

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

J.D., Appellant

and

**DEPARTMENT OF AGRICULTURE,
OFFICE OF THE INSPECTOR GENERAL,
Washington, DC, Employer**

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**Docket No. 10-640
Issued: December 17, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 19, 2010 appellant filed a timely appeal from a November 24, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly found a \$21,304.80 overpayment of compensation for the period February 26, 2004 through September 14, 2008 due to the payment of augmented compensation; (2) whether the Office properly found that appellant was at fault in creating the overpayment and therefore not entitled to waiver; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$600.00 every 28 days from her continuing compensation.

On appeal, appellant asserts that her son was a full-time student and eligible dependent during the period of the overpayment and provided additional information to verify his dependant status. She also asserted that the deduction from her continuing compensation created

a significant hardship for her and her family and submitted additional documentation concerning her current expenses. Appellant also indicated that a new vehicle was purchased on October 5, 2009.

FACTUAL HISTORY

The Office accepted that on July 31, 2001 appellant, then a 52-year-old contract specialist, sustained a lumbar sprain/strain after she tripped over binders placed on the edge of a workstation.¹ Appellant stopped work on August 1, 2001. Beginning in late January 2002, she received total disability compensation on the periodic rolls at the augmented 75 percent rate as she had a dependent son, born on February 26, 1986. Appellant returned to work 16 hours a week beginning September 15, 2008 and 20 hours a week beginning October 26, 2008. The Office adjusted her compensation accordingly.

The record reflects that appellant submitted affidavits of earnings and employment (Form CA-1032) on December 20, 2003, October 19, 2004, November 13, 2005, November 20, 2006, December 4, 2007 and February 18, 2008 listing her son as a dependent. The forms explained the circumstances under which she would be entitled to augmented compensation for her dependent child. Appellant was advised that compensation for a dependent child may continue after the 18th birthday only if the dependent was unmarried and either incapable of self-support due to a mental or physical disability or a full-time student. The forms noted that compensation was payable until age 23 for an unmarried child who had reached age 18, had not completed four years of education beyond high school and was a full-time student at an approved educational institution. Appellant's son turned 18 on February 26, 2004.

In a December 12, 2007 letter, the Office reiterated the circumstances under which augmented compensation for a dependant child could continue after the 18th birthday. In her February 18, 2008 Form CA-1032, appellant claimed compensation for student status for her son. She stated that her son had attended jobs corps school on a full-time basis since January 15, 2008. Appellant's son's enrollment in the program was confirmed by a career development counselor at the Woodstock Job Corps Center on February 19, 2008. The counselor noted that it was open enrollment and that a completion date of the program was undetermined.

Appellant received augmented compensation until September 15, 2008 when the Office adjusted her compensation to the basic rate.

On April 1, 2009 the Office advised appellant of its preliminary determination of a \$21,309.20 overpayment of compensation as she received augmented compensation for the period February 27, 2004 through September 14, 2008 while she had no eligible dependents. In attached worksheets, it calculated that she received \$190,205.24 in compensation from February 27, 2004 through September 14, 2008 but was only entitled to \$168,896.04, a difference of \$21,309.20. The Office noted that appellant's son reached age 18 on February 26, 2004 but that there was no evidence that he was a full-time student or incapable of self-support.

¹ The Office had also accepted that on April 30, 2001 appellant sustained a lumbar sprain/strain while lifting luggage up a steep incline while on government travel. This case was doubled into the current file.

It found her at fault in creating the overpayment because she was aware or should have been aware that she was not entitled to augmented compensation when she had no eligible dependents after February 26, 2004.

On April 3, 2009 appellant requested a prerecoupment hearing. In an April 3, 2009 letter, she verified that her son reached age 18 on February 26, 2004 and stated that he was a full-time student during the overpayment period. Appellant advised that he completed a high school equivalency certificate from the University of the District of Columbia through an adult education program on June 25, 2004 and attached a copy of the certificate. She stated that he was enrolled in the University of the District of Columbia in August 2005 and joined the Department of Labor Job Corps in January 2007² and obtained instruction in Culinary Arts. Appellant noted that he was living with her and she was supporting him in his educational experiences.

In an April 3, 2009 overpayment recovery questionnaire, appellant indicated that her total monthly income was \$2,492.10 and her total monthly expenses were \$2,416.00. The monthly expenses were comprised of: rent \$970.00, food \$625.00, clothing \$75.00, utilities \$421.00, other expenses \$275.00, monthly installments to Capitol One Credit Card \$25.00 and First Premiere Credit Card \$25.00. Appellant indicated that she had no assets and had \$178.00 in her checking account. She stated that she used her income to support her son and that she did not intend to mislead anyone.

In a July 27, 2009 telephonic hearing, appellant stated that her son had been identified as severely socially and emotionally disabled (SESD-Level 5) at age seven. She noted the type of schooling he had as a result of his mental disability and behavioral issues and indicated that he quit school between the ages of 16 and 17 and elected to get his GED, which he received on June 25, 2004. Appellant stated that her son was enrolled at the University of the District of Columbia during the fall 2004 semester as a full-time student and after he finished the 2004-05 school year, he enrolled in summer school. She indicated that she was unsure of his student status during the fall 2005 semester. Appellant testified that her son was enrolled in the Job Corps in January 2007, but was unsure how long that lasted as the Job Corps released him. She indicated that she continued to support her son and that she considered him a dependent based on his inability to function and his emotional problems. Appellant advised that she now worked about 52 hours every pay period and earned approximately \$2,600.00 (\$1,533.00 from workers' compensation and \$1,150.00 from her employment). She stated that her current rent was \$1,020.00, but indicated that she was getting married and her rent would increase to \$2,800.00 in September 2009 when she moved to a larger apartment with her new husband. Appellant advised that her monthly expenses were: \$600.00 food, \$75.00 clothing, \$300.00 miscellaneous. She noted that she had no assets and that she paid about \$130.00 monthly for credit cards. Appellant stated that she was considering getting a new car and was in the process of buying a home. She was advised of additional financial evidence needed regarding repayment and evidence needed about her son's status.

² This date was also noted as January 2008 in other correspondence from appellant dated August 13, 2009.

In an August 13, 2009 letter, appellant stated that her son was a full-time student at the University of the District of Columbia from August 25, 2004 through May 2005, but she was unable to get a copy of his transcript due to an unpaid balance owed to the school. She indicated that her son was also enrolled with the Job Corps from January to June 2008, but she had not requested his records. Appellant indicated that, during the three-year period, her son worked part-time with various companies. She advised that the facilities which rendered treatment or services to her son either would not provide records of services provided or were closed for summer break and would not reopen until September 2009. Appellant stated that she was unable to repay the debt due to her current and anticipated expenses. She noted that she forgot to include the monthly payments of \$25.00 to Peebles and \$75.00 to Kay Jewelers. Appellant stated that she was going to settlement on a new home on August 21, 2009 and that her monthly mortgage payment would be \$3,140.23, monthly home owner association fees, monthly Front Foot Benefit Fee of \$54.17, and that she would also be responsible for paying bills on electricity, gas, water and cable, of which she had no idea of the amount. She submitted a marriage certificate indicating that she got married on August 8, 2009, a July 15, 2009 Sprint bill totaling \$638.49, and a copy of her HUD-1 statement, which indicated approximate amounts of a monthly mortgage of \$3,140.23. Appellant also submitted copies of various bills on which balances were owed. This also included a copy of her government services account statement showing \$447.90 due and a July 2009 statement for her First Premier Bank card.

By decision dated November 24, 2009, an Office hearing representative affirmed as modified the overpayment of compensation in the amount of \$21,304.80 for the period February 26, 2004 through September 14, 2008 for which appellant was at fault. A corrected worksheet indicated that, from February 26, 2004 through September 14, 2008, appellant was paid \$190,165.95 at the augmented rate but should have been paid \$168,861.15, which resulted in \$21,304.80 overpayment. The hearing representative further found a repayment of the overpayment at \$600.00 every 28 days was reasonable and appropriate as appellant did not submit any current expenses or any financial information about her spouse which could account for the remaining amount of income after the mortgage.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his duty.⁴ Section 8129(a) of the Act provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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 an 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. Section 8110 of the Act provides that a claimant is entitled to

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

augmented compensation to three fourths of the employee's rate of monthly pay if he or she has a dependent.⁶ Section 8110(a)(3) 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, as defined under section 8101(17).⁷ The Act provides that compensation will continue at the augmented rate if the child has reached 18 years of age and is a student. Section 8101(17) of the Act defines a student as an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at a school, college or university or other educational or training institute an additional type of educational or training institute as defined by the Secretary. The federal regulations provide that an additional type of educational or training institute means a technical, trade, vocational, business, or professional school accredited or licensed by the federal or a state government, that provides courses of not less than three months duration and prepares the individual for a livelihood in a trade, industry, vocation or profession.⁸ 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 two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation from February 26, 2004 to September 14, 2008. Appellant's son, born February 26, 1986, turned 18 on February 26, 2004. The Office continued to issue his compensation at the augmented rate through September 14, 2008. It found that appellant's son had turned 18 and there was no evidence that he was either incapable of self-support or a full-time student.

Despite appellant's claims to the contrary, there is no evidence to support that her son was enrolled full time as a student. While she claimed her son was a student from February 26, 2004 through September 14, 2008, there is no evidence to support that assertion. First, appellant's son was not enrolled in high school as a student at the beginning of the overpayment period as he received his high school equivalency degree on June 25, 2004 through an adult education program. There is no evidence that the adult education program the son attended through the University of District of Columbia meets the full-time requirement under the Act necessary for him to qualify as a student.¹⁰ Other than the diploma, there are no other school records, grades, etc. The current record is also void of any evidence that appellant's son was

⁶ *Id.* at § 8110.

⁷ *Id.* at § 8110(a)(3).

⁸ 20 C.F.R. § 10.5(aa)(1).

⁹ 5 U.S.C. § 8110(a)(3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁰ 20 C.F.R. § 10.5(aa)(1) provides, in pertinent part, that the educational institution attended by the student must be accredited or licensed by the United States Government or a State Government or any political subdivision thereof. *See also G.H.*, (Docket No. 09-606, issued December 18, 2009) (the Board found an overpayment of compensation where appellant received augmented compensation during a period where his unmarried child over the age of 18 attended a nonaccredited education institution).

enrolled as a full-time student at the University of District of Columbia beginning in August 2005. Although appellant alleges her son was a full-time student, she has provided no transcripts, receipts or other evidence of his attendance. While she submitted evidence on appeal pertaining to her son's education during this period, the Board is precluded from reviewing this evidence for the first time on appeal.¹¹

Appellant also claimed her son joined the Job Corps in January 2007 (or January 2008) to receive instruction in culinary arts. The record reflects only that her son was enrolled as of February 19, 2008 at the Woodstock Job Corps Center. The dates of enrollment were not provided and the completion of course date was undetermined. This evidence is not sufficient to verify appellant's son's attendance for any period of study. There is no other evidence documenting that her son was pursuing a regular course of study or training as required by the Act's regulations.¹² As appellant's son does not meet the requirements of an eligible dependent under the Act, an overpayment of compensation was created effective February 26, 2004.

The Office provided a detailed accounting of the amount of compensation appellant should have received at the statutory 66 2/3 percent rate since there were no qualified dependents. The worksheets reflect that, from February 26, 2004 through September 14, 2008, she was paid \$190,165.95 at the augmented rate but should have been paid \$168,861.15. This amounts to an overpayment amount of \$21,304.80. Thus, the Board finds that the Office's calculation of a \$21,304.80 overpayment was correct. Accordingly, the Office properly determined the fact and amount of the overpayment.

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.¹³

Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁴ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.

¹¹ The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

¹² 5 U.S.C. § 8101(17).

¹³ 5 U.S.C. § 8129; see *P.M.*, 60 ECAB ____ (Docket No. 07-2169, issued March 3, 2009); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁴ 5 U.S.C. § 10.433(a).

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from the Office are proper.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion, that she accepted payments which she knew or should have known to be incorrect.¹⁷

For the Office to establish that appellant was at fault in creating the overpayment, it must show that, when she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁸ With respect to whether an individual is with fault, section 10.433(b) of the Office's regulations provide that whether the Office determines that an individual was with fault with respect to the receipt of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she was being overpaid.¹⁹

The Board finds that appellant was at fault in creating the overpayment. The CA-1032 forms provided information notifying her as to the status of dependents for augmented compensation. Appellant was advised as to the requirements for claiming a child as a dependent and informed that a claimant with no dependents was paid at the 66 2/3 percent basic rate, not the 75 percent augmented rate. The evidence establishes that, when placed on compensation, she received it at the augmented rate as her son was under the age of 18. While appellant testified that she did not intend to mislead the Office as she continued to provide support for her son, she knew or reasonably should have known that she was not entitled to augmented compensation when her son turned 18 years of age. As noted above, her son did not qualify as a full-time student. Additionally, there is no evidence to support that appellant's son was unable to support himself because of a mental or physical disability. Appellant indicated in her August 13, 2009 letter that during the three-year period, her son worked part time with various companies. While she may have been unclear as to her son's status as a student, she knew or should have known that the payments made at the augmented rates were incorrect in view of the cautionary language in the CA-1032 forms that she signed. Appellant is at fault in creating the overpayment and is not eligible for waiver of recovery. The Office is required by law to recover the overpayment.

¹⁵ *Id.*

¹⁶ *Id.* at § 10.433(b).

¹⁷ *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁸ *See Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁹ 20 C.F.R. § 10.433(b).

Appellant contends on appeal that she did not mislead the Office and submitted some information regarding her son's schooling. As noted above, the Board is precluded from reviewing evidence for the first time on appeal.

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship upon such individual.²⁰

ANALYSIS -- ISSUE 3

The Board finds that the Office properly directed recovery of the overpayment at the rate of \$600.00 every four weeks from appellant's continuing compensation.

In setting the rate of recovery at \$600.00 every four weeks, the hearing representative noted that appellant did not provide sufficient documentation for various expenses such as food, miscellaneous expenses, and her new mortgage. The hearing representative noted that, even if the amount of the new mortgage were accepted, there was insufficient evidence documenting other expenses. The Office had insufficient documentation regarding appellant's current monthly household expenses or any of her household bills for her new home. It is appellant's responsibility to provide information about income, expenses and assets.²¹ Section 10.441(a) of the Office's regulations, as noted, directs the Office to take certain matters into consideration in establishing the repayment schedule, including 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.²² The Office was disadvantaged by appellant's failure to timely provide financial documentation. In view of these circumstances, the Office properly considered the appropriate factors in determining the recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period February 26, 2004 to September 14, 2008, in the amount of \$21,304.80. The Board further finds that she was with fault in creating the overpayment and that the Office properly set the rate of recovery from continuing compensation.

²⁰ 20 C.F.R. § 10.441(a); see *Steven R. Cofrancesco*, *supra* note 15.

²¹ *Id.* at § 10.438.

²² *Id.* at § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board