

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH CRAVEN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Washington, DC

*Docket No. 03-312; Submitted on the Record;
Issued June 25, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether an overpayment of \$2,579.14 occurred in appellant's case; (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault and therefore not entitled to waiver of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by deducting \$150.00 every four weeks from her compensation.

Appellant, a 45-year-old employee development specialist, filed a notice of occupational disease on April 22, 1994 alleging that she developed autoimmune disease due secondary to chemical sensitivities. The Office accepted appellant's claim for allergic rhinitis by exacerbation on February 28, 1995 and entered her on the periodic rolls on January 17, 1996 at the augmented rate.

While receiving compensation, appellant completed several annual affidavits of earnings and employment (Form EN1032). These forms contain the following notice:

"A claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate. A claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. You must answer the questions below to ensure your compensation is paid at the correct rate."

* * *

"You may claim compensation for a dependent if you have one or more of the following: (a) a husband or wife who lives with you...."

* * *

“You may also claim compensation for a husband, wife or dependent who does not live with you if a court had ordered you to pay support to that person. Finally, you may claim compensation for (a) husband or wife, ... even if that person does not live with you, as long as you make regular direct payments for his or her support.”

Appellant completed a Form EN1032 on July 30, 2000 and indicated that she was married and that her husband lived with her.

In a letter dated February 12, 2001, appellant stated that effective March 6, 2001 she was moving to Athens, Georgia due to a separation from her husband. She stated that she would notify the Office once she was divorced. Beginning February 25, 2001 the Office changed appellant's compensation benefits to the basic 66 2/3 percent rate to reflect that she no longer had a dependent.¹

On February 4, 2002 appellant provided the Office with a copy of her divorce judgment dated September 26, 2001. She also provided the complaint for divorce which stated that appellant and her husband “voluntarily lived separately and apart without any cohabitation, continuously for more than 12 months” beginning on or about July 4, 2000.² The judgment also stated on February 6, 2001 the parties entered into a Voluntary Separation and Property Settlement Agreement which was made a part of the judgment of divorce.

Based on the divorce decree, the Office issued a preliminary overpayment determination on August 21, 2002, finding that appellant was not entitled to compensation at the augmented rate from the date of her separation from her husband, July 4, 2000. The Office found that appellant had received an overpayment of compensation in the amount of \$2,579.14 as she was improperly paid compensation at the augmented 75 percent rate from July 4, 2000 until February 24, 2001 when she was only entitled to the basic rate.³ The Office found that appellant was at fault in the creation of the overpayment on the basis that she should have known that she was not entitled to augmented compensation when she no longer had any eligible dependents. The Office provided appellant with an overpayment recovery questionnaire.

On September 5, 2002 appellant responded claiming that she was not at fault in the creation of the overpayment. She stated that her marital difficulties began in April 2000. Appellant alleged that she notified the Office of her separation in August 2000⁴ and that she did not think that her compensation rate would change until after the divorce was final. She stated that in July 2000 she went to Georgia to care for her ailing father. Appellant indicated that she remained in Georgia from July through at least mid-December. She then returned to Georgia to care for her mother, who died on February 28, 2001. Appellant returned to Georgia permanently in March 2001.

¹ See 5 U.S.C. § 8105(a).

² The Office received this document on July 29, 2002.

³ See 5 U.S.C. § 8110(b).

⁴ The record does not contain such notification.

Appellant further stated that she was ordered by the separation agreement to pay her husband rent and pay half of the household bills each month. She asserted in a September 3, 2002 Form EN1032 that she and her spouse shared the expense of one home in Maryland until she moved to Georgia in March 2001. Appellant stated that the expenses were ordered by the legal separation agreement which became part of her divorce judgment. She did not complete the overpayment recovery questionnaire.

By decision dated October 1, 2002, the Office found that appellant was at fault in the creation of an overpayment in the amount of \$2,579.14 on the grounds that she continued to receive compensation at the augmented rate when she was legally separated and subsequently divorced leaving her with no eligible dependents. The Office determined to recover the overpayment by withholding \$150.00 from appellant's continuing compensation beginning November 3, 2002.

The Board finds that this case is not in posture for decision.

The basic rate of compensation under the Federal Employees' Compensation Act⁵ is 66 2/3 percent of the injured employee's monthly pay.⁶ When the employee has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at 8 1/3 percent of her monthly pay.⁷

Under the Act, a husband may be a dependent if: "(A) he is a member of the same household as the employee; or (B) he is receiving regular contribution from the employee for his support; or (C) the employee has been ordered by a court to contribute to his support."⁸

The Board finds that the Office properly determined that appellant was not entitled to augmented compensation after the date her divorce became final. After her divorce became final on September 26, 2001 appellant's former husband is no longer considered a dependent under section 8110(a)(2) of the Act.⁹

The record is clear based on appellant's own statements that during most of the period of the alleged overpayment, from July 4, 2000 until February 24, 2001 she and her husband were not members of the same household. Appellant stated that as she was in Georgia caring for her parents from July 2000 until at least mid-December 2000 and again from a "short time" thereafter. She stated that she returned to Georgia on or after February 28, 2001 when her mother died and remained to settle the estate.¹⁰ However, appellant has alleged that she was

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8105(a).

⁷ 5 U.S.C. § 8110(b).

⁸ 5 U.S.C. § 8110(a)(2).

⁹ *Linda F. Green*, 39 ECAB 636 (1988).

¹⁰ The Board notes that if appellant can establish any discrete periods of time during which she and her husband resided together, she would be entitled to augmented compensation for such periods. *Mattie B. Evans*, (Docket No. 00-1993, issued May 22, 2002).

either providing regular contributions to her husband's support qualifying him as a dependent and/or that she was ordered by a court to contribute to his support during this period.

In this case, the record indicates that appellant and her husband were "sharing the expenses of one home in Maryland until [she] moved to Georgia in March 2001." The Board has held that the test for determining dependence under the Act is whether the person claimed as a dependent "looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living."¹¹ Appellant has alleged that her husband relied on her support to continue to live in the marital home and to meet monthly expenses until she permanently moved to Georgia in March 2001. However, the record was not developed concerning these allegations.

Appellant also stated that she paid rent to her husband and one half of the household bills each month as directed by the separation agreement which she stated was court ordered. The record does not contain a copy of the separation agreement. Furthermore it is unclear when, if ever, appellant was ordered by a court to contribute to her husband's support. Appellant's divorce decree, stated that the separation agreement is included as part of the divorce judgment, but does not address whether the separation agreement was bound by a court before that date.

This case requires further factual development. After the Office's preliminary finding of overpayment, but before its final decision that she has received an overpayment of compensation on the basis that she had no "dependent" after July 4, 2000, appellant submitted additional statements contending that she was both providing regular contributions for her husband's support and that she was ordered by a court to contribute to his support. In the absence of any contrary evidence, it was improper for the Office to issue its final decision that appellant received an overpayment of compensation because she did not have a "dependent." It is incumbent upon the Office to consider appellant's contentions that her husband remained a dependent before issuing a decision that she did not have a dependent and therefore was not entitled to augmented compensation.¹²

¹¹ *Barbara J. Haskell*, (Docket No. 00-1087, issued July 10, 2002); *see also Santos Bonilla Orsini*, 35 ECAB 1121, 1122 (1984) (finding that appellant failed to establish that the employee's contributions provided a "means of maintaining or helping to a customary standard of living").

¹² *Linda F. Green*, *supra* note 9 at 639 (1988).

The decision of the Office of Workers' Compensation Programs dated October 1, 2002 is set aside and the case remanded to the Office for further investigation of appellant's contention that her husband remained a dependent after their separation pending a divorce, to be followed by an appropriate decision on this issue and on the existence of any overpayment of compensation during the period from July 4, 2000 to February 24, 2001.

Dated, Washington, DC
June 25, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member