

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM P. BIKOWSKI and DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION, San Diego, CA

*Docket No. 01-1408; Submitted on the Record;  
Issued August 2, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had received an overpayment of compensation in the amount of \$3,921.93, because he received augmented compensation for the period April 15, 1998 through November 6, 1999 during which his daughter was no longer a dependent; (2) whether appellant was at fault in the creation of the overpayment and, therefore, not eligible for waiver of recovery of the overpayment; and (3) whether the Office properly determined the rate of recovery of the overpayment at \$100.00 a month.

This is appellant's second appeal before the Board. By decision dated October 6, 1998, the Board determined that appellant was at fault in the creation of the overpayment in the amount of \$1,509.17 for the period August 7, 1992 through March 11, 1994 because premiums for health benefits and life insurance were not deducted from his ongoing compensation benefits.<sup>1</sup> The facts and circumstances of the case are set forth in that decision and are incorporated herein by reference as appropriate.

On April 15, 1998 appellant's dependent daughter, Vallerie Page Bikowski, turned 18 years of age. By letter dated August 10, 1999, the Office advised appellant that Vallerie was no longer considered as a dependent in accordance with 20 C.F.R. §§ 10.405(a) and (b), unless appellant provided evidence to establish that she continued to be a full-time student enrolled in a formal school or educational program as defined in 5 U.S.C. § 8101(17). No such documentation was received from appellant.

Appellant completed and returned a Form CA-1032, dated August 26, 1999 indicating that he was no longer claiming augmented compensation as his daughter had reached maturity. An earlier Form CA-1032, had been completed on December 4, 1996 indicated appellant's dependent's status at that time.

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<sup>1</sup> Docket No. 96-2257 (issued October 6, 1998).

Despite the fact that appellant was aware of the requirements for dependency status appellant continued to receive augmented compensation payments for the period April 15, 1998 through November 6, 1999 knowing his daughter was over the age of 18. On November 4, 1999 the Office determined that appellant had received an overpayment of compensation at the augmented rate for the period April 15, 1998 through November 6, 1999 in the amount of \$3,921.93.

On May 4, 2000 the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$3,921.93 because he had kept augmented compensation checks for the period April 15, 1998 through November 6, 1999 during which his daughter was no longer a dependent. The Office also advised appellant that it found him with fault in this matter as he should have known that he was not entitled to continued compensation at the augmented rate after his daughter reached 18 years of age unless she was enrolled in a full-time school program. Appellant was advised that he had 30 days within which to submit further evidence which would support continued augmented compensation, or to request a prerecoupment hearing on the issues of amount, fault and waiver. An Overpayment Recovery Questionnaire was additionally included for appellant to complete with his pertinent financial information. Nothing further was received from appellant.

By decision dated January 5, 2001, the Office finalized its overpayment determination and finding of fault and it ordered the overpayment to be recovered at a rate of \$100.00 a month.

The Board finds that the Office properly determined that appellant had received an overpayment of compensation in the amount of \$3,921.93, which occurred because he received augmented compensation for the period April 15, 1998 through November 6, 1999 during which his daughter was no longer a dependent

In accordance with 5 U.S.C. § 8110(3), a disabled employee is entitled to augmented compensation at the three quarters rate if he supports an unmarried dependent child, who is either living with the employee or receiving regular contributions from the employee toward his or her support and who is under 18 years of age, or is over 18 years of age and incapable of self-support because of physical or mental disability. Notwithstanding paragraph 3 of this subsection, compensation payable for a child that would otherwise end because the child has reached 18 years of age, shall continue if the child is a student as defined by section 8101 of this title at the time he or she reaches 18 years of age, or until he or she reaches 23 years of age or completes four years of school beyond the high school level.<sup>2</sup>

In this case appellant was entitled to receive augmented compensation for so long as his daughter remained under 18 years of age or remained a full-time student. However, as his daughter turned 18 on April 15, 1998 and appellant failed to complete Form EN-1617 or provide documentation that she was a student enrolled in a full-time school program, he ceased to be eligible for augmented compensation. The augmented compensation appellant received for the

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<sup>2</sup> 20 C.F.R. § 10.405 (a) and (b); 5 U.S.C. § 8101(17).

period April 15, 1998 through November 6, 1999 was improper and constituted an overpayment of compensation in the amount of \$3,921.93.<sup>3</sup>

The Board further finds that appellant was at fault in the creation of this overpayment of compensation such that recovery of the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act 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 would be against equity and good conscience."<sup>4</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault in its creation.<sup>5</sup> Section 10.433(a) of Title 20 of the Code of Federal Regulations explains that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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;
- (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.

In this case appellant knew, from his previous receipt of multiple Forms CA-1032, that he was eligible for augmented compensation only for so long as his dependent remained under 18 years of age, or was enrolled as a full-time student beyond the high school level until age 23. He knew or should have known that when his daughter turned 18 years of age, he was no longer entitled to augmented compensation. Appellant further demonstrated this knowledge and understanding on the Form CA-1032, dated August 26, 1999 wherein he indicated that he was no longer claiming augmented compensation, nevertheless he continued to receive incorrect compensation payments. Therefore, under 20 C.F.R. § 10.433(a)(3) the Office properly found that appellant was at fault in the creation of the overpayment amount because he failed to return the incorrect compensation checks. Accordingly, no waiver of recovery of the overpayment is possible.

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<sup>3</sup> The 3/4-rate compensation at a weekly pay rate of \$502.80 for the period April 15, 1998 through November 6, 1999 was \$35,052.64. The 2/3-rate compensation at the same weekly rate for the same period was \$31,130.71. Total overpayment is the difference of \$3,921.93.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> See *Beverly E. Labbe*, 50 ECAB 440 (1999); *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

The Board also finds that the rate of recovery of the overpayment by withholding \$100.00 a month was properly determined.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.<sup>6</sup> If no refund is made, 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.

In the instant case, appellant has not provided the Office with the requested Overpayment Recovery Questionnaire to enable it to determine what amount of withholding would be appropriate from his continuing compensation benefits. As the individual who has received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office and as appellant has failed to provide such information, the Office must use its discretion in determining the amount of withholdings from his continuing compensation benefits.<sup>7</sup> Because no financial information appeared in the case record at the time the Office made its determination of the amount of repayment out of appellant's continuing compensation benefits, it could not assess or take in to account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, or any other relevant factors, so as to minimize any hardship. In an effort to promptly collect the overpayment, the Office, therefore, did not abuse its discretion by requiring repayment at the rate of \$100.00 every four weeks.<sup>8</sup>

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<sup>6</sup> 20 C.F.R. § 10.441(a).

<sup>7</sup> *See, e.g.* 20 C.F.R. § 10.438(a).

<sup>8</sup> *See e.g. Paul K. Raditch*, 43 ECAB 738 (1992) (the entire amount of the overpayment was immediately due and payable where appellant had not submitted sufficient financial information to permit the Office to establish a payment schedule).

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 5, 2001 is hereby affirmed.

Dated, Washington, DC  
August 2, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member