

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

CLARENCE E. BROWN, Appellant

and

**DEPARTMENT OF THE NAVY, MILITARY
SEALIFT COMMAND, Bayonne, NJ, Employer**

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**Docket No. 05-307
Issued: June 9, 2005**

Appearances:
Renné D. Brown, for the appellant
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 November 15, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 25, 2004, which found that he was at fault in the creation of an \$8,914.11 overpayment in compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$8,914.11 overpayment in compensation for the period July 25, 1999 to April 15, 2004; (2) whether the Office properly found that appellant was at fault in the creation of an overpayment in compensation and, therefore, it was not subject to waiver; and, (3) whether the Office properly required repayment of the overpayment at the rate of \$250.00 each compensation period. On appeal, appellant contends that he provided the Office with financial information relevant to waiver and provided court-ordered support payments to his daughter until she became eligible for Social Security Administration (SSA) benefits.

FACTUAL HISTORY

This case has previously been before the Board. In a December 15, 1999 decision, the Board affirmed an Office decision dated October 30, 1998 and finalized November 2, 1998, which found that appellant had no disability after September 10, 1997 causally related to his accepted January 3, 1996 employment injuries of concussion and compression of the neck.¹ The law and the facts as set forth in the previous Board decision are incorporated herein by reference.

On April 17, 2000 appellant requested reconsideration and submitted additional medical evidence. The Office referred him for a second opinion evaluation and by decision dated September 7, 2000, restored appellant to the compensation rolls effective September 10, 1997. On September 11, 2000 he filed a schedule award claim, listing as dependents stepchildren who lived with him and a daughter, Alicia S. Brown, born October 23, 1992 who, he indicated did not live with him. Appellant also submitted an Office Form EN1032 in which he claimed his daughter as a dependent. On October 11, 2000 he elected benefits under the Federal Employees' Compensation Act.² In a check dated December 15, 2000, the Office issued wage-loss compensation for the period September 10, 1997 to October 12, 2000 at the three-quarters rate and appellant was thereafter returned to the periodic rolls. On January 11, 2001 he was granted a schedule award for a 34 percent loss of use of the left eye. The award was at the three-quarters rate, for a total of 54.4 weeks, to run from December 31, 2000 to January 15, 2002. Upon expiration of the schedule award, appellant was returned to the periodic rolls at the three-quarters rate. He submitted EN1032 Office forms dated January 29, 2001, January 21, 2002 and January 21, 2003. In each of these forms he claimed his daughter Alicia as a dependent.

In a letter dated May 19, 2003, Janet Brown informed the Office that she had been granted permanent custody of Alicia on July 25, 1999 and inquired about the child's entitlement to a portion of appellant's wage-loss compensation. In letters dated July 8, 2003, the Office requested that Ms. Brown furnish the court order granting her custody and asked appellant whether Alicia lived with him and if he was making regular support payments to her. He too was asked to furnish a copy of any court order.

By letter dated July 23, 2003, appellant's representative advised that Alicia did not live with him. She did not address the question regarding whether appellant made support payments but enclosed an unsigned State of Florida final judgment dated October 21, 1993, indicating that he was to pay to the court \$51.74 weekly for Alicia S. Brown.³ Also enclosed was a SSA document, noting that Alicia Brown was receiving supplemental benefits and became eligible in July 1996. On January 15, 2004 appellant completed an Office Form EN1032, again claiming Alicia as a dependent.

¹ Docket No. 99-784 (issued December 15, 1999).

² 5 U.S.C. §§ 8101-8193.

³ The record contains a final judgment entered by the Florida court on October 28, 1993 which provided for payments of \$64.56 per week with \$51.74 going to support. Computer printouts contained in the record indicate that payments were made to the court for the period May 17, 1996 to August 16, 1997.

In letters dated April 7 and 13, 2004, the Office requested that appellant furnish documentation that he made financial contributions for his daughter. On April 13, 2004 the Office reduced his compensation from the three-quarters augmented rate to the statutory two-thirds rate because he was not making financial contributions for his minor child.⁴ In an undated letter, appellant's representative informed the Office that she and appellant had recently married and enclosed a marriage certificate indicating that they married on April 22, 2004. His compensation was returned to the three-quarters rate.

On July 6, 2004 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$8,914.11, on the grounds that he furnished no support for his minor child for the period July 25, 1999 to April 15, 2004. The Office found him to be at fault, noting that the Office EN1032 forms provided a definition for "dependent" and he reasonably should have been aware that his daughter was not a dependent as defined. He was informed of the actions he could take in response and provided an overpayment questionnaire to submit. Appellant did not respond.

By decision dated August 25, 2004, the Office finalized the finding that an overpayment in compensation in the amount of \$8,914.11 had been created for the period July 25, 1999 to April 15, 2004 and found appellant to be at fault because he claimed and received augmented compensation during this period but was not furnishing financial support for his daughter. The Office determined that \$250.00 would be withheld from appellant's continuing compensation each pay period.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Act provides, in pertinent part:

"When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁵

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has 1 or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent or a total of 75 percent of monthly pay.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant was returned to the periodic rolls effective September 10, 1997 at the three-quarters augmented rate. While the record indicates that his wage-loss compensation was terminated in September 1997, a portion of his compensation was

⁴ Appellant did not file an appeal of this decision with the Board.

⁵ 5 U.S.C. § 8129.

⁶ 5 U.S.C. § 8110(b).

paid to the clerk of the circuit court in Brevard County, Florida, the record indicates that this payment was deleted on October 17, 2000 and on December 15, 2000, appellant was issued a check for the period September 10, 1997 to October 12, 2000 at the three-quarters rate with no payment going to the Florida court.⁷ He thereafter received payments under a schedule award or for periodic disability payments at the augmented, three-quarters rate until April 13, 2004 when his compensation was reduced for the brief period until his marriage on April 22, 2004.

Appellant submitted Office Forms EN1032 dated September 11, 2000, January 29, 2001, January 21, 2002, January 21, 2003 and January 15, 2004. Each of these covered the preceding 15-month period and each explained that he could claim a dependent, who did not live with him “if a Court has ordered you to pay support to that person.” On each of these forms he acknowledged that his daughter Alicia did not live with him but claimed her as a dependent. Appellant also claimed her as a dependent on a schedule award claim of September 11, 2000, checking the box “no” attesting that he was not making support payments for his daughter.

During the period in question, July 25, 1999 to April 15, 2004, the record supports that appellant received compensation at the three-quarters augmented rate. But the record does not establish that he was making any court-ordered support payments for his daughter during this period. Therefore, he had no eligible dependents and was entitled to compensation at the basic two-thirds rate. An Office overpayment worksheet indicates that during the period July 25, 1999 to April 15, 2004 appellant received compensation totaling \$80,148.11, but should have received \$71,234.00. This created an overpayment in compensation in the amount of \$8,914.11. The Board finds that an overpayment in compensation was created in the amount of \$8,914.11 because appellant improperly received compensation at the augmented rate.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.”⁸

Section 10.433(a) of the Office’s regulation provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (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

⁷ The record does indicate that the Office of Personnel Management was reimbursed \$2,502.00.

⁸ 5 U.S.C. § 8129.

or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).⁹”

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard under section 10.433, finding appellant at fault in the creation of the overpayment as he accepted payment he knew or should have known to be incorrect as he was not entitled to receive augmented compensation.

The Board finds that appellant had actual notice of the criteria for finding an eligible dependent as set forth in the Office’s EN1032 forms that he signed on September 11, 2000, January 29, 2001, January 21, 2002, January 21, 2003 and January 15, 2004. When specifically asked by the Office if he was making financial contributions to his daughter, appellant did not respond. In his appeal to the Board, he indicated that he had furnished court-ordered support for his daughter until she qualified for SSA benefits, which was in 1996, prior to the period encompassed by this overpayment. The evidence of record supports the Office’s finding of fault under the facts and circumstances of this case, as appellant knew or should have known that his daughter was not an eligible dependent.

LEGAL PRECEDENT -- ISSUE 3

The Office’s implementing regulation provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.¹⁰

ANALYSIS -- ISSUE 3

In the instant case, appellant did not submit an overpayment recovery questionnaire or other financial information as the Office requested prior to the final August 5, 2004 overpayment decision. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.¹¹ When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.¹² As appellant did not submit any financial information to the Office as requested, the Board finds that there is no evidence to show that a recovery rate of \$250.00 every 28 days was unreasonable. On appeal appellant contends that he timely submitted the requested financial information to the Office and submitted additional evidence to the Board.

⁹ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁰ 20 C.F.R. § 10.441(a).

¹¹ 20 C.F.R. § 10.438.

¹² *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4(c)(2) (September 1994).

The Office case record forwarded to the Board does not contain any financial documentation and the Board may not consider such evidence submitted with his appeal. The Board's review of a case is limited to that evidence of record which was before the Office at the time of its final decision.¹³ It may not be reviewed for the first time on appeal.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,914.11 as he received augmented compensation during the period July 25, 1999 to April 15, 2004, when he had no eligible dependents. The Board further finds that appellant was at fault in the creation of the overpayment and that the Office properly required recovery of the overpayment by deducting \$250.00 from appellant's continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2004 be affirmed.

Issued: June 9, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 20 C.F.R. § 501.2(c).