



## **FACTUAL HISTORY**

On December 4, 1990, appellant, a 50-year-old distribution clerk, filed a Form CA-2 claim for benefits based on right carpal tunnel syndrome. The Office accepted the claim and placed her on the periodic rolls. Appellant has not worked since September 19, 1990.

In a CA-1032 form letter dated February 20, 1996, the Office advised appellant of the terms under which she would continue to receive compensation. The form letter specifically indicated, at Part C, that compensation at the augmented rate may be paid for “an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level.” Appellant completed this form and advised the Office that she had a dependent daughter who was born on October 25, 1976. In a CA-1032 form letter dated February 17, 1998, she advised the Office that her daughter completed college and started working on July 31, 1996. In a March 9, 1999 CA-1032 form letter, appellant advised the Office that she had no dependents. The Office adjusted appellant’s compensation to the statutory basic 66 and 2/3 rate, effective April 13, 1999.

By notice dated February 28, 2000, the Office advised appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$9,872.05, for the period February 1, 1996 through April 13, 1999, because she received compensation at the augmented three-fourths rate instead of the two-thirds rate to which she was entitled as a person with no dependents. The Office also determined that appellant was at fault in creating the overpayment because the Form CA-1032, which provides definitions of eligible dependents, clearly stated that a claimant with no eligible dependents should be paid at the 66 and 2/3 rate and therefore appellant knew, or should have known, that she accepted payments that were incorrect.<sup>1</sup> The Office afforded appellant 30 days in which to submit arguments, evidence and financial information and to request a telephone conference or prerecoupment hearing.

Appellant completed an overpayment recovery questionnaire on March 26, 2000 and requested a telephone conference. Appellant asserted that she was not at fault in the creation of the overpayment because she assumed that she was due the extra money she was receiving because she had been granted a schedule award. She stated that she was partially at fault for the overpayment because she incorrectly indicated on the February 17, 1998 Form CA-1032 that her daughter began to work on July 31, 1996 instead of February 1, 1996.

The telephone conference was held on October 10, 2002. The memorandum of telephone conference stated that appellant’s daughter graduated from cosmetology school in May 1996 and continued to take courses until passing a licensing examination in July 1996. Appellant further stated that her daughter became a full-time student on August 17, 1996 when she underwent training in the aviation industry. She submitted a printout from Long Beach City College, entitled “history of class records” showing that her daughter attended full-time classes in the fall 1998, spring 1999 and fall 1999 semesters. Appellant reiterated her belief that she thought she

---

<sup>1</sup> The Office noted that on February 20, 1996 appellant signed a Form CA-1032 and listed her daughter as a dependent under Part C and that on February 17, 1998 she signed a Form CA-1032 indicating that her daughter completed college on January 31, 1996 under Part C.

was entitled to the monthly payments she continued to receive without reduction because she was getting a schedule award. The Office advised her that the schedule award letter contained information that the payments were based on a 75 percent rate, a rate based on having a dependent. The Office noted that appellant had submitted information indicating that she received \$2,055.54 in net monthly compensation and monthly expenses of \$2,154.63.<sup>2</sup>

By decision dated November 7, 2003, the Office finalized its preliminary determination, with adjustments and determined that a \$8,461.41 overpayment of compensation had been created for the period between July 21, 1996 and April 13, 1999. The Office stated that the evidence of record established that appellant's daughter was a full-time student until July 21, 1996,<sup>3</sup> but was not a full-time student between July 21, 1996 and April 13, 1999. The Office indicated that the evidence appellant submitted indicated that her daughter was only a part-time student between September 28, 1998 and July 30, 1999 and that, although she became a full-time student between August 16, 1999 and December 20, 2001, she reached age 23 on October 25, 1999.<sup>4</sup> The Office adjusted appellant's compensation payments to the two-thirds rate effective April 13, 1999 and found that she was overpaid \$8,461.41 between July 21, 1996 and April 13, 1999 because her daughter was not a full-time student during that period and was employed. The Office directed recovery through withholding \$50.00 from appellant's continuing compensation payments every four weeks.

### **LEGAL PRECEDENT -- ISSUE1**

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

---

<sup>2</sup> Appellant actually listed \$2,174.63 in expenses.

<sup>3</sup> Appellant submitted an October 17, 2002 letter from the Los Angeles County Office of Education, which verified that appellant's daughter attended a cosmetology course at the Paramount School of Beauty in Paramount, California from April 1995 through July 1996, when she completed her training. The Office pegged the commencement of the overpayment date to July 21, 1996 because the letter did not indicate the exact date in July 1996 when appellant's daughter completed the course.

<sup>4</sup> The records from Long Beach City College state that appellant attended part-time in the 1998 fall semester, September 28 to December 29, 1998; part time in the 1999 spring semester, January 11 to May 25, 1999; less than half time in the 1999 summer session, June 1 to July 30, 1999; full time in the 1999 fall semester, August 16 to December 18, 1999; and full time in the 2000 spring and fall sessions.

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

<sup>6</sup> 5 U.S.C. § 8110(a)(3).

of study,<sup>7</sup> then the employee is entitled to have her basic compensation for disability augmented<sup>8</sup> to 75 percent of the monthly pay.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

In this case, the record establishes that appellant received augmented compensation based on her sole dependent, her daughter born on October 25, 1976, between July 21, 1996 and April 13, 1999. The Office properly found based on the evidence of record that appellant's daughter was a full-time student until July 21, 1996, the date she completed cosmetology school, but was not a full-time student between July 21, 1996 and April 13, 1999. Therefore, appellant was no longer entitled to receive compensation at the augmented rate during this period. The Office payroll records indicated that the Office continued to pay appellant compensation at the augmented, three-fourths rate from July 21, 1996 to April 13, 1999, which amounted to a total of \$76,849.23. Appellant, however, was only entitled to receive \$68,387.82 in compensation at the basic two-thirds rate, resulting in an overpayment the amount of \$8,461.41. Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,861.41 for the period July 21, 1996 to April 13, 1999.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of the Act<sup>10</sup> provides that an overpayment must be recovered 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." (Emphasis added.) No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>11</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:--

(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

---

<sup>7</sup> 5 U.S.C. §§ 8101(17), 8110.

<sup>8</sup> 5 U.S.C. § 8110(b).

<sup>9</sup> 20 C.F.R. § 10.403(b).

<sup>10</sup> 5 U.S.C. § 8129(a)(b).

<sup>11</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual 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>12</sup>

### **ANALYSIS -- ISSUE 2**

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected know she was not entitled.<sup>13</sup> In the instant case, appellant should have been aware as of July 1996 that she was no longer entitled to augmented compensation at the three-fourths rate when her daughter stopped taking cosmetology courses and passed the cosmetology licensing examination and began working full time. In addition, contrary to appellant’s assertion that her daughter again became a full-time student on August 17, 1996, the Long Beach City College records appellant submitted clearly indicated that her daughter was not a full-time student between July 21, 1996 and April 13, 1999. These records, which were readily accessible to appellant, should have made her aware that she was accepting a payment which was incorrect. The Office properly noted that even if appellant believed that monthly payments she continued to receive without reduction was due her because she was getting a schedule award, this was not a reasonable belief because the letter informing her that she was being granted a schedule award contained information that the payments were based on a 75 percent rate, a rate based on having a dependent which she no longer had. Upon receipt of the July 21, 1996 check, at the latest, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Instead, appellant accepted and did not question her receipt of this check and of subsequent checks in the amount of \$8,861.41 until April 13, 1999.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the checks issued by the Office from July 21, 1996 through April 13, 1999, which contained an overpayment in the amount of \$8,861.41, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$8,861.41 may not be waived.

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

Section 10.441(a) of the Office’s regulations provides:

“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

---

<sup>12</sup> 20 C.F.R. § 10.433(a).

<sup>13</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made [the Office] shall decrease later payments of compensation, taking into account the probably 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>14</sup>

### ANALYSIS -- ISSUE 3

The Board finds that the Office reasonably concluded that a repayment schedule of \$50.00 every four weeks would minimize any resulting hardship while effecting recovery of the overpayment.

Appellant completed an overpayment recovery questionnaire and provided financial information indicating that her monthly income was \$2,015.94, her compensation payment after taxes and that she paid monthly expenses of \$2,174.63. However, given the copies of receipts she submitted in support of this figure, this appeared to be an inflated amount. Appellant stated on the form that she paid \$650.00 per month in rent; the rent receipt she submitted from her landlord for the month of February 2000, indicated that she had paid \$600.00 in rent for that month; she claimed to owe \$2,298.00 on a Wells Fargo Master Card, yet the receipt from March 17, 2000 indicated a balance of \$1,442.00 and a monthly payment of \$29.00. Appellant listed over \$22,000.00 in overall credit card debt from eight credit cards, which amounted to a monthly bill of approximately \$580.00; however, she submitted copies of only six credit card receipts with payments and overall balances substantially lower than those she claimed on the form.<sup>15</sup> Other charges appeared somewhat dubious; for example, she claimed to have monthly maintenance fees on her car amounting to \$268.00. Further, appellant indicated that there were two people in her household, but did not identify the other person or indicate whether he or she contributed to the total amount of household income. Therefore, although appellant claimed that her monthly expenditures exceeded her monthly income, she failed to provide sufficiently probative documentation for this assertion.

The Board finds that the Office did not abuse its discretion in deciding to withhold \$50.00 a month from appellant’s continuing compensation in order to facilitate recovery of the

---

<sup>14</sup> 20 C.F.R. § 10.441(a).

<sup>15</sup> On her overpayment questionnaire, appellant claimed a total balance of \$6,378.00 and a monthly payment of \$134.00 on her Citibank Platinum account; the March 7, 2000 Citibank receipt appellant submitted, however, indicated a \$2,206.48 balance and a \$45.00 minimum monthly payment. She claimed a total balance of \$7,770.20 and a monthly payment of \$219.84 on her Beneficial Finance account, but the March 5, 2000 Beneficial receipt appellant submitted indicated a \$5,068.57 balance and a \$137.00 minimum monthly payment. Appellant claimed a balance of \$472.65 and a minimum monthly payment of \$30.00 on her Sears credit card; however, the March 12, 2000 receipt indicates an \$895.16 balance and a monthly minimum payment of \$22.85. Appellant claimed a balance of \$2,412.56 and a monthly payment of \$50.00 on her Providian VISA Card; however, the March 16, 2005 Providian receipt indicated a \$499.09 balance and a \$30.00 monthly minimum payment. She claimed a balance of \$2,298.00 and a minimum payment of \$45.00 on her Wells Fargo MasterCard account, but the March 17, 2000 receipt indicated a \$1,442.50 balance and a \$29.00 minimum monthly payment. Appellant also produced receipts from Capital One MasterCard, indicating a \$196.49 balance and a \$20.00 minimum payment and a \$26.10 total balance/minimum payment from a J.C. Penney credit card, but did not list these bills on her overpayment questionnaire.

overpayment. As the record establishes that appellant can repay the \$8,861.41 overpayment through a deduction of \$50.00 from her continuing compensation checks, the Office properly required repayment at this rate.<sup>16</sup>

**CONCLUSION**

The Board finds that appellant received a \$8,861.41 overpayment for the period July 21, 1996 to April 13, 1999, as appellant received augmented compensation without having any dependents as a result of the change in status of her dependent. The Board further finds that appellant was at fault in the creation of the overpayment. Additionally, the Board finds that the Office properly determined that appellant should repay the overpayment by deducting \$50.00 from each of appellant's continuing compensation checks until the overpayment is recovered.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2003 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 17, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

---

<sup>16</sup> In the present case, the Office did not specifically indicate that it considered the factors set forth by the applicable regulation in determining the rate of repayment. The Board finds, however, that in light of the financial information submitted by appellant, recovery of \$50.00 per month would not create a financial hardship.