United States Department of Labor
Employees' Compensation Appeals Board

GRADY LEWIS, claiming as guardian of VANESSA LEWIS, Appellant	)	
and	)	**Docket No. 03-1213** **Issued: February 12, 2004**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Oakland, CA, Employer	)	

Appearances:
Grady Lewis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 10, 2003 appellant filed an appeal from a decision of the Office of Workers' Compensation Programs dated March 28, 2003, finding that an overpayment of $3,607.16 was created and that appellant was not entitled to waiver because she was at fault in creating the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, appellant has filed a timely appeal and the Board has jurisdiction over the overpayment.

ISSUES

The issues are: (1) whether an overpayment of compensation of $3,607.16 was created during the period July 1 to October 5, 2002; and (2) whether appellant was at fault in creating the overpayment and, therefore, not entitled to waiver.

FACTUAL HISTORY

On December 26, 1991 the employee, Roger Lewis, filed a claim alleging that on that date he sustained a head injury while in the performance of duty. The employee was

hospitalized on January 1, 1992 and died on January 8, 1992. The Office determined that appellant, the employee's former spouse, was entitled to benefits as guardian of the employee's minor children: Roger Lewis, born January 16, 1979 and Vanessa Lewis, born March 7, 1980. Appellant began receiving compensation as of January 9, 1992.

The Office periodically requested that appellant complete a form with respect to receipt of continuing compensation benefits on behalf of the employee's beneficiaries. The Office advised appellant that a beneficiary is not entitled to compensation when she is no longer a full-time student, has completed 4 years of education beyond the high school level, has married, reached age 23 or died. On March 8, 1998 appellant completed a Form (EN1615) with respect to Vanessa Lewis. Appellant indicated that Vanessa Lewis would graduate from high school in June 1998 and she intended to enroll in college in the fall of 1998. On February 15, 1999 appellant completed a similar Form (EN1617), reporting that Vanessa Lewis was attending Merrit College in Oakland, California. A school official confirmed attendance and signed the form on February 16, 1999. On March 7, 2000 appellant reported on a Form EN1617 that appellant was a full-time student; in response to the name of the school appellant listed three names. A school official signed the form as true and correct.[1] On March 19, 2001 appellant indicated that Vanessa Lewis was attending Peralta College full time and intend to enroll at California State University at Hayward the next school year. A school official signed the form on March, 26, 2001. On June 25, 2002 appellant completed a similar form (now identified as Form EN1618) and reported that as of April 1, 2002, appellant was a full-time student at California State University at Hayward. Appellant indicated that Vanessa Lewis was expected to complete her education at this school in June 2004. In response to a question as to whether Vanessa Lewis had completed four years of education beyond high school, appellant responded "no." The form was signed by the registrar of California State at Hayward.

The record confirms that the Office paid appellant compensation from May 19 through October 5, 2002. By letter dated February 14, 2003, the Office advised appellant that a preliminary determination had been made that an overpayment of $3,607.16 was created. The Office determined that no compensation should have been paid on behalf of Vanessa Lewis after June 30, 2002, because she had completed four years of education beyond high school. The Office determined that the period of the overpayment was July 1 to October 5, 2002, in the amount of $3,607.16. With respect to waiver of the overpayment, the Office made a preliminary finding that appellant was at fault in creating the overpayment, as she provided an incorrect statement on the Form EN1618 that she knew or should have known was incorrect.

By decision dated March 28, 2003, the Office finalized the preliminary determinations with respect to fact of overpayment and denial of waiver.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act, at 5 U.S.C. § 8133 provides that compensation in case of death from an injury sustained in the performance of duty is payable to a child until the child has reached 18 years of age, but "shall continue if he is a student as defined

[1] Appellant submitted forms for both Roger Lewis and Vanessa Lewis; the signatures of the school officials are not accompanied by the name of the school.

by section 8101 of this title at the time he reaches 18 years of age for so long as he continues to be such student or until he marries." The Act defines student as:

> "[A]n individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is--
>
> > (A) a school or college or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof;
> >
> > (B) a school or college or university which has been accredited by a State or by a State-recognized or nationally recognized accrediting agency or body;
> >
> > (C) a school or college or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited; or
> >
> > (D) an additional type of educational or training institution as defined by the Secretary of labor.
>
> "Such an individual is deemed not to have ceased to be a student during an interim between school years if the interim is not more than 4 months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of study or training during the semester or other enrollment period immediately after the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education."[2]

The Office's procedure manual defines a year of education beyond the high school level as "the 12-month period beginning the month after the child graduates from high school, if the child has indicated an intention to continue in school during the next regular session and each successive 12-month period, provided that school attendance continues."[3] The procedure manual also provides that a year of entitlement based on student status means any year during all or part, of which compensation is paid based on school attendance.[4]

[2] 5 U.S.C. § 8101(17).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.8(a)(1) (July 2000).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.8(2) (July 2000). This section provides that even if a beneficiary should decide not to attend school for part of a year, during which benefits were paid on account of student status, a full year of eligibility would be charged.

ANALYSIS -- ISSUE 1

In this case, the Office determined that Vanessa Lewis, child of the employee, was no longer entitled to compensation benefits after June 30, 2002. The Office concluded that Vanessa Lewis had "completed 4 years of education beyond the high school level" as of June 30, 2002 and, therefore, did meet the definition of "student" under the Act. Compensation benefits paid to appellant, as guardian, after June 30, 2002 were found to be an overpayment of compensation.

A review of the evidence of record indicates that Vanessa Lewis graduated from high school in May 1998. Appellant continued to submit form reports indicating that Vanessa Lewis was pursuing a full-time course of study from 1998 to 2002. Although there is no indication that Vanessa Lewis had graduated from a college or university, student status under the Act is not dependent on graduation. The definition of "student" under the Act is limited to individuals that have not "completed 4 years of education beyond the high school level." The Form EN1617 and Form EN1618 reports completed by appellant indicate that Vanessa Lewis had been pursuing a full-time course of study from 1998 to 2002. Under Office procedures, the first year of education beyond high school began in June 1998, the month after her high school graduation and ended four years later in June 2002. The Office, therefore, properly held that appellant was not entitled to compensation as guardian of Vanessa Lewis after June 30, 2002.

The record establishes that appellant was paid compensation from July 1 to October 5, 2002. The $3,607.16 in compensation paid is properly found to be an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[5] provides: "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 [the Act] or would be against equity and good conscience."[6] Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.[7]

On the issue of fault 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(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 was incorrect."

[5] 5 U.S.C. §§ 8101 *et seq*.

[6] 5 U.S.C. § 8129(b).

[7] *Norman F. Bligh*, 41 ECAB 230 (1989).

ANALYSIS -- ISSUE 2

In this case, the Office determined that appellant made an incorrect statement as to a material fact that she knew or should have known was incorrect. The incorrect statement was her answer "no" on the June 25, 2002 Form EN1618 in response to the question of whether Vanessa Lewis had completed four years of education. As discussed in the analysis above, this was an incorrect statement. The finding that appellant should have known it was incorrect is proper under the facts of this case. The Board notes that in the letters sent to appellant requesting completion of the Forms EN1615, EN1617 and EN1618, appellant was advised that a beneficiary was no longer entitled to compensation if she had completed four years of education beyond high school. It was appellant who provided the information to the Office as to Vanessa Lewis' student status since her graduation from high school. The Form EN1618 does not inquire as to whether the beneficiary has graduated, but whether four years of education have been completed beyond high school. Since appellant had completed reports asserting that Vanessa Lewis had been a full-time student for the four years since her graduation from high school in May 1998, appellant should have known that the "no" response was incorrect. Accordingly, appellant is at fault pursuant to 20 C.F.R. § 10.433 in creating the overpayment and is not entitled to waiver under 5 U.S.C. § 8129(b).

CONCLUSION

The Board finds that the Office properly determined that an overpayment of $3,607.16 was created and appellant was at fault in creating the overpayment such that she was not entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 28, 2003 is affirmed.

Issued: February 12, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member