

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KVETA M. KLEVEN, claiming as widow of JOHN KLEVEN and
DEPARTMENT OF THE AIR FORCE, Westhampton Beach, NY

Docket No. 99-2474; Oral Argument Held June 22, 2000;
Issued August 10, 2000

Appearances: *Stephen J. Harbulak, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$16,469.11 for the period January 8, 1995 through December 7, 1996; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$150.00 every four weeks from her continuing compensation.

On June 13, 1978 appellant's husband, a 30-year-old flight instructor, was killed in a helicopter crash while in the performance of duty. On July 1, 1978 appellant filed a claim for survivor benefits, which was accepted by the Office on August 22, 1978. She and her son were paid appropriate death benefits based upon 45 percent of her husband's monthly salary as a widow and 15 percent for her surviving son.

By letter dated November 23, 1992, the Office found appellant had received an overpayment in the amount of \$3,700.62 for the period September 24, 1989 through November 14, 1992. By letter dated May 14, 1993, the Office found that appellant was entitled to a waiver because the overpayment had occurred due to the Office's failure to make deductions for her health benefit plan.

By letter dated April 6, 1994, the Office informed appellant that because her son had turned eighteen years old on January 9, 1994, his compensation was scheduled to expire within one year, as of January 9, 1995, unless he was unmarried and incapable of self-support or was a student. By telephone call dated December 6, 1994, appellant informed the Office that her son was attending college and therefore entitled to continued survivor's benefits. By letter dated January 25, 1995, the Office informed appellant that survivor's compensation for her son had

expired as of January 9, 1995 and that it required documentation to support her assertion that her son was currently attending college. By facsimile to the Office dated January 31, 1995, appellant reiterated that her son was attending college and therefore entitled to continued survivor's benefits. Accompanying her letter and completed form letter was documentation from the United States Air Force Academy providing evidence of her son's current enrollment. On February 5, 1995 the Office reinstated benefits for her surviving child.

By letter dated November 29, 1996, the employing establishment informed appellant that she had been receiving compensation in excess of what she was entitled. The employing establishment stated that as of January 9, 1995 she and her son were receiving \$2,627.77 every 28 days and that as of January 9, 1995 the computer dropped him from the rolls and generated a final check for him in the amount of \$24.29. The employing establishment noted that her individual benefit increased from 45 to 50 percent and she received as check for \$2,164.70 of the next period for January 8 through February 4, 1995. The employing establishment stated that when the Office became aware that her son should not have been dropped from the rolls, an effort was made to pay her a retroactive payment and at the same time reinstate his benefits for the following 28-day period beginning February 5, 1995. The employing establishment advised appellant, however, that the Office had erroneously double-entered her son on the computer system, which resulted in double benefits being paid for the surviving child from February 5, 1995 until December 7, 1996, instead of the correct rate of \$2,627.77. Subsequently, following cost-of-living increases, the monthly payment was increased to \$3,397.70.

By letter dated January 20, 1998, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$16,469.11, covering the period from January 8, 1995 through December 7, 1996 as a result of dual payments of survivor benefits for her son. The Office found that appellant was at fault in creating the overpayment because she had received an increase of \$678.55 in the check she received on March 4, 1995, which due to an increase in the consumer price index cycle increased to \$769.93 over the amount paid on the prior cycle due to the consumer price index. The Office found that this increase represented a very significant amount of money which a reasonable person would immediately question, particularly since she had been involved in a previous overpayment claim. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in her possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that pursuant to 20 C.F.R. § 10.324,¹ the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished.

¹ 20 C.F.R. § 10.324.

By letter dated February 13, 1998, appellant requested a prerecoument hearing. Appellant also requested a waiver of recovery of overpayment on February 17, 1998, claiming she was without fault for the overpayment. In addition, appellant claimed that recovery of the overpayment would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. She subsequently submitted a completed Form OWCPA-20 outlining her income and assets as well as her household expenses and debts, plus checks and financial statements documenting her statements.

The prerecoument hearing was held on February 24, 1999; appellant was represented by an attorney. Appellant's representative stated that when the overpayment occurred, she had been assigned by her employer to work in another state and therefore had no access to her financial records and papers. Appellant's representative also stated that because various discrepancies had previously occurred with regard to her compensation, she may have believed that the increased amount of her compensation check in January 1995 was to compensate for the decrease in compensation the prior month. Appellant's representative argued, in essence, that because of this prior record of increases and decreases in appellant's regular compensation payments there was no way she could have reasonably been aware that she was receiving augmented compensation for the period January 8, 1995 through December 7, 1996.

In a decision dated April 29, 1999, the hearing representative found that appellant was at fault in creating the overpayment of compensation in the amount of \$16,469.11 for the period January 8, 1995 through December 7, 1996. The hearing representative did not accept appellant's contention that she was unaware she was not entitled to the increase in her compensation checks beginning February 5, 1995 because of frequent fluctuations in her previous compensation checks. He noted that she had been receiving a check in the amount of \$2,627.77 each pay period from April 3, 1994 until January 7, 1995, that she received a check in the amount of \$24.29 representing compensation for her surviving son on January 8, 1995, after which date the Office terminated the son's compensation benefits, and that her check was reduced to \$2,164.70 for the period January 8 through February 4, 1995. The hearing representative found that when appellant received a check on February 5, 1995 in the amount of \$3,306.32, reflecting an increase caused by the erroneous double entry for her son's college status -- which due to cost-of-living increase was adjusted to \$3,397.70 the following month -- the large increase in benefits should have made her aware that there was an error in the payments being issued and that this was a greater amount than that to which she was entitled. He further found that, even if she had considered this increase an adjustment to compensate for the one payment stopped for her surviving son, she should have been reasonably aware that she was not entitled to receive this much compensation for 22 months.² The hearing representative further found that there was no evidence to support her argument that her change in address caused her to ignore the increase in benefits. He noted that she continued to maintain her residence and pay bills associated with residence, so therefore it could assumed that she was still aware of the amounts the Office was depositing into her account. Based on the above evidence of record, the

² The hearing representative noted that, despite the fact that appellant immediately contacted the Office when her check was reduced as a result of no payment for a surviving child, she did not attempt to contact the Office or the employing establishment until the overpayment/double entry error was found by the employing establishment.

hearing representative concluded that appellant was not without fault in the creation of the overpayment and that therefore recovery of the overpayment could not be waived.

The hearing representative also found that recovery of the overpayment and any applicable interest, by deductions from appellant's continuing compensation benefit payments in the amount of \$150.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant listed \$4,420.59 in monthly income on the overpayment recovery questionnaire and had regular necessary and reasonable monthly expenses exceeding \$4,045.00 and therefore had the capacity to pay at the stated rate. The hearing representative therefore concluded that \$150.00 a month in deductions from appellant's continuing compensation benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$16,649.1 for the period January 8, 1995 through December 7, 1996. The record shows that as of January 8, 1995, after appellant informed the Office that her son was attending college and therefore entitled to continued survivor's benefits - after having terminated such benefits upon her son's eighteenth birthday -- the Office erroneously duplicated this entry, resulting in him being placed on the system twice and being issued compensation based on two surviving sons, or at a 30 percent rate. The record indicates that for the next 22 months, as a result of her son's being double-entered on the compensation rolls, appellant received an overpayment in the amount of \$16,469.11.

The Board further finds that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act³ provides that an overpayment must be recovered unless "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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁴

³ 5 U.S.C. § 8129(a)-(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁵

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

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected to know she was not entitled to.⁶ In the instant case, appellant should have been aware that, as of February 5, 1995, she was not entitled to a check in the amount of \$3,306.32 or at the very least by the receipt of the following month's check for \$3,397.70, on March 4, 1995. The record indicates that appellant had been receiving monthly compensation in the amount of \$2,627.77 from April 3, 1994 until January 7, 1995. After the Office reduced her compensation to \$2,164.70 for the period January 8 through February 4, 1995 and after she informed the Office that her son was currently attending college, she began receiving checks in the amount of \$3,306.32 beginning February 5, 1995, and for \$3,397.70 as of March 4, 1995. This substantial increase should have made her aware that she was accepting a payment which was incorrect. Even if appellant believed that the substantial increase represented an adjustment for the temporary termination of her son's survivor benefits, it was not reasonable for her to believe that such an adjustment would continue for 22 months. In addition, the hearing representative properly found that there was no evidence to support appellant's contention that her change in address caused her to ignore the increase in benefits, as the record indicated she was able to pay bills and maintain a residence; thus, it could be presumed that she knew the amount of compensation contained in her direct deposit checks. Upon receipt of the March 4, 1995 check, at the latest, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant accepted and did not question the direct deposit of this check and of subsequent checks in the amount of \$3,397.70 for 22 months.

⁵ 20 C.F.R. § 10.433(a).

⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from January 8, 1995 through December 7, 1996, which contained an overpayment in the amount of \$16,649.11, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$16,649.11 may not be waived. Thus, the decision of the hearing representative dated April 29, 1999 is affirmed in this respect.

The Board further finds that the Office properly required repayment by withholding \$150.00 every 4 weeks from appellant's continuing compensation.

Section 10.441(a) of the regulations⁷ provides:

“When an overpayment has been made to an individual who is entitled to further payments [the Office] shall decrease later payments of compensation, taking into account 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 hardship.”

In the instant case, the hearing representative considered appellant's income, expenses, assets and general financial circumstances and found that appellant had \$4,420.59 in monthly income on the overpayment recovery questionnaire and had regular necessary and reasonable monthly expenses exceeding \$4,045.00 and therefore had the capacity to pay at the stated rate. The hearing representative therefore concluded that \$150.00 a month in deductions from appellant's continuing compensation benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant. Based on the amount of this expense, the hearing representative found that recovery of the overpayment by withholding \$150.00 every four weeks from her continuing compensation payments would not cause undue hardship.⁸ The Board finds that the Office arrived at this repayment schedule giving due regard to the factors set forth in section 10.321 and that the repayment schedule was not unreasonable under the circumstances.⁹

⁷ 20 C.F.R. § 10.441(a).

⁸ See *Forrest E. Brown, II*, 44 ECAB 278 (1992); see *Robert C. Schenck*, 38 ECAB 531 (1987).

⁹ *Id.*

The decision of the Office of Workers' Compensation Programs dated April 29, 1999 is hereby affirmed.¹⁰

Dated, Washington, D.C.
August 10, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁰ By letter to the Office's Branch of Hearings and Review dated August 20, 1998, appellant requested that a subpoena be issued to Sergeant Anthony J. Fantauzzi for the purpose of permitting him to testify at the hearing in regard to a payment of \$75,486.69 issued in 1989, in addition to payments and benefits pertaining to her deceased husband. She asserted that these were matters relevant to the overpayment issue. Appellant asserted in a January 20, 1999 follow-up letter that Sergeant Fantauzzi was personally knowledgeable about previous and current payment errors at issue. At the hearing, Sergeant Fantauzzi appeared, but the hearing representative did not permit him to testify. On appeal to the Board, appellant's representative contends that the hearing representative's denial was an abuse of discretion. The Board finds that this was not an abuse of discretion, as appellant failed to provide any evidence that Sergeant Fantauzzi's testimony was relevant to the issue at hand, or that the hearing representative abused her discretion pursuant to 20 C.F.R. § 10.617(c), (g).