

**United States Department of Labor  
Employees' Compensation Appeals Board**

ANDREW C. CAVAGNETTO, Appellant	)	
	)	
and	)	<b>Docket No. 04-493</b>
	)	<b>Issued: October 19, 2004</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Petaluma, CA, Employer	)	
	)	

*Appearances:*  
Andrew C. Cavagnetto, pro se  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On December 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 2, 2003, finding an overpayment of \$241.85 was created and that appellant was not eligible for waiver because he was at fault in creating the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this overpayment decision.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received a \$241.85 overpayment of compensation for the period October 31, 2002 to February 14, 2003; (2) whether appellant was at fault in creating the overpayment and, therefore, not entitled to waiver; and (3) whether the Office properly required repayment of the overpayment by making a onetime deduction of \$241.85 from appellant's next compensation payment.

## **FACTUAL HISTORY**

On November 16, 2001 appellant, then a 46-year-old mail handler, filed an occupational disease claim alleging that factors of his federal employment caused him to experience pain in his left shoulder. In a March 18, 2002 letter, the Office accepted the claim for left shoulder impingement. Appellant stopped work temporarily but returned, gradually increasing his work hours until May 9, 2002 when he began working six hours a day, five days a week and received compensation for two hours a day. On an April 25, 2002 periodic request for compensation (Form CA-7), appellant indicated that his son, Matthew, date of birth October 4, 1984, was a dependent. Consequently, he received compensation at the  $\frac{3}{4}$  rate. On a March 18, 2003 Form CA-7, appellant checkmarked the box “yes” indicating that there had been a change in the status of his dependent.<sup>1</sup>

In a March 20, 2003 letter to the Office, appellant indicated that he notified it in the March 18, 2003 Form CA-7 that there was a change in his dependent status. He stated that his son, Matthew, had turned 18 years old and that he had heard, but could not confirm, that he was accepted at the University of California, Davis and the University of California, Santa Cruz and assumed his son would be enrolling in one of the universities. Appellant also added “I had been told that Matthew was attending the local junior college, but have not heard further about this.” He stated that if this caused an overpayment he was prepared to repay it in full.

In an April 11, 2003 letter, the Office requested information about appellant’s dependent status and attached a two-part form for appellant and an official at his son’s school to complete. On April 29, 2003 appellant completed his portion of the form. He indicated that his son turned 18 years old on October 30, 2002 and had not completed four years of education beyond the high school level nor was he pursuing a full-time course of study or training. Appellant noted that, although his son intended to attend college, he did not know where.

In a June 27, 2003 letter, the Office informed appellant that it had made a preliminary determination that he received a \$241.85 overpayment for the period October 31, 2002 to February 14, 2003, as he was compensated at the  $\frac{3}{4}$  augmented compensation rate paid a claimant with dependents when he should have been paid at the statutory  $\frac{2}{3}$  compensation rate for a claimant without dependents. The Office found appellant at fault in the creation of the overpayment as he knew or should have reasonably known that he was not entitled to payments at the augmented  $\frac{3}{4}$  compensation rate based on having a dependent after his son turned 18 years old as he could not confirm that his son was enrolled in college. The Office advised appellant that he could request a telephone conference, a final decision based on the written evidence, or a hearing within 30 days of the date of the letter if he disagreed with the fact or amount of overpayment, the determination of fault, or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

In a July 18, 2003 letter, appellant objected to being found at fault in creating the overpayment, noting that he had not seen or talked to his son in over two years and that he

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<sup>1</sup> Appellant also indicated that his son’s birthday was October 30, 1984 instead of October 4, 1984 and that “payments [had] expired.”

carried a family health plan to provide his son with health insurance. Appellant stated that he had assumed that his son was enrolled at a local junior college and accepted at two universities with the intention of enrolling. Appellant also submitted a July 16, 2003 statement from his father, who stated that he too had not heard from his grandson in over two years and presumed that he was enrolled in college but was not sure. Appellant did not complete or return the (Form OWCP-20) overpayment recovery questionnaire or any other financial information and did not return the school's portion of the form requested by the Office for verification of his son's continuing education.

By decision dated October 2, 2003, the Office finalized the overpayment determination finding appellant at fault in the creation of the overpayment. The Office stated:

“You erroneously assumed your son was attending school full time when you initially filed a claim for compensation stating your son was a dependent. You should have furnished a statement saying you were unsure of your son's school status because of not being in touch with your son for two years. You had known or should have known payments received from October 31, 2002 to February 14, 2003 were incorrect.”

\* \* \*

“The claimant is found with fault and not entitled to waiver of recovery of the \$241.85 overpayment.”

The Office noted that \$241.85 would be deducted from appellant's next compensation payment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8105 of the Federal Employees' Compensation Act provides that, if the disability is total, compensation is payable at 66 $\frac{2}{3}$  percent of the monthly pay or basic compensation for total disability.<sup>2</sup> However, if a disabled employee has a dependent, defined to include an unmarried child under 18 years of age<sup>3</sup> or a student, who is regularly pursuing a full-time course of study,<sup>4</sup> then the employee is entitled to have his basic compensation for disability augmented<sup>5</sup> to 75 percent of the monthly pay.<sup>6</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, § 8105.

<sup>3</sup> 5 U.S.C. § 8110(a)(3).

<sup>4</sup> 5 U.S.C. §§ 8101(17), 8110.

<sup>5</sup> 5 U.S.C. § 8110(b).

<sup>6</sup> 20 C.F.R. § 10.403(b).

**ANALYSIS -- ISSUE 1**

The record establishes that appellant received augmented compensation based on his sole dependent, a son, who was born on October 30, 1984. Appellant's son turned 18 years old on October 30, 2002. Appellant indicated that he assumed his son was pursuing a full-time course of study at that time but was not sure. There is no presumption in the law that a child who turns 18 years of age will become a full-time student. There is no reason for appellant to have assumed that he would be entitled to continued augmented compensation without establishing that his son was, in fact, enrolled as a full-time student after reaching the age of 18. Therefore, at the time of his son's 18<sup>th</sup> birthday on October 30, 2002 appellant was no longer entitled to receive compensation at the augmented rate. The Office continued to pay appellant compensation at the augmented rate from October 31, 2002 to February 14, 2003. Appellant therefore received augmented compensation in the amount of \$2,176.50 when he was only entitled to receive \$1,935.65 at the basic statutory rate, resulting in an overpayment in the amount of \$241.85. Accordingly, the Office properly determined that appellant received a \$241.85 overpayment for the period October 31, 2002 to February 14, 2003.

**LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act 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."<sup>7</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>8</sup> In determining whether an individual is with fault, the Code of Federal Regulations provides, in relevant part, that 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

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”<sup>9</sup>

**ANALYSIS -- ISSUE 2**

In determining that appellant was at fault, the Office effectively applied all three standards; appellant made a statement which he should have known to be incorrect; appellant failed to furnish information that he should have known to be material; and appellant accepted

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>9</sup> 20 C.F.R. § 10.433(a).

payments that he knew or should have known to be incorrect. The Board notes that appellant's initial statement that his son was a dependent was correct as he was under 18 years of age at the initial time of filing. However, once his son turned 18 years old on October 30, 2002 and he could not confirm whether he was pursuing a full-time course of study he should have known that, making assumptions about his enrollment was incorrect and he should have no longer claimed him as a dependent. The Board further notes that appellant's agreement to repay any overpayment in full, due to his son turning 18 years old and his lack of ability to confirm whether he was enrolled in college, indicated that appellant knew or should have know he should not have accepted the augmented payments from October 31, 2002 to February 14, 2003, the period of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441(a) of Office's regulation provides in pertinent 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 the overpayment as soon as the error is discovered or his or her attention is called to the 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 any other relevant factors, so as to minimize any hardship.”<sup>10</sup>

### **ANALYSIS -- ISSUE 3**

Since appellant agreed in his letter dated July 18, 2003 to repay the overpayment in full and did not submit any financial data, there is insufficient information for the Board to perform an analysis of the reasonableness of the onetime deduction of \$241.85. The Board, therefore, finds that the Office properly required repayment of the \$241.85 overpayment by deducting the full amount from appellant's next compensation payment. As appellant submitted no financial data there is no evidence of record to suggest that recovery of the full amount in one payment would result in financial hardship.

### **CONCLUSION**

The Board finds that the Office determined that an overpayment of \$241.85 was created and appellant was at fault in creating the overpayment such that he was not entitled to waiver of the overpayment and that a onetime deduction of \$241.85 from appellant's next compensation payment was proper.

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<sup>10</sup> 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member