



## **FACTUAL HISTORY**

On April 28, 1990 appellant, then a 32-year-old senior printing specialist, sustained an employment-related lumbar strain when she hurt her back lifting boxes at work. From June 16, 1990 through April 3, 1992 she worked approximately 20 hours per week. Appellant has not worked since that time and was placed on the periodic rolls.

Appellant submitted a Health Benefit Election Form dated September 15, 2004 in which she claimed self-only health insurance coverage. On an Office EN1032 form dated September 28, 2004, she indicated that she had separated from her husband as of September 17, 2004 and that he was living with an aunt. Appellant advised that he was still “somewhat” a dependent as she paid him for some household repairs and continued to pay for health and life insurance benefits for her husband. In a letter dated October 13, 2004, the Office requested that she furnish her husband’s address and telephone number in order to verify support.<sup>1</sup>

By letter dated April 29, 2005, the Office issued a preliminary finding that an overpayment in compensation in the amount of \$1,843.83 had been created. The Office explained that the overpayment resulted because appellant was incorrectly paid at the augmented compensation rate or 75 percent, for the period September 15, 2004 to April 16, 2005. It noted that her husband no longer qualified as a dependent. The Office found that appellant submitted evidence indicating they were no longer living together, that she was not supporting him and had taken him off her health benefit plan. The Office found appellant not at fault in the creation of the overpayment and provided an overpayment questionnaire for her to submit if she sought waiver of the overpayment. In a decision dated May 31, 2005, the Office finalized the overpayment decision. The Office reiterated that appellant was not at fault but denied waiver noting that she had not responded to the preliminary overpayment determination. The Office directed repayment by deducting \$200.00 every four weeks from her continuing compensation.

## **LEGAL PRECEDENT -- ISSUE 1**

The basic rate of compensation paid 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 in the Act,<sup>2</sup> the employee is entitled to have his or her basic compensation augmented at the rate of 8-1/3 percent for a total of 75 percent of monthly pay.<sup>3</sup>

Section 8110(a)(2) of the Act provides that a husband qualifies as a dependent if he is a member of the same household as the employee or is receiving regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.<sup>4</sup> The Board has held that the test for determining dependency under the Act is whether the person claimed as a dependent “looked to and relied, in whole or in part, upon the

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<sup>1</sup> The record does not indicate that appellant responded to this request.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8110(b).

<sup>4</sup> 5 U.S.C. § 8110(a)(2); *Nancy J. Masterson*, 52 ECAB 507 (2001).

contributions of the employee as a means of maintaining or helping to maintain a customary standard of living.”<sup>5</sup>

### ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision regarding whether an overpayment in compensation has been created for the period September 15, 2004 through April 16, 2005.

In previous cases, the Board has determined that the factual circumstances of each case determine dependency under the Act.<sup>6</sup> The record in this case indicates that for the period September 15, 2004 through April 16, 2005 appellant received compensation at the augmented 3/4 rate for total compensation of \$23,847.60. The Office determined that she should have been paid at the basic statutory 2/3 rate for compensation of \$21,180.30. Appellant does not contend and there is no evidence to show, that her husband was a member of same household after September 17, 2004. She did, however, indicate that she had paid him for some household repairs and continued to pay his health and life insurance benefits. The record also contains a Health Benefit Election Form dated September 15, 2004, in which appellant indicated that she wanted to change her coverage from JP2, self and family, to JP1 or self-only health insurance coverage. An Office printout of her benefit status indicates, however, that for the period September 15, 2004 through April 16, 2005, health benefit deductions continued to be made under the JP2 code or self and family<sup>7</sup> and appellant’s health benefit deductions were not changed to the JP1 code until the compensation period beginning April 17, 2005.

The Board finds that the case requires further factual development in order to determine whether appellant’s husband continued to be a dependent. The record supports that she continued to make contributions for his health insurance and on the EN1032 form appellant also indicated that she paid for his life insurance and paid for household repairs. There is nothing else of record concerning her contributions or her husband’s financial situation to allow for an appropriate determination as to whether these contributions were of a sufficient degree to establish him as a dependent, as defined by section 8110(a)(2) such that appellant’s husband “looked to and relied, in whole or in part,” upon the contributions of appellant in maintaining or helping to maintain his customary standard of living.<sup>8</sup>

Accordingly, the case will be remanded to the Office to secure additional information relevant to determine the status of appellant’s husband as a dependent and if an overpayment in compensation was created. Additional relevant factual information would include the husband’s current employment (if any), the amount of his income, including that furnished by appellant and whether this was on a regular basis and monthly expenses (including medical expenses) and

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<sup>5</sup> *Helyn E. Girmann*, 11 ECAB 557 (1960).

<sup>6</sup> *Nancy J. Masterson*, 52 ECAB 507 (2001); *Sam R. Ekovich*, 37 ECAB 113 (1985); *Helyn E. Girmann*, *id.*

<sup>7</sup> The print-out does not indicate that appellant or her husband had life insurance coverage through the Federal Government’s Group Life Insurance program.

<sup>8</sup> *Supra* note 6.

opportunities to purchase health insurance on his own. After such further development as the Office deems necessary, it should issue an appropriate decision.

**CONCLUSION**

The Board finds this case is not in posture for decision regarding whether an overpayment in compensation had been created.<sup>9</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 31, 2005 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: February 10, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> Based on the Board's determination in the first issue in this case, issues two and three need not be addressed. The Board notes that appellant submitted evidence subsequent to the Office's May 31, 2005 decision. While she has asserted on appeal that this evidence was timely submitted in response to the Office's preliminary overpayment determination, it was not received by the Office until June 10, 2005. The Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant asserted on appeal that the Office had not appropriately reimbursed her for travel and medical expenses. The record before the Board does not contain any decision denying reimbursement and the Board's jurisdiction is limited to reviewing final decisions of the Office. 20 C.F.R. § 501.2(c); *see Karen L. Yaeger*, 54 ECAB 323 (2003).