

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT P. WISNIEWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, NY

*Docket No. 00-1542; Submitted on the Record;
Issued June 7, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether an overpayment occurred in appellant's case in the amount of \$18,424.67; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and was not entitled to waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation.

Appellant filed a claim alleging that he injured his back on March 31, 1981 while in the performance of duty.

The Office accepted that appellant sustained a lumbar strain and a herniated disc at L5-S1 on March 31, 1981, paid appropriate compensation benefits and placed him on the periodic rolls effective September 22, 1991. In a letter dated September 24, 1991, the Office advised appellant that compensation was "paid at the rate of two-thirds for employees without dependants and three-fourths for employees with one or more dependents."¹

On August 31, 1992 appellant submitted an annual affidavit of earnings and employment (Form CA-1032). However, appellant did not fill out the section addressing dependents on page two of the form. That section includes the following advisement:

"The basic rate of compensation is 66 2/3 percent of the applicable pay rate if the claimant has no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if one or more dependents are eligible for compensation. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate.... Finally, you may claim dependency for a unmarried child who is under 18, or, if over 18, is under 23 and a full-time student, if you

¹ The record includes a Form CA-7 that appellant submitted on June 5, 1991 claiming one dependent, a daughter, born on May 4, 1974. The record also includes a September 23, 1991 periodic rolls payment worksheet that indicated that appellant would be paid at the 75 percent compensation rate effective September 22, 1991.

make regular direct contributions to his/her support although he/she does not live with you.”

In subsequent submissions of his annual affidavit of earnings and employment from August 23, 1994 to August 19, 1998, appellant stated that he had no dependents.

In a letter dated August 31, 1998, the Office notified appellant that based on his affidavit of earnings and employment, his compensation benefits would be reduced from the 75 percent augmented rate to the 66 2/3 rate for claimants with no dependents. The Office also requested appellant to submit documentary evidence in support of his receipt of augmented compensation for his daughter from May 4, 1992, her 18th birthday, to May 4, 1997, her 23rd birthday.

By letter dated September 9, 1998, appellant stated that he had notified the U.S. Office of Personnel Management since 1992 that he was not claiming a dependent and that his daughter’s name did not appear on yearly paperwork from the Office from 1992 until its August 31, 1998 letter.

In a letter dated March 27, 1999, the Office informed appellant of its preliminary determination that an overpayment of compensation occurred in his case in the amount of \$18,424.67 because he received compensation at the augmented rate of 75 percent from May 5, 1992 to August 15, 1998, for a dependent who was over 18 years of age.

On April 11, 1999 appellant requested an oral hearing on the issue of fault and possible waiver before an Office hearing representative. A hearing was held on October 28, 1999 in New York City, New York. Appellant testified that he notified the Office from 1994 in its annual questionnaire that he was not claiming a dependent. He further testified that he had sustained significant indebtedness as a consequence of a betting addiction, and that he was a member in good standing of Gambler’s Anonymous. Appellant’s brother testified that he had appellant’s power of attorney to manage his financial matters, and that appellant was in debt up to \$40,000.00.

By decision dated and issued on February 8, 2000, the hearing representative affirmed the Office’s preliminary determination that appellant was overpaid \$18,424.67; was not without fault in the creation of the overpayment; that waiver was not appropriate and that the overpayment would be collected at the rate of \$150.00 every 28 days.

By letter dated February 22, 2000, the Office found that appellant was overpaid by \$18,424.67, that appellant was not without fault in the creation of the overpayment and that the Office would deduct \$150.00 every 28 days until the debt of \$18,424.67 was absorbed.

The Board finds that the Office properly determined that appellant received an \$18,424.67 overpayment of compensation.

The record indicates that appellant’s dependent child reached 18 years of age on May 4, 1992 and that appellant continued to receive compensation at the augmented 75 percent rate until August 15, 1998. Since appellant no longer had any dependents under the Federal Employees’ Compensation Act once his daughter reached 18 years of age and was not a full-time student, his

compensation should have been reduced from the augmented 75 percent rate to the basic 66 2/3 rate at the time of her 18th birthday.

The basic rate of compensation under the Act² is 66 2/3 percent of the injured employee's monthly pay.³ When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation augmented at the rate of eight and one-third percent of his monthly pay.⁴ The record establishes that until appellant's daughter reached 18 years of age on May 4, 1992, appellant was entitled to receive compensation at the augmented rate of 75 percent. The record further establishes that subsequent to his daughter's 18th birthday, from May 4, 1992 to August 15, 1998, he continued to receive compensation at the augmented rate, thereby creating an overpayment in the amount of \$18,424.67, the difference between \$165,328.10, the amount appellant was paid for the period and \$146,903.43, the amount he should have been paid for this period. Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of \$18,424.67 during the period May 5, 1992 to August 15, 1998.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment is not subject to waiver.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁵ 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 this subchapter or would be against equity and good conscience."⁶ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (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

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8105(a).

⁴ 5 U.S.C. § 8105(b).

⁵ 5 U.S.C. § 8129(a).

⁶ 5 U.S.C. § 8129(b).

(3) Accepted a payment which he or she knew or should have known to be incorrect.”⁷

In this case, appellant signed an affidavit of earnings and employment, Form CA-1032, on August 31, 1992 in which he did not fill out data addressing this daughter’s age. Appellant’s daughter turned 18 years old on May 4, 1992. The Form CA-1032 advised appellant that he must answer all the questions to ensure that his compensation is paid at the correct rate, and that he may claim dependency for a unmarried child who is over 18 or is under 23 and a full-time student. Appellant withheld information that his daughter was 18 years old from the Office in spite of his awareness that he was required to advise the Office of any change in the status of a claimed dependent. Although he subsequently advised the Office that he had no dependents, his omission of informing the Office in his August 1992 report that his daughter turned 18 on May 4, 1992, and thus was no longer a dependent, particularly since his report was prepared only 4 months after her birthday, demonstrates that appellant was aware of the importance of this information. Thus his failure to inform the Office of a material fact rendered him at fault in the creation of the overpayment. The Board also finds that appellant knew or should have known that his compensation payments should have been decreased after his daughter reached 18 years old.

The manner in which appellant submitted the incomplete 1992 form shows that he understood or should have understood the circumstances under which augmented compensation could be claimed and the need to immediately report to the Office any change in the status of his claimed dependents. Indeed, in an earlier Form CA-7 filed in June 1981, appellant noted his daughter’s birthday; however, in the next submission in which he was required to identify the status of a dependent, which was the August 1992 affidavit of earnings and employment, Form CA-1032, that appellant completed after his daughter reached 18 years of age, he failed to indicate the existence or the status of any dependent. This demonstrates that appellant understood or should have understood that he was no longer entitled to receive the augmented rate of compensation upon her birthday, his sole claimed dependent.

The Board finds that appellant’s failure to notify the Office of his daughter’s 18th birthday which occurred on May 4, 1992, in his August 1992 CA-1032 report constitutes failure to furnish promptly material information as defined in 20 C.F.R. § 10.433.⁸ While the Office may have been negligent in continuing to issue appellant checks for disability at the 75 percent rate after appellant failed to notify it that his daughter was not longer a dependent and for such time as when appellant did indicate that he was no claiming a dependent, this does not excuse appellant’s acceptance of such checks which he knew (or should have known) should have been returned to the Office.⁹

⁷ 20 C.F.R. § 10.433(a).

⁸ See *Madge H. Gurr*, 39 ECAB 1124, 1129-31 (1988) (finding that failure to notify the Office of a change in status of a claimed dependent almost six months after the fact constituted failure to promptly furnish material information).

⁹ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

For these reasons, the Office properly determined that appellant was not without fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.¹⁰

The Board further finds that the Office improperly determined that appellant should repay the overpayment by deducting \$150.00 every 28 days from his continuing compensation.

Section 10.441 of the Code of Federal Regulations states in relevant part:

“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 overpayment as soon as the error is discovered or his or her attention is called to same. 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 other relevant factors, so as to minimize any hardship.”

In her February 8, 2000 decision, the hearing representative determined that the Office should deduct \$150.00 every 28 days from appellant’s continuing compensation benefits, but she did not adequately explain her rationale for determining that appellant was able to make payments in this amount. The Office hearing representative noted that appellant’s compensation income every 28 days was \$1,756.88. She then noted appellant’s bank account balance as an asset of \$4,384.00¹¹ and further noted his title in a 1986 Oldsmobile. She then listed appellant’s monthly expenses which were a \$1,198.55 mortgage payment, \$400.00 for food, \$523.00 for utilities, \$200.00 for home and automobile maintenance, and a \$410.00 credit consolidation fee to an attorney’s office. The hearing representative stated that appellant “should be able to make certain adjustments that should enable him to make monthly payments and repay the overpayment,” but she did not adequately explain this assertion.

The record does not show that, in requiring repayment of the overpayment by deducting \$150.00 from appellant’s compensation payments every 28 days, the hearing representative or the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 in order to find that the method of recovery would minimize any resulting hardship on appellant. Therefore, the Office improperly required repayment of the overpayment by deducting \$150.00 from appellant’s compensation payments every 28 days.¹²

¹⁰ See *Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).

¹¹ The record includes a copy of appellant’s November 1999 bank statement with a balance of \$5,139.78 that includes a deposit of his monthly compensation benefits check.

¹² See *Francisco Serrano*, 40 ECAB 824 (1989).

The case will be remanded to the Office for consideration of the appropriate factors regarding appellant's ability to repay the overpayment to be followed by an appropriate decision.¹³

The February 8, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed with respect to the existence and amount of overpayment, the Office's finding that appellant was not without fault in the creation of the overpayment and its determination that appellant was not entitled to a waiver in recovery of the overpayment. However, the decision is set aside with respect to the issue of recovery of the overpayment. The case is remanded to the Office for further development and a *de novo* decision consistent with the above decision.

Dated, Washington, DC
June 7, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ Consideration should be given to updated information regarding both appellant's current monthly income and monthly expenses.