

FACTUAL HISTORY

On June 7, 1982 appellant, then a 30-year-old clerk, sustained a right upper extremity injury in the performance of her federal duties.¹ She missed intermittent periods of work and sustained several recurrences of disability. Appellant was permanently placed on the periodic rolls at the augmented 3/4 or 75 percent rate on November 16, 1994. By decision dated May 15, 2000, the Office found that the constructed position of drafting assistant fairly and reasonably represented appellant's wage-earning capacity and reduced her compensation accordingly. The record indicates that appellant has a son, born on September 11, 1973 and a daughter born on June 19, 1978.

Appellant submitted a number of Office EN-1032 forms dating from September 18, 1987 to June 12, 2000 claiming dependents. These forms explained the circumstances under which she would be entitled to augmented compensation for her dependent children.² Appellant continued to claim her daughter as a dependent on an EN-1032 form that covered the period May 3, 2001 to May 3, 2002, signed by her on October 2, 2002. She received wage-loss compensation by direct deposit and her daughter born June 19, 1978 was a full-time student through December 2001.

On February 26, 2004 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$3,079.21 for the period June 19, 2001 through January 25, 2003 because she continued to receive disability compensation at the augmented 3/4 rate after her daughter turned 23 on June 19, 2001. It found appellant to be at fault in the creation of the overpayment because she had previously been notified that dependency would cease once her child reached the age of 23 and she did not notify the Office of the change in dependency status. The Office forms and printouts contained in the record provide that during this period appellant received compensation at the 3/4 rate totaling \$27,742.96 and that compensation at the 2/3 rate would total \$24,663.75, which yielded an overpayment in compensation of \$3,079.21.

In a request dated April 6, 2004 and postmarked May 10, 2004, appellant requested a prerecoupment hearing. By decision dated June 18, 2004, the Office denied her hearing request on the grounds that it was untimely filed. Appellant was informed that she could request a telephone conference or file an appeal with the Board. She did not request a conference or submit an overpayment questionnaire or other financial information. On April 5, 2007 the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$3,079.21 because she should have known she was not entitled to receive wage-loss compensation at the augmented 3/4 rate after her daughter turned 23 on June 19, 2001. Appellant was advised that overpayment was due in full.

¹ The Office accepted the claim for right pectoral tendon strain, chronic right bicipital tendinitis and right rotator cuff tendon tear and repair.

² The Form EN-1032 explains that compensation for a dependent may be claimed for an unmarried child, including an adopted child or stepchild, who lives with the claimant and is under 18 years of age, an unmarried child who is 18 or over but who cannot support him or herself because of mental or physical disability or 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. See 5 U.S.C. § 8101(17); 20 C.F.R. § 10.405.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

The basic rate of compensation paid 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 in the Act, 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.⁶ Section 8110(a)(2) of the Act provides that a child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.⁷ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation to which he or she was entitled at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$3,079.21. The record supports that she continued to receive compensation at the augmented 3/4 rate after her daughter turned 23 on June 19, 2001 until January 25, 2003 and that she had no other qualifying dependents. For this period appellant received augmented compensation in the amount of \$27,742.96. As she was not entitled to compensation at the augmented rate after her daughter's 23rd birthday on June 19, 2001, she should have received compensation at the 2/3 rate or \$24,663.75. While appellant's daughter continued to be a full-time student for some of this period, dependency for students ends at age 23 unless the child is incapable of self support because of a physical or mental disability.⁹ There is no evidence in this case to support that appellant's daughter is incapable of self support. When appellant signed her name to these

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8110(b).

⁷ *Id.* at § 8110(a)(2).

⁸ *Id.* at § 8110(a)(3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁹ *Supra* note 7.

forms, she certified that she understood the terms of outlined.¹⁰ The Office thus properly found that an overpayment in compensation in the amount of \$3,079.21 had been created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “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.”¹²

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

“[T]he Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹³

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office may not deposit compensation into a claimant’s account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹⁴

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$3,079.21 overpayment, the Office stated that she should have known that the payments she received by direct deposit for the period

¹⁰ See generally *F.C.*, 59 ECAB ____ (Docket No. 07-1541, issued November 11, 2007).

¹¹ 5 U.S.C. §§ 8101, 8110.

¹² 5 U.S.C. § 8129; see *Joan Ross*, 57 ECAB 694 (2006).

¹³ 20 C.F.R. § 10.433 (1999); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

¹⁴ *Tammy Craven*, 57 ECAB 689 (2006).

June 19, 2001 through January 25, 2003 were not proper because they were at the augmented 3/4 rate and, as she had no dependents after her daughter's 23rd birthday on June 19, 2001, she was only entitled to compensation at the 2/3 rate.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁵ The Board has found that the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.¹⁶ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁷

In this case, appellant continued to receive augmented compensation by direct deposit from the time her daughter turned 23 on June 19, 2001 until January 25, 2003. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.¹⁸ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period and the case must be remanded for the Office to determine whether she is entitled to waiver for this period.

The EN-1032 forms mailed to appellant by the Office and submitted by her since 1987 clearly explained the circumstances under which she would be entitled to augmented compensation, which would end when a dependent child turned 23 years of age, no matter the student status. The Board therefore finds that after appellant's receipt of the first direct deposit for which fault may not be imputed to her, under the reasonableness standard delineated above, for the subsequent direct deposits appellant knew or should have know that the compensation paid by direct deposits issued by the Office after the first direct deposit subsequent to her daughter's 23rd birthday on June 19, 2001 were in error and the Board finds that she was at fault under the third standard outlined above for any period after the first direct deposit after her daughter's 23rd birthday. Recovery of the overpayment in compensation may not be waived for this time period and the decision dated April 5, 2007 is affirmed in this respect. The record in this case, however, does not show when appellant's individual direct deposits were made. As appellant was not at fault for the first direct deposit after June 19, 2001, the case must be

¹⁵ *William E. McCarty*, 54 ECAB 525 (2003).

¹⁶ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁷ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁸ *See Karen K. Dixon*, *supra* note 16.

remanded to the Office to determine the exact period she would not be at fault and would thus be entitled to waiver.¹⁹

Lastly, based on the Board's determination in the second issue in this case, issue three need not be addressed at this time.

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$3,079.21 had been created and that appellant was at fault for the overpayment period commencing subsequent to the first direct deposit after the 23rd birthday of her daughter but was not at fault for the first direct deposit of compensation. The case is remanded for a determination of whether she would be entitled to waiver for this brief period.

¹⁹ The Board notes that section 10.438(b) of Office regulations provides that failure to submit requested financial information within 30 days shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished. 20 C.F.R. § 10.438(b); *see John Skarbek*, 53 ECAB 630 (2002). However, under the circumstances of this case where the preliminary overpayment finding was issued on February 26, 2004 and the overpayment was not finalized until April 5, 2007, the Office should grant appellant an opportunity to provide updated financial information to determine if she would be entitled to waiver for this brief period and to determine a method of recovery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2007 be affirmed in part, vacated in part and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: August 14, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board