

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the matter of ADRIA FULKERSON, claiming as widow of FREDERICK FULKERSON and  
DEPARTMENT OF AGRICULTURE, Orofino, ID

*Docket No. 01-1657; Submitted on the Record;  
Issued May 7, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$8,912.31 for the periods June 10, 1997 to June 30, 1998 and June 11 to November 6, 1999; (2) whether the Office properly determined that appellant was not entitled to waiver of such overpayment; and (3) whether the Office properly required repayment by withholding \$300.00 every four weeks from her continuing compensation.

On October 8, 1983 appellant's husband, a 45-year-old land surveyor, died as a result of complications incurred from his work injury of June 26, 1980. Appellant's subsequent claim for survivor benefits was accepted by the Office on January 5, 1984. She and her two children were paid appropriate death benefits based upon the allowable percentage of her husband's monthly salary as a widow with two surviving children.

In a memorandum to the Director dated April 18, 2000, the Office noted that neither of appellant's two children, Kjersti and Lindsey, had obtained their Bachelor's degrees after four years of college after high school. It further noted that the Office should not have paid student benefits for their fifth year of college. Kjersti graduated high school June 1993 and her four years of education after high school ended June 10, 1997, however, compensation continued to be paid on her behalf until June 30, 1998. Lindsey graduated high school in June 1995 and finished four years of education after high school on June 11, 1999. Compensation was stopped on November 6, 1999, but should have been stopped June 11, 1999. Also as Lindsey was age 22 on March 27, 1999, he was not entitled to have health benefits coverage after age 22. The Office determined that appellant was entitled to 75 percent widow benefits plus 2 students until June 10, 1997 less HBS code 312; appellant was entitled to 60 percent widow benefits plus 1 student from June 11, 1997 though June 11, 1999 less HBS code 312 only until March 27, 1999 and for code 311 from March 28 through June 11, 1999. Appellant was entitled to 50 percent widow benefits only June 12 through November 6, 1999 less HBS code 311.

By letter dated July 17, 2000, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$8,912.31 for the period June 10, 1997 to June 30, 1998, when her daughter Kjersti finished four years of post high school education and June 11 to November 6, 1999, when her son Lindsey finished four years of post high school education. The Office found that appellant was at fault in the creation of the overpayment as she was aware or should have been aware that entitlement for her children ended on the day that they completed four years of education beyond high school. The Office informed appellant that if she disagreed with the decision she 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 she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in her possession. The Office specifically requested that appellant 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 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.

By letter dated August 7, 2000, appellant requested a precoupment hearing. Appellant also argued that she was not at fault in the overpayments and elected to fill out the applicable sections applying to waiver. She additionally supplied necessary financial information for a consideration regarding waiver of the overpayment.

The precoupment hearing was held on December 20, 2000, appellant appeared *pro se*. Appellant argued, in essence, that a completion of the year of education was for the completion of the requirements within that year of education and not a calendar year of attendance. She stated that both of her children continued in the fall of their fifth year of college because they had not met all of their requirements to obtain their degrees. She noted that her daughter had to retake some of her classes, but benefits continued until she was age 23. Appellant asserted that she assumed that benefits would continue until age 23 because, although they had been pursuing a full-time course, they had not met all of their degree requirements. Appellant argued that the Office had not fully explained the definition of four years of education and, thus, she should not be found at fault in the overpayment determination.

Appellant also clarified information regarding her Form OWCP-20 at the hearing. She stated that her compensation benefits as a widow equated to \$2,122.00 and indicated that this was calculated by multiplying \$1,867.00 by 13 divided by 12. Appellant also indicated that when she filed out the Form OWCP-20 she did not take into account the earnings from her current employment. Appellant advised that she works as an adjunct writing instructor at Oregon State University (OSU). She stated that with adjuncting, every 10 weeks you job search as attaining full-time employment is unlikely. She indicated that she made \$208.69 every other week at PCC and \$1,863.00 monthly at OSU. The Office hearing representative and appellant went over appellant's expenses and assets as listed in the Form OWCP-20 and noted slight changes, which were not of a significant nature. The Office hearing representative noted that on

the Form OWCP-20, appellant reported a total monthly income of \$2,131.00 and total expenses of \$2,813.00. He stated that on the form appellant's expenses outweighed her income by about \$700.00 a month and specifically asked appellant whether it took into account the income appellant was getting from her current employment. Appellant responded in the negative and stated that would be indicative of her situation if she was not able to find employment.

In a letter of January 8, 2001, appellant advised that the transcript of her hearing contained only minor omissions but no significant errors. Regarding the amount of the one month salary at OSU, appellant stated that the amount represents only those months for which a full salary is paid. Appellant stated that colleges and universities pay by the course -- salaries vary from \$1,100.00 per class per term to \$1,900.00 per course per term depending upon the institution -- and 4 courses per 10 to 12 weeks term is considered full-time employment. The salary is paid by the portion of the months that classes are in session. September and June, for example, are paid as half-months. July and August often are months with no income for adjuncts due to the reduced number of classes offered for the summer term.

In a decision dated March 28, 2001, the Office hearing representative found that appellant was not at fault in creating the overpayment of compensation in the amount of \$8,912.31 for the period of June 10, 1997 to June 30, 1998 for appellant's daughter and June 11 to November 6, 1999, for appellant's son on the basis that they no longer qualified as students. The hearing representative found that it was not unreasonable for appellant to believe that her children were entitled to benefits beyond four years. He stated:

“The [F]orms CA-1617 indicate that the student is no longer entitled to benefits if he has completed four years of education. The children had pursued a full course load, but had not successfully completed all of their educational requirements within four academic years. The Office's procedure manual provides a full explanation of a 'year of entitlement,' but the information given to claimant does not. Under the circumstances, it is reasonable that the claimant believed her children remained entitled to benefits until age 23, because they had not fulfilled the requirements of a 4-year course of study. This is not entirely inconsistent with the information given on Forms CA-1617 and, therefore, it cannot be concluded that the claimant was aware that the payments were incorrect. The initial finding of fault in the matter is, therefore, reversed: The claimant is not at fault in creating the overpayment.”

The Office hearing representative, however, found that appellant was not entitled to a waiver of recovery of the overpayment. The hearing representative also found that recovery of the overpayment and any applicable interest, by deductions from appellant's continuing compensation benefit payments in the amount of \$300.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant's monthly household income exceeds her monthly expenses by approximately \$1,000.00. He noted that appellant may have some variability in her teaching income and that her monthly income of \$3,852.00 was based on a part-time teaching schedule, which may increase or decrease to some extent. The hearing representative found that the monthly income of \$3,852.00 reasonably represented appellant's monthly financial

circumstances on average. He advised that although appellant was not at fault in the creation of the overpayment, she did receive funds to which she was not entitled and she did benefit by it. The hearing representative found that as appellant did not require substantially all of her income to meet her necessary living expenses, she was able to repay the overpaid funds. The hearing representative further found that appellant did not qualify for waiver on the basis that it would be against equity and good conscience. The Office hearing representative concluded that \$300.00 a month in deductions from appellant's continuing compensation benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,912.31 for the periods June 10, 1997 to June 30, 1998 and June 11 to November 6, 1999. In a series of Forms EN1617-0189 sent to appellant on an annual basis, the Office sought information necessary for the proper calculation of her benefits with respect to her claiming dependents for the period in question. The cover letter attached with each questionnaire (Form CA-1617-0189) specifically advised:

“The compensation law prohibits the acceptance of compensation to which a beneficiary is not entitled. If this individual is no longer a full-time student, has completed four years of education beyond high school, has married, has reached age 23 or has died, notify this Office immediately and return any uncashed compensation checks.”

The record shows that appellant's daughter, born June 12, 1975, attained age 18 on June 12, 1993, graduated from high school in June 1993 and began college in September 1993. She attended college for four years through June 1997 and returned to college in September 1997 for a fifth year. For the purposes of augmented compensation for dependents, section 8110 of the Act<sup>1</sup> states that “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 he is a student as defined by section 8101 of this title at the time he reaches 18 years of age for so long as he continues to be such a student or until he marries.” Section 8101(17) of the Act<sup>2</sup> defines a “student” as 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 the institutions so defined. The regulations refer to a “student as being an individual as defined in 5 U.S.C. § 8101(17), and further define the term “year beyond the high school level” to mean the 12-month period beginning the month after the individual graduates from high school, provided he or she had indicated an intention to continue schooling within 4 months of high school graduation, and each successive 12-month period in which there is school attendance or the payment of compensation based on such attendance.<sup>3</sup> Because benefits were payable for only the first four years of attendance, appellant's entitlement to compensation for her daughter ceased effective June 10, 1997, when the fourth year of school ended. Accordingly,

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<sup>1</sup> 5 U.S.C. § 8110(a).

<sup>2</sup> 5 U.S.C. § 8101(17).

<sup>3</sup> 20 C.F.R. § 10.5(aa)(2)(i).

an overpayment existed from June 10, 1997, until compensation ceased June 30, 1998. Appellant's son, born March 27, 1977, attained age 18 on March 27, 1995, graduated from high school in June 1995 and began college in September 1995. He attended four years of college through June 1999 and returned for his fifth year in September 1999. His entitlement to benefits ceased at the end of the fourth year of college on June 11, 1999. He was overpaid from June 11, 1999 until his benefits stopped on November 6, 1999.

The Office noted that prior to June 10, 1997, appellant was entitled to compensation for death benefits at 75 percent plus the appropriate rate for two surviving children.<sup>4</sup> Effective June 11, 1997, appellant was entitled to compensation at 60 percent plus one surviving child. Effective June 12, 1999, appellant was entitled to compensation at 50 percent. The Office properly calculated the appropriate amounts in each period, including making the necessary deductions for health benefit coverage after each surviving child reached 22, in determining the overpayment amount of \$8,912.31. The Office's determination of the amount of the overpayment is proper and is supported by the evidence of record.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act<sup>5</sup> 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.) Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.436<sup>6</sup> and 10.437<sup>7</sup> of the implementing federal regulations.

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<sup>4</sup> This equated to a breakdown for 45 percent to appellant and 15 percent to each of appellant's surviving children.

<sup>5</sup> 5 U.S.C. § 8129(a)(b).

<sup>6</sup> 20 C.F.R. § 10.436.

<sup>7</sup> 20 C.F.R. § 10.437.

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulations provides:

“Recovery of an overpayment will defeat the purpose of the [Act] if such recovery would cause hardship to a currently or formerly entitled beneficiary because--

(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(b) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulations provides:

“(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”

Finally, section 10.438 of the Office’s regulations<sup>8</sup> provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act], or be against equity and good conscience.

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<sup>8</sup> 20 C.F.R. § 10.438.

This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of the waiver and no further request for waiver shall be considered until the requested information is furnished.”

In this case, the financial information appellant submitted on the Form CA-20 did not take into account her earnings as an adjunct writing instructor. In finding that appellant’s monthly household income equaled \$3,852.00, the Office hearing representative approximated \$1,700.00 of monthly income derived from appellant’s part-time teaching schedule in addition to compensation check which appellant receives as a widow.<sup>9</sup> The hearing representative took into account appellant’s testimony of what she earned teaching and that such salaries varied depending upon the course per term and the institution. As appellant stated in her January 8, 2001 letter, that salaries vary from \$1,100.00 to \$1,900.00 per course per term depending upon the institution, the Office hearing representative could properly within his discretion average such income to be approximately \$1,700.00 of appellant’s total monthly income. As appellant testified that the information she submitted regarding her expenses were essentially unchanged, the record supports the hearing representative’s finding that appellant’s monthly income exceeded her monthly expenses by approximately \$1,000.00. Appellant has failed to submit sufficient evidence showing that she needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed. Therefore, she does not qualify for waiver under the “defeat the purpose of the Act” standard.<sup>10</sup> Further, there is no evidence in this case, nor did appellant allege, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the periods of June 10, 1997 through June 30, 1998 and June 11 through November 6, 1999. Pursuant to its regulations, the Office, therefore, did not abuse its discretion in denying waiver of recovery of the overpayment in the amount of \$8,912.31.

The Board further finds that the Office properly required repayment by withholding \$300.00 every 4 weeks from appellant’s continuing compensation.

Section 10.441(a) of the regulations<sup>11</sup> provides:

“When an overpayment has been made to an individual who is entitled to further payments [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.”

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<sup>9</sup> The Board notes that appellant reported that she received monthly compensation benefits of \$2,122.00 on her Form OWCP-20. However, the Office documents reflect that appellant receives a net amount of \$1,924.39.

<sup>10</sup> See *Nina D. Newborn*, 47 ECAB 132 (1995).

<sup>11</sup> 20 C.F.R. § 10.441(a).

In this case, the hearing representative considered appellant's income, expenses, assets and general financial circumstances and found that appellant had approximately \$1,000.00 after ordinary and necessary living expenses were met. The hearing representative, therefore, concluded that \$300.00 a month in deductions from appellant's continuing compensation benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.<sup>12</sup> The Board finds that the Office arrived at this repayment schedule giving due regard to the factors set forth in section 10.438 and that the repayment schedule was not unreasonable under the circumstances.<sup>13</sup>

The March 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 7, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>12</sup> See *Forrest E. Brown, II*, 44 ECAB 278 (1992); see *Robert C. Schenck*, 38 ECAB 531 (1987).

<sup>13</sup> *Id.*