



to be considered a dependent after May 12, 2003, when she reached 18 years of age, but that appellant had made regular contributions to her imprisoned husband since October 2001. Noting that the only remaining question was whether her husband used the regular contributions to maintain or help to maintain a customary standard of living in prison, the Board remanded the case for the Office to allow appellant to submit evidence showing how her husband used the regular contributions she made to him.<sup>1</sup>

In a July 15, 2005 letter, the Office advised appellant that federal regulations did not consider that a person convicted of a felony requires additional income to meet ordinary and necessary living expenses, but that, pursuant to the Board's directive, she should provide further information as to how her husband used the money she provided to him while in prison as specifically as possible. The Office requested that the information be provided within 30 days, and stated that, in the absence of a detailed response, it would have to determine that the extra money was not for ordinary and necessary living expenses. Appellant replied on July 22, 2005 stating that she had requested her husband's store detail report from the Arizona Department of Corrections and would forward this information when she received it. She stated that her husband's inmate bank account showed that he paid for utilities and legal copies and that common sense dictated that prisons only allowed inmates to "purchase items that are for their beneficial support for rehabilitation purposes, in other words ordinary and necessary living expenses." She also denied that she was at fault in the creation of the overpayment of compensation.

By decision dated August 23, 2005, the Office found that appellant received an overpayment of compensation in the amount of \$452.00, that arose because she received compensation payments at the three-fourths rate for employees with dependents from May 12 to July 12, 2003, a period during which she had no dependents. The Office further found that she was at fault in the matter of the overpayment because, by failing to supply the information requested by the Office on July 15, 2005, appellant failed to provide information she knew or should have known to be pertinent and because she continued to receive checks she knew or should have known were incorrect.

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

The basic rate of compensation under the 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 Federal Employees' Compensation Act, he or she is entitled to have the basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>2</sup> A husband is considered the employee's dependent if he is a member of the same household; or if she 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.<sup>3</sup> In determining dependency under the Act, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact,

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<sup>1</sup> Docket No. 05-520 (issued June 16, 2005).

<sup>2</sup> 5 U.S.C. §§ 8105(a), 8110(b).

<sup>3</sup> 5 U.S.C. § 8110(a)(2).

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.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$452.00. She received compensation at the augmented, three-fourths rate for employees with dependents from May 12 to July 12, 2003, but has not established that she had a dependent during that period. Pursuant to the Board's decision on the prior appeal, appellant was given an opportunity to submit evidence showing that her imprisoned husband used the regular contributions he received from her to maintain a customary standard of living in prison. She did not submit any such evidence. Appellant argued that her husband's inmate bank account showed that he paid for utilities and legal copies, but a perusal of the record of this account shows that deductions of these expenses were infrequently made and when they were, they were in the amount of \$1.00. As appellant has not established that her husband used the regular contributions she made to him to maintain or help to maintain a customary standard of living, she has not established that her husband qualified as a dependent under the Act.<sup>5</sup>

### **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. 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 the Act or would be against equity and good conscience."<sup>6</sup> No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states 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

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

<sup>5</sup> The Office incorrectly advised appellant in its July 15, 2005 letter that the standard was whether the money was used for ordinary and necessary living expenses.

<sup>6</sup> 5 U.S.C. § 8129.

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>7</sup>

### ANALYSIS -- ISSUE 2

The Board finds that the Office incorrectly found that appellant was at fault in the creation of the overpayment of compensation. The Office has not shown that she failed to furnish information which she knew or should have known to be material. Appellant listed her husband as a dependent on an Office Form EN1032 she completed on February 27, 2003. When the Office requested that she submit documentation of regular contributions to her husband, appellant promptly submitted such evidence, consisting of receipts for money orders to her husband. The Office’s finding that appellant was at fault because she failed to supply the information requested by the Office on July 15, 2005 is nonsense. By the time the Office sent the July 15, 2005 letter to her, the overpayment was over two years old and had already been collected. Appellant’s failure to respond to an Office inquiry two years after the overpayment was created could not and did not create that overpayment.

The Office also has not shown that appellant accepted a payment she knew or should have known was incorrect. At the time the overpayment occurred, she believed (and still does believe) that her imprisoned husband qualified as a dependent under the Act. With proper documentation of how he used the regular contributions appellant provided, her husband might still be found to so qualify. As the status of her husband was in question at the time the overpayment occurred, there was no way that appellant should have known that he did not qualify as a dependent and that she, therefore, was not entitled to the augmented compensation she received from May 12 to July 12, 2003.

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$452.00, but that she was not at fault in the creation of this overpayment. The case will be remanded to the Office to allow appellant to request waiver of recovery of the overpayment and to submit financial information to justify waiver.

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<sup>7</sup> 20 C.F.R. § 10.320(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2005 decision of the Office of Workers' Compensation Programs is affirmed insofar as it found that appellant received an overpayment of compensation in the amount of \$452.00. Insofar as it found that she was at fault in the creation of the overpayment, the Office's August 23, 2005 decision is reversed and the case remanded to the Office for action consistent with this decision of the Board.

Issued: February 1, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board