 4 weeks.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 11, 2003 is affirmed.

Issued: February 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member