

FACTUAL HISTORY

On December 5, 1990 appellant, then a 47-year-old personnel management specialist, filed an occupational disease claim alleging that she developed an emotional condition in the performance of duty. The Office accepted aggravation of post-traumatic stress disorder and obsessive compulsive disorder. Appellant worked intermittently until stopping on December 12, 1990.

By letter dated April 14, 1999, appellant informed the employing establishment that she was married on March 27, 1999. She requested the employing establishment make the dependant status change on her records and attached a marriage certificate.

By letter dated April 21, 1999, the employing establishment acknowledged receipt of appellant's marriage certificate and informed her that the rate of compensation would be changed from the statutory two-thirds to the three-fourths augmented rate effective March 27, 1999.

In a Form EN1032 dated March 13, 2000, appellant advised that she was married and listed her husband as a dependent.¹ She indicated that she received more compensation for being married as the employing establishment had advised. In an EN1032 form dated March 16, 2001, appellant advised that she was married but indicated that her husband did not live with her. She noted that she continued to pay half of his loan payments. In an EN1032 form dated March 11, 2002, appellant advised that she was married and indicated that her husband did not live with her. She noted that she paid half of his loan payments.

By letter received on July 15, 2002, appellant requested information from the Office with regard to a divorce hearing being held in August 2002. In a letter dated September 16, 2002, the Office advised her that she was currently receiving compensation at the augmented rate for dependents of 75 percent, for a net compensation of \$2,263.88. The Office advised that after her divorce, she would receive compensation at a statutory rate of 66 percent for no dependents for a net compensation of \$2,014.84.

By letter dated December 7, 2002, appellant informed the Office that she was divorced on November 27, 2002 and attached a copy of the divorce decree, dated November 22, 2002. It noted that there were no outstanding joint debts and that each party would be responsible for payment of all debts and credit cards in his or her name. The decree further noted that neither party shall pay any present or future maintenance.

In a daily roll payment worksheet dated December 19, 2002, the Office noted that appellant was divorced on November 27, 2002 and that the compensation rate would be changed from three-quarters percent to two-thirds percent. In an overpayment worksheet, the Office indicated that appellant was separated from her husband on December 4, 2000 and divorced on November 27, 2002. Compensation was paid at the three-quarters percent augmented pay rate from the time of appellant's marriage in March 1999 to December 28, 2002. The Office

¹ The EN1032 form noted the different compensation rates for claimants with eligible dependents and those without eligible dependents. The form also noted the circumstances under which a claimant could claim compensation for a dependent.

determined that there was an overpayment of compensation for the period commencing with the separation date of December 4, 2000 to December 28, 2002.

Appellant submitted two EN1032 forms dated March 13, 2003 and March 16, 2004, indicating that she was not married and had no dependents.

In memoranda dated June 16 and 23, 2004, the Office noted that appellant's pay rate was \$593.98 effective December 4, 2000 to December 28, 2002. During this period, she was separated and had no dependents and was incorrectly paid at the three-quarters percent augmented pay rate for dependents, for a total of \$62,166.50. Rather, compensation at the statutory two-thirds percent pay rate without dependents totaled \$55,205.21. The Office determined that appellant was overpaid compensation for the period December 4, 2000 to December 28, 2002 by \$6,961.29.

On June 24, 2004 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$6,961.29. The Office noted that the overpayment occurred because appellant was separated from her husband and without dependents since December 4, 2000 and divorced on November 27, 2002; however, she received augmented compensation at the three-fourths rate for a claimant with dependents instead of at the statutory two-thirds rate for the period December 4, 2000 to December 28, 2002. The Office found that she was at fault as she knew or reasonably should have known that the payment of compensation for herself and dependents was incorrect. The Office indicated that appellant had the right to submit evidence or arguments, which would affect the preliminary findings.

On July 10, 2004 appellant submitted a Form OWCP-20 overpayment recovery questionnaire. She listed monthly expenses of \$2,284.42 and monthly income of \$2,086.96. Appellant further noted that she had cash on hand of \$17.50, a checking account balance of \$15.91, savings account balance of \$12,093.49 and a retirement account of \$17,216.30. She asserted that she was not at fault in creating the overpayment and noted that she did not understand the questions on the EN1032 form and reported her divorce when it was granted. Appellant requested that the Office make a decision based on the written evidence in the file.

By decision dated October 12, 2004, the Office found that appellant received a \$6,961.29 overpayment of compensation from December 4, 2000 to December 28, 2002, for which she was at fault. The Office found that appellant knew or should have reasonably known that she received compensation at an incorrect pay rate. The Office noted that she submitted a completed overpayment questionnaire form. The Office advised that the overpayment would be collected by withholding \$100.00 from continuing compensation payments every four weeks, beginning October 30, 2004.

LEGAL PRECEDENT -- ISSUE 1

The basic statutory rate of compensation under the Federal Employees' Compensation Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation

augmented at the rate of 75 percent of monthly pay.² A husband is considered the employee's dependent if he is a member of the same household; or if he is receiving regular contributions from the employee for his support; or if the employee has been ordered by a court to contribute to his support.³ In determining dependency under the Act, the test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.⁴

ANALYSIS -- ISSUE 1

The record establishes that appellant received augmented compensation, at the three-fourths rate for a claimant with dependents, from December 4, 2000 to December 28, 2002. Appellant concedes that she did not have an eligible dependent during this period. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,961.29, for the period December 4, 2000 to December 28, 2002. This was based on the difference between the \$62,162.50 in compensation she received at the augmented rate and \$55,205.21 she should have been paid at the statutory rate.

In a letter dated December 7, 2002, appellant indicated that she had been separated since December 4, 2000 and divorced as of November 27, 2002. The divorce decree specifically noted that there were no outstanding joint debts and that each party would be responsible for payment of all debts and credit cards in his or her name. The decree further noted that neither party shall pay any present or future maintenance.

The Board notes that during the period commencing March 16, 2001 and continuing through March 11, 2002, appellant listed on EN1032 forms that she was still married but her husband was not residing with her and was, therefore, not a member of the same household nor was there an order by a court to contribute to his support. Under the Act, appellant's husband could only be found to be her dependent during this time if he received regular contributions for support. She noted on the EN1032 forms that she continued to pay half a loan payment of her husband; however, she did not identify the type of loan payments nor did she submit evidence such as cancelled checks or receipts to support that she made regular contributions to her husband during the period for which the overpayment was declared.⁵ Without further evidence

² 5 U.S.C. §§ 8105(a), 8110(b).

³ 5 U.S.C. § 8110(a)(2).

⁴ *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

⁵ See *Jenny M. Drost*, 56 ECAB __ (Docket No. 05-520, issued June 16, 2005) (where the Board set aside the Office decision finding an overpayment of compensation and fault in the creation of the overpayment on the grounds that appellant submitted receipts of money orders showing regular contributions to her husband during the period for which the overpayment was declared); *Walter T. Chester*, 39 ECAB 771 (1988) (where the Board affirmed the Office's decision finding an overpayment of compensation and fault in the creation of the overpayment on the grounds that, although appellant gave his wife valuable items during the period of the overpayment there was no evidence of regular contributions for the necessities of life and the valuable items given by appellant to his wife represented more of an equitable distribution of the couple's assets than a "regular" payment for support).

regarding the nature of these payments, there is insufficient evidence to find that such payments would rise to the level of “regular contributions” set forth in the statute.⁶

The Board notes that as of December 4, 2000 appellant was no longer entitled to claim her husband as a dependent. However, the Office erroneously continued to pay her at the augmented three-fourth rate from December 4, 2000 to December 28, 2002. The record indicates that, as a result of this error, appellant received an overpayment in the amount of \$6,961.29.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁷ provides as follows:

“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.⁸

“No waiver of an overpayment is possible if the claimant is at fault in creat[ing] the overpayment.⁹”

Section 10.433(a) of the Office’s implementing regulations provides:

“On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part: 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.¹⁰

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

“(b) 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

⁶ 5 U.S.C. § 8110(a)(2).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(b).

⁹ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁰ *Kenneth E. Rush*, 51 ECAB 116 (1999).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."¹¹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known the payments were incorrect.¹² The record establishes such knowledge.

Appellant contends in her appeal that she informed the Office on March 9, 2001 in an EN1032 form that she did not live with her husband and noted on the form that she was not sure how to answer the question. Appellant advised that she never received any correspondence or telephone calls from the Office and assumed she was preparing the form correctly.

The Board notes that, where an overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payments she knew or should have known were incorrect.¹³ Appellant knew or should have been aware that as of December 4, 2000, the date of her separation, she was no longer entitled to compensation at the augmented three-fourth rate. Appellant regularly completed the Form EN1032, which states that a claimant must immediately inform the Office of any change in the status of claimed dependents, such as a spouse living with the claimant. The form also states that claimants without dependents would be paid at a rate of two thirds of the weekly rate and that, claimants with dependents, such as a spouse living with the claimant, would be paid at a three-fourth rate. Appellant was aware of these provisions, as she had previously notified the Office of her marriage by a letter dated April 14, 1999 and requested that the dependent status change be processed. On April 21, 1999 the Office advised appellant that based on the change in dependent status she was entitled to compensation at the augmented rate of three-fourths percent effective March 27, 1999. Thus, she knew or should have known that she was accepting incorrect payments following her separation from her husband on December 4, 2000. Upon receipt of the December 4, 2000 check, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, she accepted payments made at the augmented rate from December 4, 2000 to December 28, 2002, resulting in an overpayment of \$6,961.29.

The Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the checks issued from December 4, 2000 to December 28, 2002 were incorrect. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$6,961.29 may not be waived.

¹¹ 5 U.S.C. § 10.433(b).

¹² See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹³ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 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.”¹⁴

ANALYSIS -- ISSUE 3

With respect to the \$100.00 withheld from appellant’s continuing compensation payments to recoup the amount of the outstanding overpayment, the Office’s regulations note the factors to be considered in determining repayment from continuing compensation.¹⁵ The implementing regulations provide that the Office must take 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.¹⁶

Prior to the Office’s October 12, 2004 decision, appellant submitted an overpayment recovery questionnaire dated July 10, 2004 in which she indicated that her monthly income was \$2,086.96 and that her monthly expenses totaled \$2,284.42. Thus, the record indicates that appellant’s monthly expenses exceed her monthly income by approximately \$197.46. There is no indication in the Office’s October 12, 2004 decision that this information was taken into consideration in setting the rate of recovery at \$100.00 from her continuing compensation payment. Therefore, the Board finds that the Office abused its discretion in determining the rate of recovery in this case. The case will be remanded to predetermine the rate of recovery after considering the evidence of record concerning appellant’s financial circumstances.¹⁷

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$6,961.29 overpayment of compensation from December 4, 2000 to December 28, 2002 and that she was not “without fault” in the creation of the overpayment. The Board further finds that the case is set aside with respect to the rate of recovery from continuing compensation.

¹⁴ 20 C.F.R. § 10.441(a). See *Fred A. Cooper, Jr.* 44 ECAB 498 (1993); *Roger Seay*, 39 ECAB 441 (1988).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Stephen A. Hund*, 47 ECAB 432 (1996) (where the Board found that the Office abused its discretion in determining the rate of adjustment without considering the evidence of record including an overpayment questionnaire).

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2004 decision of the Office of Workers' Compensation Programs of is affirmed as to the issues of fact and amount of overpayment and waiver or recovery but is remanded on the issue of rate of adjustment.

Issued: November 10, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board