

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE L. DARDEN and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Marietta, GA

*Docket No. 01-1970; Submitted on the Record;
Issued April 23, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$6,309.03 for the periods November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000; (2) whether the Office properly determined that appellant was at fault in creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$150.00 every four weeks from her continuing compensation.

On December 20, 1984 appellant, a 30-year-old machine tool operator, injured his lower back while moving some furniture. He filed a claim for benefits on April 30, 1985, which was accepted on January 16, 1986 by the Office for herniated nucleus pulposus. The Office paid him appropriate compensation for intermittent periods of partial and total disability.

The Office periodically advised appellant, who was married at the time of his injury, in CA-1332 forms that he must immediately inform the Office of any change in the status of claimed dependents. The form also stated that claimants without dependents would be paid at a rate of two thirds of the weekly rate; claimants with dependents, such as a spouse living with the claimant, would be paid at a three-fourth rate. Appellant's first wife died on July 27, 1989; appellant notified the Office by letter dated August 26, 1989. In his subsequent Form CA-1332, appellant indicated again that his first wife had died and that, therefore, he was no longer entitled to claim her as a dependent. By letter dated February 23, 1996, appellant informed the Office that he had remarried as of February 13, 1996. In a Form CA-1332 dated August 14, 1996, appellant again indicated that he had remarried and was claiming his wife as a dependent.

On November 9, 1998 appellant divorced his second wife. He submitted a copy of the divorce decree to the Office, which was received on December 2, 1998. Appellant also submitted a letter, dated December 7, 1998, in which he specifically stated that he had been divorced from his second wife on November 9, 1998 and that he was changing his mailing address. In a Form CA-1332 dated August 5, 1998, appellant indicated that he was still married and was claiming his wife as a dependent. The form stated that claimants without dependents

would be paid at a rate of two thirds of the weekly rate; claimants with dependents, such as a spouse living with the claimant, would be paid at a three-fourth rate.

By letter dated May 19, 2000, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$6,309.03, covering the periods November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000. The Office found that appellant was at fault in creating the overpayment because he had been divorced on November 9, 1998, at which time he no longer had an eligible dependent, and was, therefore, no longer entitled to receive compensation at the augmented three-fourth rate. The Office stated that appellant was at fault in creating the overpayment because a reasonable person would have realized his compensation should be adjusted when he was no longer married; the Office noted that he was paid a total of \$56,385.14 during the period of overpayment, when he should have been paid \$50,004.58.¹ The Office also noted that his compensation had been adjusted to the two-third rate for one pay period, that of December 6, 1998 through January 2, 1999, and then erroneously readjusted back to the incorrect three-fourth rate. The Office stated that this should have provided additional indication to appellant that he was receiving augmented compensation. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a precoupment hearing with the Branch of Hearings and Review. The Office further informed appellant that he should submit a detailed explanation of his reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in his 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. § 10.324,² 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.

Appellant subsequently submitted a completed Form OWCP-20, dated June 15, 2000, in which he outlined his income and assets as well as his household expenses and debts, plus checks and financial statements documenting his statements. In addition, appellant submitted a June 15, 2000 statement indicating his disagreement with the Office's overpayment and fault findings. He stated that he had kept the Office informed of his marital status, submitting his divorce documents in a timely fashion, and that it therefore was not his fault that he was receiving augmented compensation. Appellant also asserted that the Office, in its May 19, 2000 letter, never specified his appropriate monthly rate of compensation as of November 9, 1998 and that it did not indicate the formula for computing the overpayment or the source of the amount. Although he admitted accepting the checks and using the proceeds to help pay his expenses, appellant asserted that he was entitled to waiver of the overpayment because he had relied on the

¹ The Office also calculated that it had overcharged appellant a total of \$71.53 in health insurance premiums during the periods of overpayment, representing the total augmented sum the Office had deducted from his compensation checks based on the family rate for these periods, in excess of the rate for a single person. The Office therefore allotted appellant a credit in the amount of \$71.53, which it subtracted from his overpayment.

² 20 C.F.R. § 10.324.

professional judgment of the Office. He further argued that the Office had a prior record of increases and decreases in his regular compensation payments; thus, there was no way he could have reasonably been aware that he was receiving augmented compensation for the periods November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000.

By decision dated July 24, 2001, the Office found that appellant was at fault in creating the overpayment of compensation from November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000, which amounted to \$6,309.03. The Office did not accept appellant's contention that he was unaware after his November 9, 1998 divorce that he was no longer entitled to compensation at the three-fourth rate because of period fluctuations in his previous compensation checks. The Office noted that appellant had previously been able to notice a significant difference in the amount of his compensation check when his first wife died, at which time he no longer had a claimed dependent; therefore, he should have been similarly aware he was no longer entitled to compensation at the three-fourth rate at the time of his 1998 divorce from his second wife. In light of this history and in light of his demonstrated ability to keep meticulous records of his compensation, the Office found that appellant should have known he was receiving augmented compensation and was therefore not entitled to waiver of the overpayment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,309.03 for the periods November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000. The record shows that as of November 9, 1998, after appellant informed the Office that he was divorced from his second wife -- and was therefore no longer entitled to claim his second wife as a dependent -- the Office erroneously continued to pay appellant at the augmented three-fourth rate from November 9 through December 5, 1998 and from January 3, 1999 through April 22, 2000. The record indicates that, as a result of this error on the part of the Office, appellant received an overpayment in the amount of \$6,309.03.

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." (Emphasis added.) 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 to which he knew or should have known that he was not entitled.⁶ In the instant case, appellant should have been aware that as of November 9, 1998, the date of his divorce from his second wife, he was no longer entitled to compensation at the augmented three-fourth rate. Appellant regularly completed the Form CA-1332, which states that a claimant must immediately inform the Office of any change in the status of claimed dependents, such as a spouse living with the claimant. The form also states that claimants without dependents would be paid at a rate of two thirds of the weekly rate and that claimants with dependents, such as a spouse living with the claimant, would be paid at a three-fourth rate. Appellant was aware of these provisions, as he had previously had his compensation reduced to the two-third rate following his first wife's death in 1989. Thus, he should have been aware that he was accepting a payment which was incorrect following his divorce from his second wife on November 9, 1998. Upon receipt of the December 5, 1998 check, 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 from January 3, 1999 through April 22, 2000, totaling \$6,309.03.

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 November 9 through December 5, 1998 and January 3, 1999 through April 22, 2000, which contained an overpayment in the amount of \$6,309.03, 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 \$6,309.03 may not be waived. Thus, the decision of the hearing representative dated July 24, 2001 is affirmed in this respect.

⁵ 20 C.F.R. § 10.433(a).

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

The decision of the Office of Workers' Compensation Programs dated July 24, 2001 is hereby affirmed.

Dated, Washington, DC
April 23, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member