

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLEN KENNEDY and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, San Diego, Calif.

*Docket No. 95-1942; Submitted on the Record;
Issued January 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had received an overpayment of compensation in the amount of \$1,913.35 during the period June 1, 1992 to April 3, 1993, because appellant received compensation at the augmented rate although he did not have any dependents; and (2) whether the Office properly found appellant at fault in the creation of the overpayment.

In the present case, appellant began receiving compensation on the periodic rolls as of March 3, 1991, with compensation based on the augmented rate of 75 percent of the weekly payrate. By letter dated September 7, 1994, the Office advised appellant that a preliminary determination had been made that an overpayment of compensation of \$1,913.35 occurred during the period June 1, 1992 to April 3, 1993, because appellant had been paid at the augmented rate for one or more dependents, when he did not have any eligible dependents during that period. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment. By decision dated October 19, 1994, the Office finalized the preliminary determination.

The Board has reviewed the record and finds that the Office has not established that an overpayment of compensation occurred during the period June 1, 1992 to April 3, 1993.

It is well established that when an employee loses pay due to temporary total disability resulting from an employment injury, compensation is payable at the rate of 66 and 2/3 percent of the payrate established for compensation purposes. The compensation rate is increased to 75 percent when there are one or more dependents.¹ In the present case, the Office found, in its September 7, 1994 preliminary determination of overpayment, that appellant had notified the Office in a February 16, 1993 letter that he no longer had eligible dependents "as his wife had

¹ See *Dorothy F. Ellis*, 41 ECAB 296 (1989).

moved out of his house.”² The record does contain a February 16, 1993 letter from appellant stating that his wife left the house in June 1992, although the Board notes that appellant’s wife indicated in a February 19, 1993 letter that she had not been living in the same household as appellant since 1983. In any case, a wife can remain a dependent if “she is receiving regular contributions from the employee for her support.”³ Appellant has maintained that he continued to be married and provided support to his wife. The Office made no findings of fact in this regard or otherwise explained why appellant did not have a “dependent” under 5 U.S.C. § 8110(a)(1)(B).

The Board also notes that in a July 7, 1992 Form CA-1032, appellant claimed his mother as a dependent. Under 5 U.S.C. § 8110(a)(4), a parent can be a dependent “while wholly dependent on and supported by the employee.” The Office did not develop the record on this issue or make any findings of fact in this regard.

Accordingly, the Board cannot find, based on the evidence of record, that under 5 U.S.C. § 8110 appellant was not entitled to augmented compensation during the period June 1, 1992 to April 3, 1993. It is the Office’s burden to establish that an overpayment of compensation occurred and it has not met its burden in this case.⁴

The decision of the Office of Workers’ Compensation Programs dated October 19, 1994 is reversed.

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

² Under 5 U.S.C. § 8110(a)(1)(A), a dependent includes a wife if she is a member of the same household as the employee.

³ 5 U.S.C. § 8110(a)(1)(B).

⁴ See *Robert D. Short*, 44 ECAB 354 (1993). In view of the Board’s finding with regard to fact of overpayment, the fault issue will not be addressed.