

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOIS MASENGALE claiming as the widow of JOHNNY A. MASENGALE,
and DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO & FIREARMS, Seattle, WA

*Docket No. 99-1206; Submitted on the Record;
Issued February 22, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$7,876.99 during intermittent periods from November 18, 1994 through June 30, 1997; (2) whether the Office properly found that appellant was with fault in the creation of the overpayment; and (3) whether the Office abused its discretion by ordering appellant to repay the overpayment in the amount of \$350.00 per month.

On May 10, 1992 appellant, then a 36-year-old widow, filed a claim for compensation based on the employee's death on May 6, 1992 from injuries sustained in an explosion on a bomb disposal range. In a May 13, 1992 letter, the Office accepted appellant's claim.

Commencing July 26, 1992, appellant received survivor's benefits for the death of her husband, an ordinance disposal specialist. Benefits were paid at the rate of 45 percent to appellant as the widow and 15 percent to the employee's minor son, Larry M. Masengale.

In a July 28, 1994 telephone conversation, appellant advised the Office that her compensation check had been reduced. The Office responded that Larry had turned 18 years old, and thus had been dropped from the compensation rolls. Appellant responded that Larry had just graduated from high school, that he was going to summer school and that he would be attending Washington State University in the fall as a full-time student. The Office advised appellant that a student letter would be sent to her and that Larry would be reinstated on the rolls.

On August 4, 1994 appellant completed a Form CA-1617 indicating that Larry was enrolled as a full-time student at Washington State University and that the beginning and end dates of the present school year were August 1994 through May 1995. In addition, the Form CA-1617 was signed by D.A. Guzman, assistant registrar for academic records at Washington State University, indicating that the foregoing facts were correct as stated.

On October 24, 1994, November 1, 1995 and November 4, 1996 appellant submitted a completed Form CA-12 applying for continuation of survivor's benefits. In the October 24, 1994 form, appellant provided that Larry's college tuition had been waived since his father was a law enforcement officer killed in the line of duty. In the November 14, 1996 form, appellant indicated that Larry was a full-time student at Washington State University.

By letter dated November 1, 1994, the Office advised appellant to complete an accompanying Form EN-1617 because Larry was pursuing a full-time course of study. Appellant did not respond.

In a June 16, 1997 letter, the Office advised appellant to inform the registrar at Washington State University to submit written certification of the dates Larry had been enrolled as a full-time student during each of the semesters since September 1994. The Office again advised appellant to complete an accompanying Form EN1617 because Larry was pursuing a full-time course of study.

The Office received a June 24, 1997 letter from Monty E. Nielsen, registrar of Washington State University, revealing that Larry had been enrolled in the school as follows:

“August 29 to November 18, 1994	full time
November 18 to December 23, 1994	half time
January 16 to April 14, 1995	full time
April 14 to May 12, 1995	half time
August 28 to October 27, 1995	full time
October 27 to December 22, 1995	half time
January 15, 1995 to March 15, 1996	full time
March 15 to May 10, 1996	half time
August 26 to December 20, 1996	half time”

In a July 2, 1997 letter, the Office advised appellant that because Larry was not established as a full-time student for any period after March 15, 1996 her compensation had been adjusted to pay 50 percent on her account only. The Office further advised appellant that an overpayment for November 18 through December 23, 1994, April 14 through May 12, 1995, October 27 through December 22, 1995 and March 16, 1996 through February 28, 1997 was being computed.

In a July 11, 1997 letter, the Office issued a preliminary determination that an overpayment of compensation in the amount of \$7,876.99 occurred because Larry did not attend college full time during four periods from November 18 through December 23, 1994, April 14 through May 12, 1995, October 27 through December 22, 1995 and March 15, 1996 through

June 30, 1997. The Office found that appellant was at fault in the creation of the overpayment because she did not inform the Office when Larry reduced his enrollment from full time to half time and did not return any compensation checks she received on his behalf. The Office informed appellant of the right to a prerecoupment hearing and enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived. She was given 30 days in which to respond.

On July 23, 1997 the Office received appellant's completed EN-1617 dated June 30, 1997 revealing that Larry was pursuing a full-time course of study at Washington State University during the present school year beginning August 1997, that Larry attended this school beginning in August 1994, that he expected to complete his education in May 1999 and that he intended to go to school next year. The form stated that Larry had not completed a four-year undergraduate degree program but was taking nine credit hours of correspondence courses that began on September 25, 1996, which constituted half-time status.

On August 11, 1997 the Office received appellant's completed overpayment questionnaire and her request for reevaluation of the fault determination. Appellant stated that she believed the overpayment was due to her because she understood that Larry was to be a "student" and that she did not know that he was supposed to be a "full-time" student. Appellant maintained that she was not at fault in the creation of the overpayment because she had not been given "written" information stating the conditions of "full-time" status for benefits.

At the July 29, 1998 hearing, appellant explained why Larry became a half-time student during the overpayment period. She testified that during the fall of 1994 Larry's professors at Washington State University requested that he be tested for learning disabilities. Appellant testified that on November 18, 1994 when Larry first became a half-time student, he withdrew from a class after he had made the first of two suicide attempts. She stated that Larry's suicide attempts were due to his depression and guilt resulting from his father's employment-related death.

Appellant testified that Larry's testing on March 22, 1995 revealed a learning disability. She noted that Larry withdrew from a class on April 14, 1995 based on the advice of Dr. Robert Bauers, Larry's treating therapist and the university. Prior to April 14, 1995, Larry made a second suicide attempt. Appellant testified that Larry later enrolled in summer classes at Highline Community College to obtain credits for the classes he had dropped during the school year.

Appellant stated that during the summer of 1995, Larry was again tested based on the recommendation from the university. She discussed the findings of the report prepared by Dr. Betty L. Jones, a licensed psychologist, which included verification that Larry had a specific learning disability in the areas of word recognition and spelling, and that he had difficulties with math. Appellant testified that Larry did not have the will to live during this period. Further, appellant testified that Larry was putting forth efforts in school despite his difficulties and disabilities.

Appellant also testified that during the fall of 1995, Larry dropped one class due to an alcohol problem. She stated that the university failed to provide him with the remedial help

recommended by Dr. Jones. Appellant further testified that Larry's emotional condition and disability caused him to drop the class and that he did not drop any courses because he did not want to go to school. Regarding the spring 1996 semester, appellant testified that Larry continued to experience emotional and alcohol problems. During the fall 1996 semester, appellant testified that Larry, a half-time student, registered for correspondence courses and changed his major to hotel/restaurant management, based on the university's recommendation.¹

Appellant described Larry's alcohol problem and the family intervention that took place in December 1997. Appellant testified that Larry's alcohol problem decreased as a result of the intervention and that he enrolled in correspondence courses and planned to become a full-time student at the university. Appellant also testified that there was no period in the summer that Larry did not take a course because he wanted to get through school. Appellant then testified that since November 18, 1994 when Larry was first categorized as a half-time student he always intended to take as many courses as he was able to take given his diagnosed learning disability, dyslexia, emotional state and drinking problem. Appellant stated that there was no time when Larry did not want to attend school and that he refused to take her suggestion to withdraw for a semester.

In addition to testifying at the hearing, appellant submitted records indicating the classes that Larry enrolled in and dropped while attending Washington State University and his transcript from the Highline Community College. Appellant also submitted a report of Larry's March 22, 1995 testing and Dr. Jones' August 8, 1995 report providing Larry's medical and developmental history. Dr. Jones stated that Larry lost interest in school and dropped classes after the death of his father during his junior year in high school. Dr. Jones added that Larry ended high school with a 2.3 grade point average despite his emotional turmoil and learning disability. Dr. Jones noted Larry's difficulty with his courses at Washington State University and summer school.

Dr. Jones provided her findings on behavioral observation and intellectual, academic and psychosocial testing. She verified that Larry had specific learning disabilities in reading and spelling areas, and that he had difficulties with math. Dr. Jones concluded that remedial support and modification of programming was warranted for Larry. In a March 8, 1996 report, she stated that the August 8, 1995 test revealed the difficulty Larry had with word recognition, which would have a significant impact on his acquisition of foreign language skills.

Subsequent to the hearing, appellant's counsel submitted Dr. Jones' July 28, 1998 report which noted Larry's learning disability and the difficulties he had with his college courses. Dr. Jones recommended methods to improve Larry's study skills. She also recommended that Larry maintain a close therapeutic relationship with a mental health specialist near or affiliated with the university.

By decision dated November 4, 1998, the Office hearing representative finalized the preliminary overpayment determination. The hearing representative also ordered appellant to repay the overpayment in the amount of \$350.00 per month.

¹ The Board notes that Larry subsequently returned to his original major in criminal justice.

The Board finds that the Office improperly determined that appellant received an overpayment in the amount of \$7,876.99 during intermittent periods from November 18, 1994 through June 30, 1997.

The Federal Employees' Compensation Act² provides that if an employee's death results from an injury sustained in the performance of duty, the United States will pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule: (1) to the widow or widower, if there is no child, 50 percent; (2) to the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child, not to exceed 75 percent; (3) to the children, if there is no widow or widower, 40 percent for one child and 15 percent for each additional child, not to exceed a total of 75 percent.³

Section 8133(b) provides in pertinent part that the compensation payable under subsection (a) is paid from the time of death until a child dies, marries or becomes 18 years of age. Notwithstanding, compensation that would otherwise end because the child has reached 18 years of age shall continue if he is a student as defined by section 8101 for as long as he continues to be a student, up until age 23 or until he marries.⁴

Section 8101(17) provides that student means an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an accredited institution.⁵

Larry received compensation from August 1994 through June 30, 1997 on the basis that he was a full-time student at Washington State University.

Section 10.5(a)(25) of the Code of Federal Regulations, defining "student," states:

"An individual continues to be a student during any interim between school years if the interim does not exceed four months and the individual shows to the satisfaction of the Office that he or she has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately after the interim, or during periods of reasonable duration during which, in the judgment of the Office, the individual is prevented by factors beyond his or her control from pursuing his or her education."⁶

² 5 U.S.C. § 8101 *et seq.*

³ 5 U.S.C. § 8133(a); *Wanda Avant (James A. Avant)*, 40 ECAB 1155 (1989).

⁴ A dependent child of an employee is entitled to receive compensation until such child dies, marries or attains 18 years of age. 20 C.F.R. § 10.306(e) (1998). See *Ronald L. Berente (John M. Berente)*, 40 ECAB 1269 (1989).

⁵ 5 U.S.C. § 8101(17).

⁶ 20 C.F.R. § 10.5(a)(25) (1998).

The Federal (FECA) Procedure Manual states:

“Where a student is prevented by reasons beyond his or her control (such as a brief but serious illness) from continuing in school, compensation may be continued for a period of reasonable duration. However, any such period would be counted toward the four years of entitlement. The claims examiner will determine what constitutes ‘reason beyond the control’ of the beneficiary and decide what may be considered a period of reasonable duration during which compensation may be continued. The claims examiner will also place a memorandum in the file outlining the circumstances of the case and the reasons for the decision.”⁷

The record establishes that throughout the overpayment period, Larry provided no indication that he did not want to pursue his education. Larry never dropped a course because he decided that he did not want to attend school. Rather, when appellant suggested that Larry take a semester off, he said he did not want to give up. In addition, appellant testified that there was not a time since August 1994 that Larry did not attend summer school.

Larry switched from full-time to half-time status on several occasions because he was unable to manage his courseload due to his learning disability, depression and alcoholism. His difficulties are well documented in the record. Also, he was advised by Washington State University to drop courses so he would not fail. Up until March 1996, when Larry experienced alcoholism, two of the three half-time periods, November 18 through December 23, 1994 and April 14 through May 12, 1995, lasted only one month, and the other period October 27 through December 22, 1995, lasted almost two months. During the overpayment period the record establishes that there was not a period of four months when Larry did not attend school.

Contrary to the hearing representative’s finding that Larry’s conditions were chronic according to Dr. Jones, a licensed psychologist, Larry overcame his emotional and learning disability condition in high school and achieved high grades until his father’s death.

Based on the factual circumstances of this case, the Board finds that Larry was prevented from factors beyond his control from keeping up with a full course load, but was going to school as full time as he could manage up through June 30, 1997. Moreover, the record establishes a *bona fide* intent on his part to pursue his education full time. Inasmuch as the evidence of record establishes that Larry was a student under the Act from November 18, 1994 through June 30, 1997, the Board finds that the Office improperly determined that appellant received an overpayment in the amount of \$7,876.99 during this period.⁸

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims* Chapter 2.700.8(a)(4) (July 2000).

⁸ Because of the Board’s disposition of this case, the second and third issues are rendered moot.

The November 4, 1998 decision of the Office of Workers' Compensation Programs hearing representative is hereby reversed.

Dated, Washington, DC
February 22, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member