

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

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<b>V.F., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 10-1394</b>
	)	<b>Issued: February 23, 2011</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, Columbia, MO, Employer</b>	)	

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*Appearances:*  
Barbara J. Baney, for the appellant  
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 April 27, 2010 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' December 23, 2009 overpayment decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$5,231.93 for the period February 19 through May 13, 2006; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office abused its discretion in setting the rate of recovery.

## **FACTUAL HISTORY**

Appellant's February 28, 2002 occupational disease claim was accepted for right carpal tunnel syndrome and right shoulder impingement.<sup>1</sup> On November 5, 2002 she returned to work without restrictions.

On August 8, 2005 appellant submitted a claim for a schedule award. She listed her 54-year-old nephew, Bill Coats, as a dependent.

In a letter dated February 8, 2006, the Office informed appellant that her claim was being processed. It advised her that the Federal Employees' Compensation Act did not provide for augmented compensation for dependents other than spouses or children.

On February 13, 2006 the Office granted appellant a schedule award for a four percent permanent impairment of the right shoulder. The amount of the award was \$6,125.04, covering the period November 9, 2005 to February 18, 2006.<sup>2</sup> The Office informed appellant that the payment of the award would end when she had been paid for February 18, 2006.

On May 22, 2006 appellant forwarded benefit statements to the Office reflecting payments received subsequent to February 18, 2006. She asked the Office whether the payments were part of her schedule award and, if so, when she would receive the last payment.

On June 2, 2006 the Office informed appellant that her schedule award for a four percent impairment to the right shoulder ran from November 9, 2005 to February 18, 2006, and that her benefit checks should have terminated effective on February 19, 2006. It stated that it had erroneously made payments to her for the period February 19 to June 10, 2006. Noting that it was too late to prevent the latest check for the period May 14 to June 10, 2006 from being issued, the Office asked that appellant return that check, together with any prior uncashed checks for the overpayment period.

On June 6, 2006 appellant advised the Office that she was confused as to what her schedule award was supposed to be, noting that she had also received a schedule award for a five percent impairment of the right wrist. She asked the Office to advise her as to how to proceed.

The record contains a copy of a check dated June 10, 2006, payable to appellant in the amount of \$1,751.00 for the period May 14 to June 20, 2006. The check was received by the Office on July 12, 2006.

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<sup>1</sup> This case was previously before the Board. By order dated December 5, 2007, the Board set aside an April 10, 2007 overpayment decision on procedural grounds and remanded the case for proper service. Docket No. 07-1854 (issued December 5, 2007). On August 10, 2009 the Board set aside a September 28, 2008 overpayment decision, which found that appellant had abandoned her hearing request. The Board remanded the case for further development. Docket No. 09-101 (issued August 10, 2009).

<sup>2</sup> In another decision dated February 13, 2006, the Office granted a schedule award for a five percent impairment of the right wrist. The amount of the award was \$6,281.39, covering the period November 18, 2002 to March 7, 2003. The record reflects that appellant was paid a lump-sum amount of \$6,281.39, by check dated February 17, 2006.

In a preliminary overpayment decision dated November 21, 2006, the Office found that appellant had incorrectly received compensation in the amount of \$5,231.93 for the period from February 19 through May 13, 2006, due to the fact that she continued receiving payments following the expiration of her schedule award on February 18, 2006. It also made a preliminary determination of fault in the creation of the overpayment, finding that she retained payments that she knew or should have known were erroneous. The Office advised appellant of actions available to her if she believed that she should receive a waiver instead of repaying the overpayment, including requesting that the Office issue a final decision based on the written evidence currently of record. It further advised her to submit a detailed explanation of her reasons for seeking a waiver; a completed Form OWCP-20; and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

An automated computer payment system (ACPS) form, bearing a “run date” of November 21, 2006, reflected schedule award payments for the period November 9, 2005 through May 13, 2006. Appellant received a check, dated February 24, 2006, in the amount of \$6,125.04 for the period November 9, 2005 through February 18, 2006. She also received a check dated March 18, 2006 in the amount of \$1,692.00 for the period February 19 through March 18, 2006; a check dated April 15, 2006 in the amount of \$1,788.00 for the period March 19 through April 15, 2006; and a check dated May 13, 2006 in the amount of \$1,751.00 for the period April 16 through May 13, 2006, for a total net amount of \$5,231.93.

Appellant submitted an overpayment recovery questionnaire reflecting monthly income of \$1,586.32 and monthly expenses of \$2,190.48. In a December 15, 2006 letter, she stated that she was confused as to how and why she was overpaid. Appellant believed the second check she received was for her qualified dependent and that she was entitled to receive multiple payments because she had two injuries.

In an April 10, 2007 decision, the Office finalized its preliminary determination of overpayment, finding that appellant was at fault in its creation and demanding payment in full.

Appellant sought review by the Board. In an order dated December 5, 2007, the Board set aside the April 10, 2007 decision on the grounds that neither the preliminary determination of overpayment nor the final decision had been properly served on appellant’s representative. The case was remanded for proper service.<sup>3</sup>

In a preliminary overpayment determination dated March 4, 2008, the Office found that appellant had received an overpayment of compensation in the amount of \$5,231.93 for the period February 19 through May 13, 2006, due to the fact that she continued receiving payments following the expiration of her schedule award on February 18, 2006. It also made a preliminary determination of fault in the creation of the overpayment, finding that appellant retained payments that she knew or should have known were erroneous.

On March 28, 2008 appellant requested a precoupment hearing, which was scheduled for August 7, 2008 in St. Louis, MO. On July 23, 2008 counsel requested that the hearing be postponed or rescheduled to a telephone hearing, due to her inability to attend the scheduled hearing for medical reasons. The hearing representative denied the request.

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<sup>3</sup> Docket No. 07-1854 (issued December 5, 2007).

By decision dated September 25, 2008, a hearing representative found that appellant had abandoned her request for an oral hearing, as she failed to appear at the scheduled hearing. She found that appellant had received an overpayment in the amount of \$5,231.93 and was at fault in its creation. The representative instructed appellant to repay the overpayment amount in full.

Appellant appealed the overpayment decision to the Board. In an August 10, 2009 decision, the Board set aside the September 25, 2008 decision, finding that the hearing representative had failed to follow proper procedures in denying appellant's request to reschedule the oral hearing. The Board remanded the case for further development.<sup>4</sup>

On remand, a telephone hearing was scheduled for October 20, 2009. At the hearing, counsel contended that appellant was not at fault in creating the overpayment because she was unaware that she was not entitled to the funds. She argued that the Office was at fault for continuing to make payments erroneously and that appellant's nephew should be considered a dependent for purposes of augmented compensation. The hearing representative advised appellant to submit updated financial information within 30 days.

Appellant submitted a completed overpayment recovery questionnaire reflecting that she had monthly income of \$1,947.04 and monthly expenses of \$2,470.06. She also indicated that she had personal property and other funds valued at \$20,150.00.

By decision dated December 23, 2009, an Office hearing representative found that an overpayment existed in the amount of \$5,231.93 and that appellant was at fault in its creation, thereby precluding waiver. She noted that appellant's nephew was not a dependent under the Act and that, therefore, she had been correctly compensated at the 2/3 rate. The representative further determined that appellant should repay the overpayment amount by submitting payment in full.

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

The Act<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

The Office's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.<sup>8</sup>

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<sup>4</sup> Docket No. 09-101 (issued August 10, 2009).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Id.* at § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004).

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

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,231.93 for the period February 19 through May 13, 2006, due to the fact that she continued receiving payments following the expiration of her schedule award.

The record reflects that, in satisfaction for her schedule award, appellant received a lump-sum payment in the amount of \$6,125.04 for the period November 9, 2005 through February 18, 2006. An overpayment arose when the Office continued to make schedule award payments for subsequent periods of time through May 13, 2006. In addition to receiving the lump sum of \$6,125.04, appellant received additional payments of \$1,692.00 for the period February 19 through March 18, 2006; a payment in the amount of \$1,788.00 for the period March 19 through April 15, 2006; and a payment in the amount of \$1,751.00 for the period April 16 through May 13, 2006, for a total net amount of \$5,231.93. As appellant was not entitled to receive schedule award compensation for any period subsequent to February 18, 2006, the Office properly determined that she received an overpayment of compensation in the amount of \$5,231.93.

Appellant contended that her nephew should be considered a dependent for purposes of augmented compensation and that, therefore, she was incorrectly compensated at the 2/3 rate. The Act, however, does not provide for augmented compensation for dependents other than spouses or children. Therefore, the Office properly determined that appellant should be paid at the 2/3 rate.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act provides that 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.<sup>10</sup>

Section 10.433 of the Office's implementing regulations provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; failed to provide information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.<sup>11</sup>

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<sup>9</sup> See 5 U.S.C. § 8110, which provides that, for purposes of that section, "dependent" means a wife, husband, an unmarried child or a parent under specific circumstances.

<sup>10</sup> *Id.* at § 8129(b).

<sup>11</sup> 20 C.F.R. § 10.433.

## **ANALYSIS -- ISSUE 2**

The Board finds that appellant was at fault in creating the overpayment that occurred between February 19 and May 13, 2006. Therefore, appellant is not entitled to a waiver of the overpayment amount.

The February 13, 2006 schedule award specified the amount and duration of the schedule award. Therefore, appellant was on notice that she would receive the amount of \$6,125.04 for the period November 9, 2005 through February 18, 2006. She was also informed that the payment of the award would end when she had been paid for February 18, 2006. On February 24, 2006 appellant was issued a check in the full amount of the schedule award. The Office, however, erroneously continued to issue checks to her, which she accepted and cashed. Under these circumstances, the Board finds that the Office properly found that appellant was at fault in the creation of the overpayment. Therefore, the overpayment was not subject to waiver.

Appellant contended that she was not at fault in creating the overpayment because she was unaware that she was not entitled to the funds. She argued that the Office was at fault for continuing to make payments erroneously. The Board has consistently held that the Office's erroneous payment of benefits does not excuse an employee from accepting a payment that she knew or should have known to be incorrect.<sup>12</sup> In this case, appellant was on notice that she was not entitled to payments in excess of \$6,125.04 relating to her schedule award or for payments for any period subsequent to February 18, 2006. She should also have known that she was not entitled to augmented compensation for her nephew, as she received written notice to that effect in a February 8, 2006 letter. The Board finds that appellant knew or should have known that any payments dated after February 18, 2006 were in error.<sup>13</sup>

## **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>14</sup> However, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>15</sup>

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<sup>12</sup> See *Ricky Greenwood*, 57 ECAB 462 (2006).

<sup>13</sup> As noted appellant received another schedule award on February 13, 2006 for a five percent impairment of the right wrist. The amount of the award was \$6,281.39, covering the period from November 18, 2002 to March 7, 2003. Appellant was paid a lump sum amount of \$6,281.39 on February 17, 2006, in full satisfaction of the award. Therefore, she could not reasonably have expected to receive any further payments pursuant to the schedule award for the right wrist.

<sup>14</sup> 5 U.S.C. § 8129(b).

<sup>15</sup> *Joan Ross*, 57 ECAB 694 (2006); see also *Albert Pineiro*, 51 ECAB 310 (2000).

### **ANALYSIS -- ISSUE 3**

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>16</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$5,231.93 for the period February 19 through May 13, 2006. The Board also finds that the Office properly determined that she was at fault in creating the overpayment and not entitled to waiver. The Board further finds that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, it lacks jurisdiction to review recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment and determination of fault.

Issued: February 23, 2011  
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

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<sup>16</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>17</sup> *Cheryl Thomas, id.*