

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHLEEN D. ABBOTT, claiming as widow of WILLIAM Y. ABBOTT  
and DEPARTMENT OF THE AIR FORCE, EDWARDS AIR FORCE BASE, CA

*Docket No. 01-423; Submitted on the Record;  
Issued December 19, 2001*

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DECISION and ORDER

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

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$31,591.81; and (2) whether appellant was without fault in the matter of the overpayment.

On August 3, 1992 appellant, then 38 years old, filed a claim for the death of her husband, the employee, an aerospace engineer, in an aircraft flight test on July 16, 1992. The Office of Workers' Compensation Programs accepted the claim and began paying compensation at the rate of 45 percent of the decedent's pay rate to appellant and 15 percent each to her minor children.

By letter dated September 15, 1997, appellant advised the Office that she had recently remarried on July 24, 1997. She stated that she understood that she was entitled to a lump sum equal to 24 months of compensation and that her minor children remained entitled to compensation.

By letter dated December 12, 1997, the Office advised appellant that it had paid her compensation in the amount of \$42,734.27, representing 24 months of compensation from July 24, 1997 through July 23, 1999, less the amount already paid to her from July 24 to December 6, 1997. The Office stated that, with appellant's remarriage, her children became eligible for a total of 55 percent of the employee's pay rate.

On November 3, 1999 appellant completed an Office form applying for continuance of compensation on account of the death of the employee. She stated that her July 1997 marriage was in the process of being annulled. Appellant subsequently submitted a decision from a District Court in the State of Utah dated November 19, 1999 finding that appellant was entitled and awarded a decree of annulment.

In a memorandum dated January 5, 2000, the Office noted that the decree of annulment voided appellant's July 24, 1997 marriage, that the court judicially determined that no valid

marriage ever existed and that it seemed logical to reinstate appellant's benefits from the time they were terminated.

On January 11, 2000 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$42,734.27, the amount of the lump-sum payment she received upon her July 24, 1997 remarriage. The Office preliminarily found that appellant was not without fault in the matter of the overpayment, as she was notified at the time of the lump-sum payment that it would have to be returned if her remarriage proved void or voidable.

Appellant requested a prerecoupment hearing before an Office hearing representative, which was held on June 28, 2000. The Office hearing representative stated that the issue was whether the overpayment of compensation had to be repaid and appellant testified and submitted evidence on her income, expenses and assets.

By decision dated October 13, 2000, the Office hearing representative found that appellant received an overpayment of compensation in the amount of \$31,591.81 calculated as follows: "The family entitlement for the period July 24, 1997 through December 4, 1999 was \$105,304.89, the total amount actually received for the period July 24, 1997 through December 4, 1999 was \$136,896.70." The Office hearing representative found that appellant was not without fault in the creation of the overpayment for the reason that she was aware that if she requested reinstatement of benefits, some or all of the lump sum received for the 24-month period from July 24, 1997 to July 23, 1999 would constitute an overpayment of compensation. The Office hearing representative found that recovery should be made by deducting \$500.00 per month from appellant's continuing compensation benefits.

The Board finds that the Office hearing representative incorrectly computed the amount of the overpayment of compensation.

Upon her remarriage on July 24, 1997 before reaching age 55, appellant was entitled, under section 8135(b) of the Federal Employees' Compensation Act, to a lump sum equal to 24 times 45 percent of the employee's monthly pay, but no further compensation thereafter.<sup>1</sup> This lump sum was paid to appellant on December 12, 1997 in the amount of \$42,734.27.

When appellant's July 24, 1997 marriage was annulled on November 19, 1999, appellant was no longer entitled to the lump-sum payment she had received, as, in the eyes of the law, her marriage never existed. The lump-sum payment becomes the overpayment in such situations as provided for in the Office's procedure manual: "If the remarriage later proves to be void or voidable, the entire lump-sum award then becomes an overpayment subject to waiver or recovery."<sup>2</sup> Office Program Memorandum No. 150, issued December 22, 1971 states that the effect of reinstatement of compensation to a widow following an annulment is to create an

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<sup>1</sup> 5 U.S.C. § 8135(b) provides: "On remarriage before reaching age 55, a widow or widower entitled to compensation under section 8133 of this title ['Compensation in case of death'], shall be paid a lump sum equal to twenty-four times the monthly compensation payment (excluding compensation on account of another individual) to which he was entitled immediately before the remarriage." 5 U.S.C. § 8133(b) states that compensation is payable to a widow until she remarries before reaching age 55.

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Benefits*, Chapter 2.700.7b(4) (August 1994).

overpayment of the 24-month lump-sum payment awarded upon the remarriage and that, if indicated, waiver under section 8129 of the Act should be considered.

In the October 13, 2000 decision, the Office hearing representative calculated the overpayment of compensation by subtracting the family entitlement for the two years of the annulled marriage, which would be 75 percent of the employee's rate of pay, from the amount, including the lump sum that the family received during this period. This calculation was incorrect not only because the Office's procedures quoted above provide that the overpayment in annulment situations is the lump-sum payment, but also because the Office hearing representative's decision offset appellant's overpayment with an underpayment of compensation appellant and her children received during the period of her remarriage.<sup>3</sup>

Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.<sup>4</sup> In *Califano v. Yamasaki*,<sup>5</sup> the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act and the Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Act.<sup>6</sup>

The Office's offset practice, as exercised in the Office hearing representative's October 13, 2000 decision, precludes the proper consideration of waiver of the entire amount of the overpayment, which in this case is \$42,734.27. The Office hearing representative's decision in fact considered only whether to waive a portion of this amount: \$31,591.81. The Office's

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<sup>3</sup> 5 U.S.C. § 8133 (c) provides: "On cessation of compensation under this section to or on account of an individual, the compensation of the remaining individuals entitled to compensation for the unexpired part of the period during which their compensation is payable, is that which they would have received if they had been the only individuals entitled to compensation at the time of the death of the employee." Chapter 2.700.7b(3) of the procedure manual provides: "Following a spouse's remarriage, the other beneficiaries are entitled to compensation at the rate they would have received had they been the only beneficiaries." Section 8133(a)(3) of the Act provides that, if there is no widow, the children are entitled to 40 percent for the first child and 15 percent for each additional child, divided among the children share and share alike. Appellant's children were entitled to (and received) 55 percent of the employee's pay rate during appellant's remarriage. As noted above, upon the annulment, appellant and her children were entitled to 75 percent of the employee's pay rate during the period of the later annulled remarriage.

<sup>4</sup> See generally FECA Circular No. 82-48, "Overpayments and Waiver" (issued December 1, 1982).

<sup>5</sup> 442 U.S. 682 (1979).

<sup>6</sup> This policy was announced in FECA Bulletin No. 80-35, issued October 20, 1989 and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994).

practice also permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a).<sup>7</sup> The Board finds that such a practice denies administrative due process with respect to the amount offset.<sup>8</sup>

The Board further finds that the Office hearing representative incorrectly found appellant was not without fault in the creation of the overpayment in the amount of \$42,734.27.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error or fact of 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 tests 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.”<sup>9</sup> No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

With respect to whether a claimant is with fault in the creation of an overpayment, the Office’s regulations provide:

“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 he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she 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. (This provision applies only to the overpaid individual.)”<sup>10</sup>

Applying these criteria to appellant’s situation, it is apparent that she was without fault in the creation of the overpayment of compensation in the amount of \$42,734.27. Appellant did not make an incorrect statement as to a material fact, she did not fail to provide material information and she did not accept an incorrect payment. At the time she received the lump-sum payment, that later became the overpayment of compensation, she was entitled to it. As appellant was without fault in the creation of the overpayment, the case will be remanded to the Office for consideration of waiver of the overpayment of compensation.

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<sup>7</sup> This section states that, in collecting an overpayment of compensation, 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.”

<sup>8</sup> *Diana L. Booth*, 52 ECAB \_\_\_\_ (Docket No. 99-1760, issued May 10, 2001); *Michael A. Grossman*, 51 ECAB \_\_\_\_ (Docket No. 98-2511, issued September 21, 2000).

<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 20 C.F.R. § 10.433(a).

The decision of the Office of Workers' Compensation Programs dated October 13, 2000 is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC  
December 19, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member