

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA P. HUMPHREY and DEPARTMENT OF JUSTICE,
U.S. BORDER PATROL, San Diego, Calif.

*Docket No. 96-1720; Submitted on the Record;
Issued December 11, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$1,580.70 because appropriate deductions for basic life insurance and post-retirement life insurance were not made during the period September 26, 1992 through October 15, 1994; (2) whether the Office properly denied waiver of recovery of the overpayment; (3) whether the Office properly required repayment of the overpayment at the rate of \$100.00 per month; (4) whether the Office properly reduced appellant's wage-loss compensation benefits during the period November 12, 1995 through January 30, 1996 on the grounds that appellant refused to undergo vocational rehabilitation services pursuant to 5 U.S.C. § 8113(b); (5) whether the Office properly found that appellant was not entitled to augmented compensation during the period June 24, 1993 through January 6, 1996 because appellant failed to advise the Office about a change in her marital status; (6) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,457.32 on the grounds that appellant was not entitled to augmented compensation during the period June 24, 1993 through January 6, 1996 because appellant failed to advise the Office about a change in her marital status; (7) whether the Office properly found that appellant was at fault in the creation of the overpayment in the amount of \$4,457.32; and (8) whether the Office properly required repayment of the overpayment at the rate of \$120.00 per month.

On October 5, 1990 appellant, then an administrative support assistant, filed a claim for an occupational disease (Form CA-2) alleging that on September 28, 1990 she first realized that her carpal tunnel syndrome was caused or aggravated by her employment.¹ On January 24, 1991 the Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized carpal tunnel release.

¹ Appellant was separated from the employing establishment effective September 25, 1992 due to her inability to perform the duties of her position and the employing establishment's inability to accommodate her disability.

By letter dated February 1, 1995, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,580.70 because appropriate deductions for basic life insurance and post-retirement life insurance were not made during the period September 26, 1992 through October 15, 1994. The Office found that appellant was without fault in the creation of the overpayment.

In a notice of proposed reduction of compensation dated October 2, 1995, the Office advised appellant that it proposed to reduce her wage-loss compensation benefits on the grounds that she refused to cooperate with vocational rehabilitation services.

By decision dated October 3, 1995, the Office finalized its overpayment decision and finding of no fault. The Office found that appellant was capable of repaying the debt at the rate of \$100.00 per month.

By decision dated November 6, 1995, the Office finalized its decision to reduce appellant's wage-loss compensation benefits beginning November 12, 1995 on the grounds that appellant refused to undergo vocational rehabilitation services.²

By decision dated January 3, 1996, the Office found that appellant was not entitled to augmented compensation after June 24, 1993. In an accompanying memorandum, the Office found that appellant's dependent status had changed on June 24, 1993 based on her request for a change in health benefits from family coverage to self-only coverage. The Office also found that the overpayment would be calculated from June 24, 1993 through January 6, 1996, the end of the current pay cycle.

By letter dated January 23, 1996, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$4,457.32 during the period June 24, 1993 through January 6, 1996 because appellant had received augmented compensation that she was not entitled to receive due to a change in her dependent status. The Office advised appellant that she was at fault in the creation of the overpayment because she failed to furnish information which she knew or should have known to be material and that she accepted payments which she either knew or should have been expected to know were incorrect.

By decision dated February 28, 1996, the Office finalized its overpayment decision and finding of fault. Attached to the Office's decision was a debt amortization schedule requiring appellant to repay \$120.00 per month effective March 3, 1996 until the overpayment was complete.

² By letter dated March 4, 1996, the Office reinstated appellant's wage-loss compensation benefits at the 66 2/3 rate effective January 31, 1996 based on appellant's signing of a vocational rehabilitation plan to cooperate with the Office's vocational rehabilitation efforts. By letter dated April 29, 1996, the Office advised appellant in response to her telephone call regarding her request for compensation benefits retroactive to the date that the Office terminated her compensation, that compensation could not be reinstated to total disability during the period of the reduction. The Office then advised appellant to exercise her appeal rights that were attached to the November 6, 1995 decision if she disagreed with its decision.

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$1,580.70 for the period September 26, 1992 through October 15, 1994.

In this case, the Office of Personnel Management advised the Office that basic life insurance premiums should have been withheld beginning September 26, 1992 and that appellant had elected post-retirement basic life insurance/no reduction. The record reveals that \$508.20 should have been deducted for basic life insurance and \$1,072.50 should have been deducted for post-retirement life insurance from appellant's compensation benefits during the period September 26, 1992 through October 15, 1994, totaling \$1,580.70. Accordingly, the Board finds that an overpayment of compensation was created in the amount of \$1,580.70.

The Board, however, finds that this case is not in posture for decision regarding whether the Office properly denied waiver of recovery of the overpayment in the amount of \$1,580.70 and whether the Office properly required repayment of the \$1,580.70 overpayment at the rate of \$100.00 per month.

In this case, the Office found in its October 3, 1995 decision that appellant was not entitled to waiver of recovery of the overpayment. In so doing, the Office stated that "[t]he reasons for this decision are shown on the enclosed memorandum." The Office also found that appellant was capable of repaying the debt at the rate of \$100.00 per month. However, the record does not contain the Office's "enclosed memorandum." The Board is, thus, unable to review the Office's basis for denying waiver of the recovery of the overpayment and in requiring appellant to repay the debt at the rate of \$100.00 per month. Inasmuch as the Board is unable to determine whether the Office properly denied waiver of recovery of the overpayment in the amount of \$1,580.70 and properly calculated the repayment rate, the Office's October 3, 1995 decision should be remanded to the Office for further consideration of these issues.

The Board finds that the Office properly reduced appellant's wage-loss compensation benefits during the period November 12, 1995 through January 30, 1996 on the grounds that appellant refused to undergo vocational rehabilitation services pursuant to 5 U.S.C. § 8113(b).

Section 8104 of the Federal Employees' Compensation Act provides the Secretary of Labor with the authority to direct disabled employees to undergo vocational rehabilitation.³ The Act provides that, notwithstanding the forfeiture provision of section 8106, individuals directed to undergo vocational rehabilitation by the Secretary shall, while undergoing such rehabilitation, receive compensation benefits.⁴ Further, section 8113(b) of the Act provides:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, ... after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would

³ 5 U.S.C. § 8104.

⁴ 5 U.S.C. § 8104(b).

probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”⁵

The Office has promulgated federal regulations under section 8113(b) of the Act concerning the obligation of employees to participate in vocational rehabilitation efforts as directed by the Secretary. Section 10.124(f) of the federal regulations provides:

“Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee’s monetary compensation based on what would probably have been the employee’s wage-earning capacity had there not been such failure or refusal. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (*i.e., interviews, testing, counseling, and work evaluations*), the Office cannot determine what would have been the employee’s wage-earning capacity had there not been such failure or refusal. *It will be assumed, therefore, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and the Office will reduce the employee’s monetary compensation accordingly.* Any reduction in the employee’s monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office.”⁶ (Emphasis added.)

Dr. Richard M. Braun, a Board-certified orthopedic surgeon and appellant’s treating physician, released appellant to return to work on February 16, 1994 with physical restrictions, which included limited left hand grasping activities, lifting no more than 10 pounds, and pushing and pulling no more than 20 pounds with the left hand, no repeated tool use with the left hand, keyboard activities for 1 to 2 hours in the morning and 1 to 2 hours in the afternoon with rest for at least 2 hours, intermittent use of the telephone, interaction with persons in the office, and occasional filing of forms.

Appellant was referred to a vocational rehabilitation counselor and underwent vocational testing. In a January 31, 1995 letter, the employing establishment advised the vocational rehabilitation counselor that it was unable to provide appellant with a position within her physical restrictions. In a February 24, 1995 report, the rehabilitation counselor recommended that appellant be changed from placement with previous employer to plan development.

⁵ 5 U.S.C. § 8113(b). Section 8113(b) is distinguishable from section 8106(c) of the Act which allows the Office to terminate compensation where an employee refuses to accept suitable work; *see John W. Karandy*, 34 ECAB 764 (1983).

⁶ 20 C.F.R. § 10.124(f).

By letter dated May 17, 1995, the Office advised appellant that it had been notified of her refusal to participate in rehabilitation efforts on the basis of her belief that she was disabled for work due to her accepted condition. The Office also advised appellant about the importance of vocational rehabilitation services in a workers' compensation system and the penalty for refusing such services pursuant to section 8113(b) of the Act. The Office further advised appellant to contact the Office to make a good faith effort to participate in the rehabilitation effort to return to gainful employment or to provide a good reason for not participating in the rehabilitation effort along with supportive evidence. In a June 11, 1995 response letter, appellant expressed her concerns about being able to work within the restrictions outlined by Dr. Braun and her ability to keep a job once she was placed by rehabilitation efforts.

In a June 16, 1995 report, appellant's rehabilitation counselor indicated that he was still unable to contact appellant regarding rehabilitation services. In a July 14, 1995 report, appellant's rehabilitation counselor indicated that appellant had informed him that she responded to the Office's May 17, 1995 letter and that she was still unable to work. The rehabilitation counselor also indicated that the medical evidence had not changed regarding appellant's physical capacity for work. The counselor concluded that he would provide selected position information to the Office based on appellant's refusal to work and that there was no change in the medical evidence regarding appellant's ability to work.

On September 27, 1995 appellant's rehabilitation counselor identified the positions of real estate assistant/clerk and mortgage loan processor, as within appellant's physical restrictions. Specifically, the former position was a sedentary one that required appellant to lift no more than 10 pounds, and to reach, handle, feel, talk and visual acuity. The latter position was identical to the real estate assistant/clerk position with regard to its sedentary nature. It also required the same physical requirements with the addition of visual accommodation.

On October 16, 1995 appellant telephoned the Office to find out what options were available to her regarding the proposed reduction of her compensation. On the following date, October 17, 1995, the Office advised appellant to comply with its rehabilitation efforts and to submit her intent to comply with these efforts in writing. Appellant did not respond.

The issue is whether appellant presented "good cause" in failing to continue her vocational rehabilitation. Although appellant believed that her condition prevented her from performing the positions identified by the rehabilitation counselor, the medical evidence of record establishes that the requirements of these positions fall within appellant's physical restrictions. Dr. Braun did not support appellant's contention of total disability for work. Thus, there is no evidence that appellant's failure to continue vocational rehabilitation counseling was with "good cause." Accordingly, the Board finds that the Office acted properly in reducing appellant's compensation pursuant to section 8113(b) of the Act.

The Board further finds that the Office properly found that appellant was not entitled to augmented compensation from June 24, 1993 through January 6, 1996 because she failed to advise the Office about a change in her marital status.

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, she is entitled to have her basic compensation augmented at the rate of 8 1/3 percent of her monthly pay.⁷ Under the Act, a husband is considered an employee's dependent if "(a) he is a member of the same household as the employee; (b) he is receiving regular contributions from the employee for his support; or (c) the employee has been ordered by a court to contribute to his support."⁸

In the present case, appellant received compensation benefits at the 75 percent augmented pay rate from February 2, 1991 through January 6, 1996 based on a January 25, 1991 Form CA-7 revealing that James Humphrey was appellant's husband and that she was living with her husband. Deductions were made from appellant's compensation for "CY2," family health benefits.

On June 7, 1993 the Office received a call from the employing establishment regarding a change in appellant's health benefits from family to self-only coverage. The record reveals that appellant made the change in her health benefits on June 24, 1993 and that this change became effective on September 19, 1993.

Appellant advised the Office that she was involved in divorce proceedings against her husband and that she was no longer living with him. By letter dated October 20, 1995, the Office advised appellant to provide the date that she stopped living with her spouse. The Office further advised appellant to provide whether she was making regular contributions to her husband's support or whether she had been ordered by a court to contribute to her husband's support. The Office also advised appellant to submit the requested information within 30 days pursuant to 20 C.F.R. § 10.107(c) or her right to augmented compensation may be suspended.

In an October 30, 1995 response letter, appellant requested a copy of section 10.107(c) regarding entitlement to augmented compensation. Appellant also requested clarification about the proposed reduction of her benefits after her divorce became final.

By letter dated November 13, 1995, the Office provided appellant with a copy of section 10.107(c) and advised appellant that if no response was received within 30 days, the Office would determine that the date she separated from her husband was the date that she changed her health benefits from family to self-only coverage. The Office explained that the reduction of her benefits after her divorce was due to factors over which it had no control.

In a December 12, 1995 response letter, appellant stated that she was still married and that she intended to reconcile with her husband. Appellant then stated that, since a motion for a new trial in her divorce proceeding was pending, there was no final divorce date yet.

Inasmuch as appellant was no longer living with her husband, and appellant failed to submit the requested evidence establishing that she was either making regular payments in support of her husband or was ordered by a court to make contributions to her husband's

⁷ 5 U.S.C. § 8110(b).

⁸ 5 U.S.C. § 8110(a)(2).

support, the Board finds that appellant was not entitled to augmented compensation during the period June 24, 1993 through January 6, 1996.

The Board additionally finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,457.32 on the grounds that appellant was not entitled to augmented compensation during the period June 24, 1993 through January 6, 1996 because appellant failed to advise the Office about a change in her marital status.

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.⁹ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): “[a]djustment 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.”¹⁰ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹¹ In evaluation of whether appellant is without fault, the Office will consider whether appellant’s receipt of the overpayment occurred because she relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.¹²

As noted above, appellant was not entitled to receive augmented compensation at the rate of 75 percent during the period June 24, 1993 through January 6, 1996. The record reveals that from June 24 through September 18, 1993 appellant was paid at the 75 percent pay rate and family health benefits were deducted from her compensation, and thus, appellant received \$3,466.85 in disability compensation, rather than \$3,380.82. The record further reveals that appellant had been improperly charged \$479.22 for family health coverage when she should have only been charged \$127.14 for self-only, during the period June 24 through September 18, 1993, resulting in an overpayment of benefits in the amount of \$86.03. The record also reveals that from September 19, 1993 through January 6, 1996 appellant was paid at the 75 percent pay rate, and thus, received \$38,073.17 in disability compensation rather than \$33,701.88. Consequently, appellant received an overpayment in the amount of \$4,457.32. Because appellant continued to receive compensation at the augmented rate from June 24, 1993 through January 6, 1996, the Board finds that an overpayment in the amount of \$4,457.32 occurred during this period.

The Board also finds that the Office properly found that appellant was at fault in the creation of the overpayment in the amount of \$4,457.32.

⁹ 5 U.S.C. § 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Harold W. Steele*, 38 ECAB 245 (1986).

¹² 20 C.F.R. § 10.320(c)(1).

In deciding whether an individual is “without fault,” what constitutes “fault” is determined by section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“(a) Although the Office may have been at fault in making the overpayment that fact does not relieve the overpaid individual ... from liability for repayment if such individual is not without fault.

“(b) *With fault.* In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. 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
- (3) [A]ccepted a payment which the individual knew or should have been expected to know was incorrect.”¹³

In the present case, the Office properly applied the second and third standards in finding appellant to be at fault in the creation of the overpayment. After consideration of all the particular circumstances surrounding the overpayment, the Board finds that the facts of this case establish that appellant knew or should have been expected to know that she was required to inform the Office of any change in her dependent status. Appellant completed a Form CA-1032 dated February 25, 1993 indicating that she was claiming additional compensation for a dependent, because of her husband. Under part B of this form regarding dependents, the following statement appeared: “[t]he basic rate of compensation is 66 percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate.” The form also indicated that the signer of the form understood that he or she must immediately report to the Office any change in the status of claimed dependents and appellant signed and dated the forms. The manner in which appellant completed the Form CA-1032 shows that she understood or should have understood the circumstances under which augmented compensation could be claimed and the need to immediately report to the Office any change in the status of her claimed dependents. Therefore, appellant failed to promptly furnish material information as defined in section 10.320(b)(2).

Additionally, the Board finds that the facts of this case establish that appellant knew or should have been expected to know that she accepted incorrect compensation payments. Appellant was advised by the Office’s April 22, 1993 letter that she was receiving compensation

¹³ 20 C.F.R. § 10.320(b).

at the rate of 75 percent of her salary. Further, the Board notes that appellant answered the questions that appeared below the language in part B of the February 25, 1993 Form CA-1032 regarding dependents and indicated that her husband was still a dependent. Inasmuch as appellant completed the form on February 25, 1993, slightly over four months before she changed her health benefits from family to self-only coverage on June 24, 1993, the Board finds that appellant knew or should have been aware that she was still receiving compensation at an augmented rate after June 24, 1993. Accordingly, the Board finds that waiver of recovery is not possible in this case.

The Board finds that the Office properly required repayment of the overpayment in the amount of \$4,457.32 at the rate of \$120.00 per month.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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.”¹⁴

The record establishes that appellant failed to submit a completed financial questionnaire within the 30-day time period prescribed by the Office or any other evidence from which the Office could determine what amount she could afford to repay out of her continuing compensation benefits.¹⁵ Because the Office’s decision to withhold \$120.00 per month from appellant’s continuing compensation payments was made with due regard to the amount of appellant’s continuing compensation payments, it is therefore, appropriate under the circumstances. Accordingly, the Board finds that recovery of the overpayment by withholding \$120.00 a month from appellant’s compensation does not constitute an abuse of discretion.¹⁶

¹⁴ 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁵ *See* 20 C.F.R. § 10.321(h) which provides that if additional financial information is not submitted, or a preresoupment hearing is not requested, within 30 days of the Office’s preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action; *see Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).

¹⁶ The Board notes that on appeal, appellant submitted a completed financial questionnaire. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

The October 3, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed in part with respect to the fact and amount of the \$1,580.70 overpayment and set aside with respect to the finding of fault and the method of recovery of the overpayment. The case is remanded to the Office for further proceedings consistent with this decision of the Board to be followed by an appropriate decision. The February 28 and January 3, 1996 and November 6, 1995 decisions of the Office are hereby affirmed.

Dated, Washington, D.C.
December 11, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member