

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDA HOWELL-PATE claiming as widow of EDGAR L. HOWELL and  
TENNESSE VALLEY AUTHORITY, Chattanooga, Tenn.

*Docket No. 96-2308; Submitted on the Record;  
Issued June 4, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$327.19 overpayment of compensation; (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$327.19 from appellant's continuing compensation.

The Board has duly reviewed the case record in the present appeal and finds that appellant received a \$327.19 overpayment of compensation.

In the present case, the record reveals that appellant received compensation at an augmented rate for the period January 15 to March 5, 1994 despite the fact that she was not entitled to compensation at an augmented rate for this period.<sup>1</sup> The basic rate of compensation under the Federal Employees' Compensation Act<sup>2</sup> is 66 2/3 percent of the injured employee's monthly pay.<sup>3</sup> When a person entitled to compensation has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at the rate of 8 1/3 percent of her monthly pay.<sup>4</sup> The record establishes that appellant's 18-year-old stepson stopped attending school on January 14, 1994 and, therefore, no longer qualified as a dependent.<sup>5</sup> The record further establishes that subsequent to the time her stepson stopped attending school, appellant continued to receive compensation at the augmented rate, thereby creating an overpayment in the

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<sup>1</sup> Appellant was receiving compensation due to the October 3, 1991 death of her husband, the employee.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8105(a).

<sup>4</sup> 5 U.S.C. § 8110(b).

<sup>5</sup> See 5 U.S.C. § 8101(17), 8110(a).

amount of \$327.19, the difference between \$1,963.19, the amount appellant was paid for the period January 15 to March 5, 1994, and \$1,636.00, the amount she should have been paid for this period. Accordingly, the Office properly determined, in its June 18, 1996 decision, that appellant received an overpayment of compensation in the amount of \$327.19.

The Board further finds that whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

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>6</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b):

“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>7</sup>

No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>8</sup>

In this case, the Office applied the second and third standards in determining that appellant was at fault in creating the overpayment.

With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part:

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<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.320(b).

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”<sup>9</sup>

In the present case, appellant acknowledged that she received compensation at an augmented rate after her stepson stopped attending school on January 14, 1994 and she knew that she would no longer be able to collect compensation at an augmented rate after that date. Appellant did not contest the recovery of the overpayment or otherwise provide an argument that she was not at fault in its creation.<sup>10</sup> Therefore, the Office had an adequate basis to determine, in its June 18, 1996 decision, that appellant was at fault in creating the overpayment of compensation and the overpayment was not subject to waiver.<sup>11</sup>

The Board further finds that the Office properly required repayment of the overpayment by deducting \$327.19 from appellant’s continuing compensation.

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.”<sup>12</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$327.19 from appellant’s continuing compensation, the Office took into consideration the relevant financial information as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant.<sup>13</sup>

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<sup>9</sup> 20 C.F.R. § 10.320(c).

<sup>10</sup> Appellant first advised the Office that her son had stopped attending school in a letter dated March 1, 1994.

<sup>11</sup> On appeal appellant asserted that the Office did not pay all the compensation due to her. The record contains a June 11, 1996 letter in which the Office indicated that appellant received all compensation due to her, but this letter does not constitute a final decision of the Office. The record does not contain a final decision of the Office concerning this matter and, therefore, it is not currently before the Board; *see* 20 C.F.R. § 501.2(c).

<sup>12</sup> 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>13</sup> Appellant did not complete all the portions of the financial questionnaire provided to her by the Office. However, appellant bears responsibility for providing the requisite information with respect to the overpayment and

The decision of the Office of Workers' Compensation Programs dated June 18, 1996 is affirmed.

Dated, Washington, D.C.  
June 4, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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the available evidence of record otherwise supports the Office's method of recovery; *see* 20 C.F.R. § 10.324.