

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES B. MOSES and TENNESSEE VALLEY AUTHORITY,
YELLOW CREEK NUCLEAR PLANT, Iuka, MS

*Docket No. 00-2811; Submitted on the Record;
Issued August 3, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of an overpayment in the amount of \$23,672.82, which he received during the period March 16, 1992 to November 6, 1999.

On October 2, 1980 appellant, then a 55-year-old carpenter worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on October 1, 1980 he injured his left knee in the performance of duty.

On October 31, 1980, the Office accepted appellant's claim for a left knee strain and on January 26, 1983, expanded its acceptance to include a torn left medial meniscus. Appellant subsequently sustained several recurrences of disability and was eventually placed on the periodic rolls at the augmented rate designated for claimants with dependents.

On CA-1032 form letters dated November 20, 1985 and February 1, 1989, appellant indicated that he was married to Opaline Moses, who he claimed as his dependent. On a CA-1032 form letter dated June 21, 1990, appellant advised the Office that he did not have any dependents, but did not elaborate further. However, the record contains a letter from Opaline, who indicated that she and appellant had divorced on October 8, 1990. Appellant subsequently submitted a marriage certificate indicating that on November 16, 1990 he married Judy Ann Martin. By CA-1032 form letters submitted annually from February 4, 1991 through November 16, 1998, appellant again indicated to the Office that he claimed a wife as a dependent, but on his CA-1032 dated November 3, 1999, he indicated that was not married and claimed no dependents.

The Office continued to pay disability compensation at the augmented rate until November 6, 1999, when they received appellant's November 3, 1999 notification that he no longer had any dependents. In a letter dated December 22, 1999, the Office asked appellant the reason for his changed status and requested that he submit supporting documentation such as a death certificate or divorce decree, whichever was appropriate. In a response received

January 13, 2000, appellant indicated that he was divorced, and submitted a copy of the divorce decree, which established that he was divorced from Judy Ann Moses on March 16, 1992.

On a March 14, 2000 disability benefits payment worksheet, the Office calculated that, from March 16, 1992 through November 6, 1999, appellant received \$197,483.75 in disability compensation when he should have received \$173,810.93, resulting in an overpayment of benefits in the amount of \$23,672.82.

In an April 6, 2000 letter, the Office advised appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$23,672.82 for the period March 16, 1992 through November 6, 1999 because he received compensation at the augmented three-fourths rate after he and his wife had divorced, instead of the two-thirds rate to which he was entitled. The Office also determined that appellant was at fault in creating the overpayment. Appellant was informed that he had the right to request either a final decision on the written evidence, a preresumption hearing, or a telephone conference within 30 days of the preliminary decision.

By letter dated May 1, 2000, appellant, through counsel, objected to the Office's preliminary determination. Counsel asserted that while appellant did in fact divorce his second wife, Judy, on March 16, 1992, he shortly thereafter resumed the relationship of husband and wife with his first wife, Opaline, although they did not legally remarry.¹ Counsel asserted that appellant and Opaline remained together until her death in April 2000, and submitted a copy of the obituary notice, in which appellant is identified as Opaline's husband. Counsel explained that while appellant probably did live for a few months between March 16, 1992 and November 6, 1999 "without a wife or someone in that relationship," it would be nearly impossible to determine exactly how long a period appellant was on his own. Therefore, counsel proposed a settlement in which appellant would repay an amount equating to one year's extra compensation. Counsel requested that this amount be repaid at a rate of no more than \$200.00 a month, and submitted financial documentation in support of his assertion that appellant could not repay at a greater rate. Finally, counsel stated that "If we cannot resolve it in that manner, then I would request a hearing."

By letter dated June 20, 2000, the Office informed appellant that they had received the letter from his counsel proposing a settlement and indicating that he had married and divorced a

¹ On appeal, appellant, through counsel, asserts that appellant's relationship with Opaline subsequent to his divorce to Judy became one of common law marriage, thus entitling him to augmented compensation benefits. A wife qualifies as a dependent if she is a member of the same household as the claimant, receives regular contributions from the claimant for her support or the claimant is under court order to contribute to her support. 5 U.S.C. § 8110(a)(1). Appellant contended that his ex-wife had become his common law wife and, therefore, qualified as a dependent. Questions affecting relationship, such as the validity of marriage or divorce, are determined by the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place. *Mary Bee McCabe (Estate of George S. Sampio)*, 35 ECAB 218 (1983). In this case, Mississippi statutes ended recognition of common law marriages after April 5, 1956, but continued to recognize common law marriages contracted prior to that date, Miss. Code § 93-1-15. Appellant contended that subsequent to his March 16, 1992 divorce from Judy, he entered into a common law marriage with Opaline. However, as appellant's post-divorce relationship with Opaline is not recognized as a valid marriage under Mississippi law, it is not recognized as a valid marriage by the Office.

woman named Judy. The Office advised appellant that, in order to be entitled to augmented compensation based on marriage, he must prove that he was legally married and living with his wife. The Office requested that appellant submit, within 15 days, a copy of the divorce decree and marriage certificate as supporting evidence.

On July 5, 2000 appellant submitted the requested information pertaining to his marriage to and divorce from his wife Judy.

By decision dated July 11, 2000, the Office finalized its preliminary determination that an overpayment in the amount of \$23,672.82 had been created. The Office further found that appellant was at fault in the creation of the overpayment and that the overpayment would be recovered by withholding \$250.00 from his continuing compensation checks every four weeks.

The Board finds that this case is not in posture for a decision.

With regard to the overpayment in the amount of \$23,672.82, the Board finds that the Office did not properly adjudicate this overpayment, as it did not comply with its regulations. A review of the record reveals that, by letter dated May 1, 2000, appellant, through counsel, disagreed with the Office's preliminary findings, proposed a settlement of the overpayment, and, in the alternative, requested a hearing.² Office regulations provide that the hearing request must be sent within 30 days as determined by the date of the postmark.³ As the envelope originally containing counsel's May 1, 2000 letter is not contained in the record, the hearing request is considered timely by virtue of the date of the letter, which is within the 30 days allowed by the Office for response. Consequently, the case must be remanded for the Office to consider appellant's request for a prerecoupment hearing.⁴ Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.

² The Office has administratively decided that the test used in 20 C.F.R. § 10.616(a) for determining the timeliness of hearing requests should apply to requests for prerecoupment hearings. 20 C.F.R. § 10.439. Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used; see *William J. Kapfhammer*, 42 ECAB 271 (1990); *Douglas McLean*, 42 ECAB 759 (1991).

³ 20 C.F.R. § 10.616(a).

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Conferencing*, Chapter 2.500 (July 1995); Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(3) (September 1994).

The decision of the Office of Workers' Compensation Programs dated July 11, 2000 is set aside and this case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
August 3, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member