

chair. The Office accepted that appellant sustained a lumbar strain and an L4-5 herniated disc and authorized discectomy surgery, which was performed on December 5, 1997. He stopped work on December 21, 1995 and did not return.

On January 13, 2000 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant had the capacity to earn wages as a telemarketer at the rate of \$120.00 a week. The Office found that this constructed position was in compliance with the restrictions of appellant's treating physician. By decision dated February 22, 2000, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a telemarketer.

In a Form CA-1032 dated February 7, 2000, appellant advised that he was not married and had no dependents. The daily compensation log revealed that from January 30, 2002 to July 12, 2003 appellant was paid compensation at the augmented three-fourths pay rate for a claimant with dependents.

In a disability payment worksheet dated February 15, 2000, the Office noted that appellant's weekly pay rate was \$669.36 with a compensation rate of three-fourths percent effective December 21, 1995.

In a July 9, 2003 overpayment worksheet, the Office calculated that appellant had been paid at the three-fourths augmented pay rate for a claimant with dependents from January 30, 2000 to July 12, 2003 instead of at the basic statutory two-thirds pay rate for a claimant without a qualifying dependent. The Office calculated that appellant's gross compensation paid at the erroneous three-fourths rate was \$85,562.60 and that the gross compensation payable at the statutory two-thirds rate was \$76,094.74. The Office calculated that this resulted in a \$9,467.86 overpayment of compensation to appellant.

On July 11, 2003 the Office made a preliminary finding that appellant had been overpaid compensation in the amount of \$9,467.86. The Office noted that the overpayment occurred after a loss of wage-earning determination was made on February 22, 2000, whereby appellant received compensation at the augmented three-fourths rate for a claimant with dependents instead of the basic statutory two-thirds rate for the period January 30, 2000 to July 12, 2003. The Office determined that appellant was at fault in the creation of the overpayment as he knew or reasonably should have known that he was not entitled to augmented compensation for himself. The Office indicated that appellant had the right to submit evidence or arguments which would affect the preliminary findings.

On July 29, 2003 appellant submitted a Form OWCP-20 overpayment recovery questionnaire. He noted monthly income of \$2,311.12 and monthly expenses of \$1,900.00. Appellant asserted that he was not at fault in creating the overpayment and realized that his compensation would be reduced after the Office's February 22, 2000 wage-earning capacity decision but did not question the Office's determination. Appellant stated that "I knew there was going to be an adjustment for a lesser amount after doctor's said I could work. I thought it would be a greater amount than it was." He noted that his son was 24 years old and he had not received augmented compensation for him since 1997 or 1998. Appellant requested a telephone conference with an Office representative.

An August 14, 2003 Office telephone log indicates that a telephone call was made to appellant's home but that there was no answer and no voice mail to leave a message.

By decision dated August 14, 2003, the Office found that appellant received a \$9,467.86 overpayment of compensation from January 30, 2000 to July 12, 2003 for which he was at fault. In an accompanying memorandum, the Office indicated that appellant should have reasonably known that he was not entitled to receive augmented compensation at the three-fourths rate as he had no qualifying dependent for the period January 30, 2000 to July 12, 2003. The Office noted that appellant submitted a completed overpayment questionnaire form and requested a telephone conference and an attempt was made to contact him by telephone; however, this was unsuccessful.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8110, a claimant is entitled to augmented compensation at the rate of 75 percent of his monthly pay if he has a dependent. Under this section a dependent includes an unmarried child under 18 years of age. The Office regulations implementing the Federal Employees' Compensation Act, however, provides that augmented compensation will continue if the unmarried child is a student under 23 years of age.¹

ANALYSIS -- ISSUE 1

An overpayment of compensation was created in this case. The record establishes that appellant received compensation at the augmented three-fourths rate for a claimant with dependents, from January 30, 2000 to July 12, 2003. Appellant conceded that he did not have an eligible dependent during this period. The Office determined that for the period January 30, 2000 to July 12, 2003 the difference between compensation paid at the augmented rate exceeded the amount due appellant at the basic statutory rate by \$9,467.86. Appellant was not entitled to augmented compensation at the three-fourths rate for that period. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. Appellant does not dispute that he received augmented compensation that covered the period January 30, 2000 to July 12, 2003. Thus, the Office properly determined the fact amount and period of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

“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

¹ 20 C.F.R. §§ 10.405(b), 10.406.

against equity and good conscience.”² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.³

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

“An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”⁵

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that appellant accepted payments of compensation which he knew or should have been expected to know were incorrect.⁶

The record establishes that appellant was injured in 1995 and his claim accepted by the Office for a herniated disc. Appellant was in receipt of compensation for total disability after he stopped working following the employment-related injury. On January 13, 2000 the Office proposed to reduce appellant’s compensation based on the finding that he had the capacity to work as a telemarketer. On February 7, 2000 prior to the final February 22, 2000 wage-earning capacity decision, appellant advised the Office that he was unmarried and claimed no dependents.

The Office found that appellant was as fault because he received compensation at the three-quarters augmented rate from January 30, 2000 to July 12, 2003. The Board notes,

² 5 U.S.C. § 8129(b).

³ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁴ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁵ 20 C.F.R. § 10.433(b).

⁶ *See Claude T. Green*, 42 ECAB 174, 278 (1990).

however, that the record does not establish that appellant inaccurately advised the Office as to the status of his dependents. The Office has not sufficiently explained what evidence would put appellant on notice to establish that he knew or should have known that he was accepting incorrect payments of compensation. Although appellant acknowledged that he understood there would be an adjustment of his continuing compensation to a lesser amount after being found capable of working; the Office has not shown how appellant would know that the reduction in his compensation benefits reflected payment of compensation at the erroneous three-quarters augmented rate instead of payment at the basic statutory rate. As noted, appellant had accurately reported the status of dependents to the Office. For this reason, the Board finds that the Office's finding of fault must be set aside and the case remanded to the Office for a determination of appellant's eligibility for waiver. Based on this finding, the Board notes that the issue of recovery is rendered moot pending consideration of waiver.

CONCLUSION

The Board finds that the Office improperly determined that appellant was at fault in the creation of the overpayment of compensation. The case must, therefore, be remanded for the Office to consider appellant's eligibility for waiver. After developing the issue of waiver as is necessary, the Office shall issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2003 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment and is reversed on the issue of fault and the case is remanded for action consistent with this decision of the Board.

Issued: February 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member