

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA D. COLLINS and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

*Docket No. 96-2562; Submitted on the Record;
Issued March 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether an overpayment occurred in appellant's case in the amount of \$2,415.28; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and, therefore, was not entitled to waiver of the overpayment; and (3) whether the Office properly determined the rate of adjustment.

On July 6, 1984 appellant, then a 33-year-old letter carrier, sustained cervical, thoracic, and lumbar myofascia in the course of her federal employment. Appellant subsequently received compensation benefits for total disability. On November 3, 1990 appellant claimed a recurrence of disability on October 31, 1990 and beginning February 27, 1991 appellant began receiving compensation benefits for total disability at the rate of three-fourths of her pay.

By letter dated March 5, 1991, the Office informed appellant, "If you have no dependents compensation is paid at 66 2/3 percent of your pay rate. If you have at least one dependent, compensation is paid at 75 percent." The Office indicated that an "[u]nmarried child under 23 receiving your support who is a full-time student and has not completed four (4) years of schooling past the high school level" qualified as a dependent. The Office also instructed appellant to ask questions if she did not understand the dependency qualifications. The Office sent this identical information to appellant in a separate letter dated July 26, 1993.

In Office employment history questionnaires (Form 1032) dated May 12, 1992, May 10, 1993 and May 26, 1994, the Office advised appellant that compensation benefits were payable at two-thirds of the applicable pay rate if there were no eligible dependents and at the augmented three-fourths rate if there were one or more dependents. The Office further advised that children were considered dependents only if they were unmarried, under age 23 and receiving appellant's support as a full-time student who has not completed four years of schooling past the high school level. Appellant indicated on the questionnaire dated May 26, 1994, that her daughter, born on July 27, 1971, would turn 23 on July 27, 1994.

An Office daily roll payment sheet dated May 25, 1995, indicated that appellant received the augmented three-fourths compensation rate for claimants with dependents for the period July 27, 1994 through May 27, 1995 in the amount of \$21,813.82 although she was only eligible to the two-thirds rate for claimants with no eligible dependents of \$19,398.54 and that this resulted in an overpayment of compensation benefits of \$2,415.28.

By letter dated June 21, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in her case in the amount of \$2,415.28 because appellant's daughter turned age 23 yet appellant received the augmented three-fourths compensation rate for claimants with dependents for the period July 27, 1994 through May 27, 1995 in the amount of \$21,813.82 although she was only eligible to the two-thirds rate for claimants with no eligible dependents of \$19,398.54. The Office advised appellant that a preliminary finding had been made that she was at fault in the creation of the overpayment because she knew or reasonably should have known that she was not entitled to augmented benefits upon her daughter's 23rd birthday. The Office indicated that this information was contained in the employment history questionnaire dated May 26, 1994. The Office advised appellant that if she disagreed with the preliminary determination of the overpayment she should submit additional evidence or argument as well as a completed overpayment questionnaire.

On June 22, 1995 appellant requested a hearing on the issue of fault and waiver.

On June 22, 1995 appellant submitted an overpayment recovery questionnaire, in which he indicated that she received \$11.00 per month in Veteran's Administration benefits and that her monthly expenses were \$1,836.56.

At a hearing held February 13, 1995, appellant stated that she received \$1,705.00 in compensation benefits each month. Appellant's statement is supported by an Office compensation log printout indicating that appellant received \$1,703.04 for the period of June 25, 1995 through July 22, 1995. Appellant further testified that she received 20 to 30 dollars in food stamps from her daughter. Appellant stated that she was unaware that her compensation would decrease upon her daughter's twenty third birthday as her daughter remained a dependent student. She stated that she always provided the Office with correct information including the change in her daughter's age.

By decision dated July 9, 1996, the Office hearing representative determined that appellant was at fault and, therefore, was not entitled to waiver of the overpayment. The hearing representative indicated that the Office clearly informed appellant that she was not entitled to augmented benefits upon her daughter's 23rd birthday and that, therefore, appellant knew or should have known her compensation benefits were incorrect. The hearing representative further stated that appellant had compensation income of \$1,890.00 in addition to \$30.00 in food stamps from her daughter and \$11.00 from the Veteran's Administration each month. He, therefore, found that appellant's monthly income was \$1,931.00. Upon noting that appellant's monthly expenses were \$1,836.00, the Office hearing representative found that a repayment rate of \$100.00 minimized financial hardship as appellant's monthly income exceed her expenses by \$95.00. Finally, the hearing representative noted that a waiver on the basis that recovery would be against equity and good conscience should not be applied because the recovery would not

cause severe financial hardship and appellant had not relinquished a valuable right or changed her position for the worse. Accordingly, the hearing representative finalized the overpayment determination.

The Board finds that the Office properly determined that an overpayment occurred in appellant's case in the amount of \$2,415.28.

In this case, the record shows that appellant's daughter turned 23 on July 27, 1994, but that appellant received the augmented three-fourths rate of compensation based on her daughter's status as a dependent from the Office for the period of July 27 through May 27, 1994. Pursuant to 20 C.F.R. § 10.301(b):

“When an injured employee loses pay due to temporary total disability resulting from an injury, compensation is payable at the rate of 66 2/3 percent of the pay rate established for compensation purposes. The compensation rate is increased to 75 percent when there are 1 or more dependents. Dependents include a wife or husband; an unmarried child under 18 years of age or if over 18, incapable of self-support, or a student (until reaching 23 years of age or completing 4 years of school beyond the high school level)....”

Consequently, upon her daughter's 23rd birthday on July 27, 1994, appellant was not entitled to the augmented compensation rate. Therefore, the Office properly determined that an overpayment of compensation had occurred in her case in the amount of \$2,415.28 because appellant's daughter turned age 23 yet appellant received the augmented three-fourths compensation rate for claimants with dependents for the period July 27, 1994 through May 27, 1995 in the amount of \$21,813.82 although she was only eligible to the two-thirds rate for claimants with no eligible dependents of \$19,398.54.

The Board further finds that the Office properly determined that appellant was not without fault in the creation of the overpayment and, therefore, he was not entitled to waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act¹ 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. The only exception to this requirement is a situation which meets the test 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 the Act or would be against equity and good conscience.”² If an employee is not “without fault” the overpayment is not subject to waiver.³ In determining whether an individual is “without fault” what constitutes “fault” must first be determined. The

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8129(b).

³ *Monroe E. Hartzog*, 40 ECAB 322 (1988).

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 if he:

“(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.”⁴

In this case, the third criterion applies. The record shows that by letter dated March 5, 1991, the Office informed appellant, “If you have no dependents compensation is paid at 66 2/3 percent of your pay rate. If you have at least one dependent, compensation is paid at 75 percent.” The Office indicated that an “[U]nmarried child under 23 receiving your support who is a full-time student and has not completed four (4) years of schooling past the high school level” qualified as a dependent. The Office also instructed appellant to ask questions if she did not understand the dependency qualifications. The Office sent this identical information to appellant in a separate letter dated July 26, 1993, and in employment history questionnaires appellant signed on May 12, 1992, May 10, 1993 and May 26, 1994. Consequently, appellant knew or should have know that she was not entitled to augmented benefits upon her daughter’s 23rd birthday. The Office, therefore, properly determined that appellant was not without fault in the creation of the overpayment and was not entitled to waiver of recovery of the over payment of compensation.

The Board further finds that the Office did not abuse its discretion in determining the rate of adjustment in recovering the overpayment.

With respect to the \$100.00 withheld monthly from appellant’s continuing compensation, the Act notes that the rate of adjustment lies within the Office’s discretion.⁵ Office regulations provide:

“Whenever an overpayment has been made to an individual who is entitled to further payment, 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.”⁶

Prior to the hearing representative’s decision, appellant submitted an overpayment recovery questionnaire dated June 22, 1995, in which she indicated that her monthly expenses were \$1,836.56. The Office records indicate that appellant received a monthly income of

⁴ 20 C.F.R. § 10.320(b).

⁵ See 20 C.F.R. § 10.321(a).

⁶ *Id.*

\$1,931.00 based on its bi-weekly compensation payments, monthly Veteran's Administration benefits and food stamp help from her daughter. Thus, the record indicates that appellant's monthly income exceeds appellant income by \$94.44. The Office hearing representative properly considered appellant's income, expenses, assets, and general financial circumstances and set a rate of adjustment at \$100.00 from each continuing compensation payment.⁷ The Board finds that in determining this repayment schedule, the Office rendered due regard to the factors set forth in section 10.321 and the repayment schedule was not unreasonable in light of the fact that appellant's car payments of \$400.00 per month end in 1998 and that she had a monthly phone bill of \$125.00. Therefore, the Board finds that the Office did not abused its discretion in determining the rate of adjustment.

The July 9, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 5, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ *James Lloyd Otte*, 48 ECAB ____ (Doctet No. 95-672, issued February 24, 1997).