U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM G. ROYSTEN and DEPARTMENT OF THE NAVY, CONSOLIDATION CIVILIAN PERSONNEL OFFICE, Honolulu, HI

Docket No. 98-1285; Submitted on the Record;
Issued May 3, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $1,430.46 existed; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that $110.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

This case is on appeal to the Board for the second time.[1] On the first appeal, the Board reviewed a September 23, 1997 decision, by which the Office found that appellant, who lived in Honolulu, Hawaii, was not entitled to reimbursement for medical treatment and related travel expenses in Seattle, Washington. The Board affirmed the Office's decision, finding that appellant did not submit medical evidence showing that the medical treatment he received in Seattle was necessary or reasonable.

In a preliminary determination dated November 21, 1997, the Office found that appellant received an overpayment in the amount of $1,430.46 during the period January 30 to October 11, 1997 at an augmented rate based on his having a dependent child when, in fact, his child was employed and was not a dependent during that time period. The Office stated that appellant notified the Office that his son stopped being eligible on the employment history form, CA-1032, which was signed by appellant on April 1, 1997 and received by the Office on April 14, 1997. The Office found that appellant was at fault in the matter of the overpayment. The Office informed appellant that, if he disagreed with the fact or the amount of the overpayment or that he was at fault in the creation of the overpayment and wanted the overpayment to be waived, he had the right to submit new evidence to support his contention or he could request a waiver or recoupment within 30 days of receipt of the letter and submit appropriate evidence to justify his

[1] Docket No. 98-260. The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

request. The Office enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

By decision dated March 4, 1998, the Office finalized its preliminary determination of an overpayment in the amount of $1,430.46 from January 30 through October 11, 1997. The Office found that appellant was at fault in the creation of the overpayment, stating that, based upon the completion of the Office's Form CA-1032, he was advised that his dependent child, William, Jr., could no longer be considered a dependent. The Office stated that, based on his knowledge of that fact, appellant should have been reasonably aware that, until his compensation benefits were changed to reflect nondependency status, he was not entitled to the full amount of the compensation checks being issued. In the memorandum attached to the decision, the Office stated that appellant was afforded 30 days in which to provide additional evidence or argument regarding the findings of overpayment or the amount of the overpayment. The Office stated that no reply had been received from appellant or his authorized representative. Further, the Office stated that appellant received a monthly compensation payment of $1,241.00 and that the amount of $110.00 would be deducted monthly until the overpayment was absorbed.

The Board finds that appellant received an overpayment in the amount of $1,430.46.

The Office found in its November 21, 1997 preliminary determination that appellant received an overpayment of $1,430.46 because he received compensation at an augmented monthly rate from January 30 to October 11, 1997 based on his child's status as a dependent when in fact the child was employed and was not a dependent. The Office documented its calculation with the payment form, CA25-A and computer printouts. There is no evidence to the contrary.

The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act[2] provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.[3] Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.[4]

The implementing regulation[5] provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid

[2] 5 U.S.C. § 8129(b).

[3] *Claudia A. Dixon*, 47 ECAB 168, 180-81 (1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

[4] *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

[5] 20 C.F.R. § 10.320(b).

individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

In the November 21, 1997 preliminary determination, the Office stated that, effective January 30, 1997, appellant was no longer entitled to compensation at the augmented rate as his sole dependent child, William, Jr., became employed and was no longer considered a dependent. The Office stated that appellant informed the Office on Form CA-1032, which was signed by him on April 1, 1997 and received by the Office on April 14, 1997, that his son was no longer eligible to be a dependent. The Office found that appellant's response on Form CA-1032 informing the Office that his child was no longer a dependent indicated that he knew he was receiving compensation at an augmented rate based on his son's status as a dependent and therefore knew or should have known that he was no longer entitled to the augmented rate as of January 30, 1997 when his son became employed.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.[6] Forms CA-1032 typically state the requirements for establishing a dependent and inform appellant to notify the Office if there is any change.[7] The Act provides at section 8110 that eligible dependents, for purposes of augmented compensation benefits, include an unmarried child under 18 years of age who is living with the claimant, or a child to whom the claimant made regular contributions for support.[8] Compensation for total disability is payable at 75 percent of the pay rate if the employee has at least one dependent but is otherwise payable at 66 2/3 percent of the employee's pay rate.[9]

In the present case, the Form CA-1032 that the Office references in its preliminary determination is not in the record but appellant did not challenge that he received one or failed to complete it as the Office stated. In fact, in his December 8, 1997 letter, appellant's attorney noted that appellant informed the Office of his son's employment in April 1997. Since appellant had been receiving compensation regularly for years and, therefore, received the Form CA-1032 informing him of the eligibility requirements for a dependent, he knew or should have known that he should not have received compensation at an augmented rate as of January 30, 1997 when his son became employed. The fact that he informed the Office in April 1997 of the change in his son's dependent status, did not excuse him for subsequently accepting the augmented payments through October 17, 1997 which he knew or should have known were incorrect. Appellant therefore is at fault in the creation of the overpayment. Since the Board finds that appellant was at fault in the creation of the overpayment, he is not entitled to waiver of the overpayment.[10]

[6] *Danny L. Paul*, 47 ECAB 282, 285 (1994).

[7] *See Stephen A. Hund*, 47 ECAB 432, 434 (1996).

[8] 5 U.S.C. § 8110.

[9] 20 C.F.R. §§ 10.301-303, 10.401(b).

[10] *Nina D. Newborn*, 47 ECAB 132, 140 (1995).

The Act provides that, where an overpayment of compensation has been made, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.[11] The applicable regulation provides for "decreasing subsequent payments of compensation, having due regard to the probable extent of the 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."[12]

Appellant submitted no financial evidence to show that the monthly withdrawal of $110.00 to recover the overpayment was unreasonable. On appeal, appellant's attorney stated that the Office's statement in the memorandum attached to the March 4, 1998 decision that appellant had been afforded thirty days in which to provide additional evidence or argument regarding the findings of the overpayment or the amount of the overpayment and neither he nor his attorney replied was incorrect. The November 11, 1997 preliminary determination which informed appellant that he had 30 days to respond, was forwarded to appellant's correct address and under the mailbox rule, it is presumed that properly addressed correspondence is mailed within the ordinary course of business unless rebutted.[13] Appellant has not shown that he did not receive the Office's November 11, 1997 preliminary determination. His attorney also stated on appeal that by letter dated December 8, 1997, he responded to the November 21, 1997 preliminary determination. In that letter, appellant's attorney expressed shock that the Office's preliminary determination had been sent to appellant instead of to appellant's attorney. Further, he stated that, because appellant informed the Office in April 1997 that his son began working, appellant was not at fault in the creation of the overpayment as the Office should have made appropriate adjustments in payments. As stated above, however, appellant knew of the requirements for establishing a dependent and knew or should have known that the augmented payments he received were incorrect once his son started working and, therefore, under the Act, he is at fault.[14]

In the December 8, 1997 letter, appellant's attorney stated that he did not receive any financial forms for appellant to complete and appellant's sole income was his compensation payments and he had no assets or bank accounts with savings. This is not sufficient information for the Office to perform an analysis of the reasonableness of the monthly recovery rate of $110.00 as appellant's attorney did not provide any evidence of appellant's expenses.[15] Appellant has therefore not shown that the Office abused its discretion in withholding $110.00 from appellant's monthly compensation payments.[16]

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[11] 5 U.S.C. § 8128(a); *see William D. Emory*, 47 ECAB 363, 373 (1996).

[12] 20 C.F.R. § 10.321(a); *see Roger Seay*, 39 ECAB 441 (1988).

[13] *See A.C. Clyburn*, 47 ECAB 153, 159 (1995).

[14] *See Stephen A. Hund*, *supra* note 7.

[15] *See Emory*, *supra* note 11 at 373.

[16] If appellant has additional evidence to submit in support of his contention that the amount of $110.00 being withdrawn from his monthly compensation rate is unreasonable, he may submit that evidence with a request for reconsideration to the Office; *see* 20 C.F.R. §§ 10.606, 10.607.

The decision of the Office of Workers' Compensation Programs dated March 4, 1998 is hereby affirmed.

Dated, Washington, D.C.
May 3, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member