

exposure to chemical fumes. Appellant was placed on the periodic roles as of November 13, 1991 at the rate of 75 percent.

Appellant completed Form CA 1032 requested by the Office dated January 4, 1999, reflecting that he was married and that he was claiming additional compensation because of his dependent wife. The form signed by appellant detailed the conditions under which he was to receive additional compensation for his wife. He certified under part "G" that he understood that he was required to report immediately to the Office any change in the status of claimed dependents.

On March 26, 1999 the Office made a wage-earning capacity determination, finding that appellant's pay rate on March 30, 1991, the date his disability began, was \$1,298.00 per week; that his wage-earning capacity was \$662.38; and that his four-week compensation at 75 percent was \$2,223.00. By letter dated June 1, 2000, the Office suspended appellant's benefits because he had failed to return his annual CA-1032 form. Appellant submitted his CA-1032 form on May 29, 2001 indicating that he was not married and that he had obtained a divorce in February 2001. The record contains a certified copy of a Decree of Dissolution of Marriage reflecting that appellant was divorced effective January 14, 1999.

Worksheets prepared by the Office reflect that from January 14, 1999 through June 1, 2000, appellant was paid compensation at the rate of 75 percent in the total amount of \$39,555.63. Further, calculations reflect that at the rate of 66 2/3 percent, he should have received total compensation for the same period in the amount of \$36,356.05, thereby creating an overpayment in the amount of \$3,199.63.

On February 20, 2004 the Office issued a preliminary determination that appellant was at fault in the creation of an overpayment in the amount of \$3,199.63 for the period January 14, 1999 through June 1, 2000, because he knew or should have known that he was not entitled to receive compensation at the augmented 75 percent rate after he was divorced.

By decision dated May 28, 2004, the Office finalized the determination that an overpayment in compensation in the amount of \$3,199.63 had been created. The Office found appellant to be at fault and determined that the overpayment would be repaid by withholding \$50.00 from his periodic compensation payment until the debt was resolved.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, the basic compensation rate for total disability.² Under section 8110 of the Act, entitled augmented compensation for dependents, an employee is entitled to compensation at the

¹ 5 U.S.C. § 8102(a).

² *Id.* at § 8105(a). See also *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

augmented rate of 75 percent of his or her weekly pay if he or she has one or more dependents.³ In pertinent part, section 8110 provides that the term “dependent” includes a wife while living with the employee, receiving regular contributions from the employee towards her support or if the employee has been ordered by a court to contribute to her support.⁴

If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly determined the fact of overpaid compensation in this case. However, the Board finds that the case is not in posture for a decision on the amount of overpayment.

Appellant was placed on the periodic roles as of November 13, 1991 at the rate of 75 percent, based upon his representation that he was married. During the period in question, January 14, 1999 through June 1, 2000, appellant continued to receive augmented compensation based on the 75 percent compensation rate. However, the evidence of record is clear that he was divorced effective January 14, 1999 and, therefore, not entitled to receive augmented compensation after that date.

The difference between the two-thirds compensation rate appellant should have received and the augmented or three-fourths compensation rate he did receive the period in question, constitutes an overpayment of compensation. Therefore, the Board finds that the Office correctly determined the fact of overpayment in this case.

On appeal, appellant does not contest the fact that he was overpaid. However, he alleges that the overpayment was repaid due to the Office’s incorrect calculations of his compensation. Appellant states that subsequent to the Office’s overpayment decision, he began receiving compensation and continues to receive compensation at the rate of \$1,738.00 every 28 days. As appellant was receiving compensation at the 75 percent rate of \$2,320.00 prior to the Office’s overpayment decision, he contends that his compensation should have been reduced to a two-thirds rate of \$2062.00. Therefore, according to appellant’s calculations, he has been

³ 5 U.S.C. § 8110.

⁴ 5 U.S.C. § 8110(a)(1).

⁵ *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

⁶ 5 U.S.C. § 8129.

underpaid by \$324.00 per month since the date of the overpayment calculation and the overpayment was repaid within the first 10 months. It is unclear from the record how the Office arrived at a revised payment of \$1,738.00 after its overpayment determination. Appellant correctly notes that a straight mathematical calculation of compensation at the 75 percent rate and at the two-thirds rate indicates that subsequent rate should have been \$2062.22. The Board finds that this case is not in posture for a decision regarding the amount of overpayment and must be remanded to the Office for a determination of appellant's correct pay rate and recalculation of overpayment if necessary.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8129 of the Act and the implementing regulations, 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.⁷

Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ The regulation further provides that 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.⁹ The Office may 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 with respect to 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; (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 (this provision applies only to the overpaid individual).¹⁰

ANALYSIS -- ISSUE 2

In determining that appellant was at fault in the creation of the overpayment, the Office found that he accepted payments for the period January 14, 1999 through June 1, 2000 that he knew or should have known were incorrect. The Office based its finding on appellant's certification that he understood that he was required to report immediately to the Office any change in the status of claimed dependents.

⁷ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436-437.

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

¹⁰ *Id.*

On January 4, 1999 when appellant signed Form CA 1032, he was aware that his divorce was imminent and that his status would change upon entry of the final decree of divorce. However, he did not inform the Office of his impending divorce or notify the Office when the divorce subsequently became final on January 14, 1999. The Board finds that appellant was on notice by virtue of his acknowledgment on Form CA-1032 that he was obligated to inform the Office of any change in status and that he knew or should have known that he was accepting payments which were incorrect.¹¹ The Board further finds that appellant was at fault in accepting the overpayment in compensation and is, therefore, not entitled to waiver.¹²

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 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.¹³

ANALYSIS -- ISSUE 3

In that a determination cannot be made at this time regarding the amount of overpayment, the Board finds that the case is not in posture for a decision with respect to the repayment schedule.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation as appellant received augmented compensation during the period January 14, 1999 through June 1, 2000, when he had no dependents. The Board further finds, however, that the case is not in posture for a decision regarding the amount or a repayment schedule. The Board also finds that the Office properly determined that appellant was at fault in creation of the overpayment and that, therefore, it was not subject to waiver.

¹¹ See *Henry Baskin*, 53 ECAB 719 (2002).

¹² 20 C.F.R. § 10.433(a); *Grady A. Tubbs*, 53 ECAB 460 (2002).

¹³ 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2004 decision of the Office of Workers Compensation Programs is affirmed in part and remanded in part in accordance with the terms of this order. The Office shall issue a *de novo* decision in order to protect appellant's rights of appeal.

Issued: November 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board