U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN ARMSTRONG and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Chillicothe, OH

Docket No. 98-911; Submitted on the Record;
Issued November 15, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had received a $2,304.62 overpayment in compensation; and (2) whether the Office properly determined that appellant was not without fault in the creation of the overpayment.

On May 4, 1992 appellant, then a 50-year-old registered nurse, was assisting a patient with a shower when the patient grabbed and pulled her left middle finger. The Office accepted appellant's claim for a ruptured tendon of the left middle finger. Appellant received continuation of pay for the period May 5 through June 14, 1992. She returned to work on June 15, 1992.

On February 19, 1994 appellant filed a claim for a schedule award. She listed a granddaughter as a dependent who was living with her. In an August 3, 1994 decision, the Office issued a schedule award for a 35 percent permanent impairment of the left middle finger. The Office indicated that the compensation would be paid at 75 percent of her monthly pay rate. In an October 11, 1994 memorandum to the file, an Office claims examiner indicated that appellant did not have a husband and had not had a husband since 1991 and had listed two dependents in a separate claim, a son who was 18 years old, had graduated from high school and had not gone to college, and a granddaughter. Appellant indicated that she had legal custody of the granddaughter but had not adopted her granddaughter. In an October 13, 1994 decision, the Office vacated the August 3, 1994 decision on the grounds that it was premature because appellant had not reached maximum medical improvement. In a December 28, 1994 letter, the Office informed appellant that it had found that she received a $3,102.79 overpayment in compensation because she had received a schedule award prematurely. The Office further indicated that it found appellant was not without fault in the creation of the overpayment. In a March 27, 1995 decision, the Office found that appellant had received a $3,102.79 overpayment in compensation. The Office further found that recovery of the overpayment should not be waived because appellant had not responded to its December 28, 1994 letter with any financial

information, request for waiver of recovery of the overpayment, or any other communication with regard to the overpayment determination.

In an August 3, 1995 decision, the Office issued a schedule award for a 23 percent permanent impairment of the left arm. The Office indicated that the schedule award would be paid at a rate of 75 percent of her weekly pay and that the period of the award was June 15, 1995 through October 29, 1996. The Office noted that the first overpayment had been recovered.

In a June 11, 1996 memorandum, an Office claims examiner indicated that another official in the Office asked after a review of the record whether appellant's granddaughter could be considered a dependent for which appellant would receive compensation at the rate of 75 percent of her pay. The claims examiner responded that the granddaughter did not count as a dependent because she had not been adopted. She stated that appellant should be paid at the 2/3 rate and an overpayment would be created. In a June 20, 1996 memorandum, the claims examiner was told that the Office official would submit information to demonstrate appellant knew her granddaughter was not a dependent.

In a July 2, 1996 letter, the Office informed appellant that it had found that she had received an overpayment of $2,034.62 because she was due compensation under the schedule award at the 2/3 rate of her salary but was paid at the augmented, 3/4 rate for dependents to which she was not entitled because her granddaughter was not a dependent under the Federal Employees' Compensation Act. The Office further found that appellant was not without fault in the creation of the overpayment because she had previously been informed that she could not be paid at the augmented rate based on only having court-ordered custody of her granddaughter. The Office informed appellant that she had the right to request a prerecoupment hearing before an Office hearing representative. In a July 6, 1996 response, appellant requested a hearing before an Office hearing representative. She stated that she did not know she was receiving compensation at the augmented rate or that a schedule award had been issued until she called the Office and had been informed that a schedule award had been issued. Appellant also submitted a copy of a July 27, 1995 letter in which she had described the ages and status of her son and granddaughter and asked to be notified if she was ineligible to treat them as dependents.

In a September 6, 1997 letter, the Office informed appellant that a hearing would be held on October 27, 1997. In a November 12, 1997, the Office found that appellant had abandoned her request for a hearing because she had not appeared for the hearing, had not submitted a written request for postponement of the hearing and had not provided good cause for her failure to appear for the hearing.

In a November 25, 1997 decision, the Office found that appellant had received $2,034.62 overpayment in compensation because she was paid compensation from June 15, 1995 through June 22, 1996 at the augmented, 3/4 rate rather than the appropriate 2/3 rate. The Office further found that she was not without fault in the creation of the overpayment because she had been previously notified that she could not be paid compensation at the augmented rate based on having court ordered custody of her granddaughter.

The Board finds that appellant received a $2,034.62 overpayment of compensation.

Under section 8110 of the Act, augmented compensation is paid for dependents for an unmarried child who is living with the employee and is under 18 years of age.[1] Section 8101(a) of the Act further defines "child" as including stepchildren, adopted children and posthumous children but not married children.[2] The definition does not include grandchildren, even if the employee has legal custody of the grandchild.[3] Appellant therefore was not entitled to augmented compensation under the schedule award because her granddaughter did not meet the statutory definition of the category of dependents for which appellant could received augmented compensation.

The Board finds, however, that the case is not in posture for decision on whether appellant was not without fault in the creation of the overpayment.

Section 8129(a) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."[4] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's regulations provide 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
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[5]

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

The Office noted that appellant had several claims for compensation pending and had allegedly informed her in one of her other claims, both verbally and in writing, that she could not

[1] 5 U.S.C. § 8110.

[2] 5 U.S.C. § 8101(a).

[3] *Louis Jackson, Sr.*, 39 ECAB 423 (1988).

[4] 5 U.S.C. § 8129(b).

[5] 20 C.F.R. § 10.320(b).

claim augmented compensation on the basis of legal custody of her granddaughter. However, in the case record submitted on appeal in this case, there is no original or copy of such a letter from the Office giving her such notification nor is there any memorandum of any telephone conversation in which the Office conveyed the same information. In an October 11, 1994 memorandum, an Office reconsideration claims examiner indicated she asked appellant whether she had dependents. There is no indication in this memorandum that the claims examiner informed appellant at that time that she could not consider her granddaughter as a dependent as defined by the Act. There are memoranda of telephone calls in June 1996 in which Office employees discussed whether appellant could consider her granddaughter as a dependent. There is an indication that evidence would be submitted that showed appellant knew her granddaughter was not a dependent under the Act. Such information is not contained in the current case record. The only statement from appellant on this issue was in her July 27, 1995 letter in which she asked whether her granddaughter was a dependent under the Act. The case record submitted on appeal does not contain any response by the Office to that letter. The Board cannot find that appellant had previously been notified that she could not regard her granddaughter as a dependent based solely on statements by the Office. The Board must have before it the documentation that such notification was actually given. The case, therefore, must be returned to the Office for reconstruction of the case record to include such notification. The Office should issue an appropriate decision so as to protect appellant's right to appeal.

The decision of the Office of Workers' Compensation Programs dated November 25, 1997 is hereby affirmed insofar as it finds that appellant received an overpayment in compensation. The decision is hereby set aside insofar as it considers whether appellant was at fault in creation of the overpayment and the case is remanded for further action in accordance with this decision.

Dated, Washington, D.C.
November 15, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member