

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

JENNY M. DROST, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
El Paso, TX, Employer**

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**Docket No. 05-520
Issued: June 16, 2005**

Appearances:
Jenny M. Drost, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 28, 2004 appellant filed a timely appeal of a November 4, 2004 decision of a hearing representative of the Office of Workers' Compensation Programs that found she received an overpayment of compensation in the amount of \$452.00, that she was at fault in the creation of the overpayment and that it should be recovered by deducting \$150.00 per payment from her continuing compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this overpayment case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$452.00 due to receipt of compensation at the augmented rate during a period she had no dependents; (2) if so, whether appellant was without fault in the creation of this overpayment; and (3) whether the Office's recovery of the overpayment by deducting \$150.00 per payment from appellant's continuing compensation was correct.

FACTUAL HISTORY

On April 8, 1991 appellant, then a 32-year-old letter carrier, filed a claim for compensation for an occupational disease of stress that she attributed to not being treated fairly. The Office accepted that she sustained an anxiety disorder in the performance of duty and began payment of compensation for temporary total disability on April 8, 1991 the date she stopped working. Compensation was paid at the augmented, three-fourths rate for employees with dependents, based on appellant's statements on Office forms that she had a son born on August 2, 1982 and a daughter born on May 12, 1985 living with her.

By decision dated September 10, 1996, the Office reduced appellant's compensation to that for partial disability, based on a finding that her actual earnings as a paralegal fairly and reasonably represented her wage-earning capacity. The Office denied modification of this determination in decisions dated November 29, 1996, June 25, 1998 and July 22, 1999. Appellant appealed to the Board, which, by decision dated November 8, 2000, reversed these decisions on the basis that the Office relied on medical evidence more than two and one-half years old when more contemporaneous medical evidence indicated that she was not able to work.¹

On Office Forms EN1032 she completed on December 20, 2000 and February 15, 2002, appellant claimed augmented compensation for her dependent daughter born on May 12, 1985. She indicated that she was married, that her husband did not live with her and that she did not make regular direct payments for his support. The form advised appellant that she could claim augmented compensation for a husband or for an unmarried child between 18 and 23, who was a full-time student even if they did not live with her, as long as she made regular direct payments for their support. On an Office Form EN1032 she completed on February 27, 2003, appellant claimed augmented compensation for her daughter and also indicated that she was making regular direct payments for the support of her husband who did not live with her.

In letters dated June 4, 2003, the Office requested documentation of the regular direct payments to appellant's husband and advised her that compensation for her daughter was scheduled to stop because she would become 18 years old, unless she was incapable of self-support or was a full-time student. In a June 16, 2003 letter, appellant stated that her daughter was not in school that summer, but was enrolled for the fall. She submitted receipts for money orders dated December 12, 2001 and June 14 and November 29, 2002 payable to Calvin Turner in the amount of \$100.00 each. In a July 8, 2003 letter, the Office requested that appellant complete forms regarding her daughter's continuing education and provide proof of registration for school. In a July 11, 2003 response she stated, "Drop my pay to 66 2/3 percent if you have to -- I can't keep track of all this extra stress." On July 13, 2003 the Office reduced appellant's compensation to the two-thirds rate for employees without dependents and advised her that the reduction was made because she had not provided documentation that her daughter was in college.

On February 5, 2004 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$452.00, that arose because she

¹ Docket No. 99-2484 (issued November 8, 2000).

received two compensation payments at the three-fourths rate for employees with dependents after she no longer had a dependent. The Office found that \$300.00 in payments to her husband in 15 months did not meet the requirements for financial support. The Office found that appellant was at fault in the creation of the overpayment because she did not complete the Office form requesting information about her daughter's continuing education.

Appellant requested a hearing and in a February 28, 2004 letter, contended that she was not at fault in the matter of the overpayment, as she believed that her husband was her dependent, since she supported him with regular direct payments. She also contended that her failure to complete the Office forms regarding her daughter's education was irrelevant, since her daughter was not in school. Appellant submitted additional receipts for money orders payable to Calvin Turner on October 1 and 25 and December 1, 2001, March 2, April 1, June 14, November 9 and 29, 2002 and March 21, April 24 and May 21, 2003. Each money order was in the amount of \$100.00, with multiple money orders issued on some of these dates. She also submitted a copy of Mr. Turner's inmate bank account, which showed deposits on dates within a few days of the dates the money orders were issued.

At a hearing on July 22, 2004 appellant testified that she married Calvin Turner, in October 2001, while he was incarcerated, that she was still married to him, that her daughter graduated from high school before June 2003, that her daughter was supposed to enroll in college in the fall but did not and that she thought the status of her daughter was moot since her husband was her dependent. Appellant submitted a copy of her marriage license to Calvin Turner on October 29, 2001.

By decision dated November 4, 2004, an Office hearing representative found that appellant received an overpayment in the amount of \$452.00, that arose because she received augmented compensation at the 75 percent rate during a period when she had no dependents. The hearing representative found that appellant's payments to her husband did not constitute support, as she "was not responsible for her husband's ordinary and necessary living expenses while he was incarcerated; any money sent to him was for nonessential items that he was permitted to purchase while in prison." She was found to be at fault in the creation of the overpayment because she failed to furnish information about her daughter's continuing education that she knew or should have known was material and because she knowingly accepted two compensation payments that were incorrectly paid at the augmented rate. The hearing representative further found that recovery of the overpayment at the rate of \$150.00 every 28 days from appellant's regular compensation payments would allow the Office to recover the overpayment without depriving the claimant of funds to meet ordinary and necessary living expenses.

LEGAL PRECEDENT ISSUE 1

The basic rate of compensation under the Federal Employees' Compensation Act is $66\frac{2}{3}$ percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation augmented at the rate of $8\frac{1}{3}$ percent, for a total of 75 percent of monthly pay.² An unmarried child living

² 5 U.S.C. §§ 8105(a), 8110(b).

with the employee is a dependent if he or she is under 18 years of age or if he or she is under 23 years of age and is a full-time student.³ A husband is considered the employee's dependent if he is a member of the same household; or if she is receiving regular contributions from the employee for his support; or if the employee has been ordered by a court to contribute to his support.⁴ In determining dependency under the Act, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.⁵

ANALYSIS -- ISSUE 1

Appellant was receiving compensation at the augmented rate for employees with dependents at the time her daughter, who was living with her, reached 18 years of age on May 12, 2003. As evidenced by her testimony at a July 22, 2004 hearing, her daughter was not a full-time student after her eighteenth birthday on May 12, 2003. As appellant's daughter did not meet the criteria to be considered a dependent, she would be entitled to augmented compensation after May 12, 2003 only if her husband was a dependent after that date.

Through her submission of receipts for money orders, the record reveals that appellant made regular contributions to her husband since October 2001, the month in which they married.⁶ Since she remained married and continued to make regular contributions to her husband during the period for which the overpayment was declared, the only remaining question is whether her husband used the regular contributions to maintain or help to maintain a customary standard of living in prison. The record contains no evidence that would allow the Board to make an informed decision on this question. The case will, therefore, be remanded to the Office to allow appellant to submit evidence showing how her husband used the regular contributions she made to him.⁷ Following this decision, the Office should issue an appropriate

³ 5 U.S.C. §§ 8110(a)(3), 8101(17).

⁴ 5 U.S.C. § 8110(a)(2).

⁵ *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

⁶ These payments meet the requirement set for in *Walter T. Chester*, 39 ECAB 771 (1998), that the payments be made "with some degree of regularity."

⁷ This is consistent with recent cases of *Robert E. Martin*, Docket No. 02-942 (issued January 7, 2003) and *Barbara J. Haskell*, Docket No. 00-1087 (issued July 10, 2002), in which the Board remanded the case to the Office for further development on whether regular contributions for health insurance were relied upon by a husband or wife, thereby qualifying them as a dependent.

decision on whether there was an overpayment of compensation⁸ and, if so, whether appellant was at fault in its creation.⁹

CONCLUSION

The Board finds that further development of the evidence is needed to determine whether appellant's husband was a dependent within the meaning of the Act during the period for which the overpayment of compensation was declared. Given this disposition of the case and the obligation of the Office to issue a new decision on remand, the Board will not address the issues of fault and rate of recovery.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: June 16, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ To comply with the Office's procedure manual, this decision must contain "a clearly written explanation indicating how the overpayment was calculated." Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004).

⁹ The Office overpayment decision being appealed addressed fault only with regard to the dependency status of appellant's daughter.