

strain and temporary aggravation of mixed personality disorder. She received periodic compensation at the 75 percent augmented rate for dependents.

On August 2, 1995 the Office received a physical therapy note indicating that appellant called on May 5, 1995 to cancel an appointment because her husband had passed away. On a Form EN1032 dated August 15, 1995 appellant reported that she was widowed and no longer claiming a dependent as of June 1995. Although she repeatedly documented that she was no longer claiming a dependent due to her husband's death, the Office continued to pay compensation at the augmented rate for dependents through October 2, 2004.

On January 19, 2005 the Office made a preliminary determination that appellant received an overpayment of \$22,421.50 from May 6, 1995 through October 2, 2004, because she received augmented compensation after her husband passed away. The Office found that she was without fault in creating the overpayment because she repeatedly documented that she was no longer claiming her husband as a dependent. The Office asked her to submit an overpayment recovery questionnaire, together with supporting financial documents, to help determine whether she was eligible for waiver and, if not, to decide how to collect the overpayment. The Office informed her that waiver would be denied if she failed to furnish the information requested within 30 days.

In a decision dated March 2, 2005, the Office finalized the overpayment determination. The Office noted that appellant did not respond to the January 19, 2005 request for financial information: “[She] has not responded to our finding. She has not requested a conference, a waiver or submitted any financial data which would support a request for waiver.” The Office noted that she was receiving benefits for temporary total disability in the amount of \$1,590.00 every 28 days. The Office also noted that there was no indication that she would be unable to repay the debt in the amount of \$150.00 every 28 days, which would be less than 10 percent of her net payment. The Office determined, however, that recovery would be made by deducting \$200.00 from her continuing compensation payments beginning March 19, 2005.

On March 4, 2005 the Office received appellant's completed overpayment recovery questionnaire and supporting financial documents. The Office held a conference call with her on March 18, 2005 to discuss the information provided. The Office advised that her reported expenses of \$5,538.44 a month seemed excessive, but she stated that she did have all the relevant bills. Appellant added that she received \$94,145.48 from a home equity loan but used the money for home repairs and to pay off bills. The Office wrote appellant on March 21, 2005 to request documentation supporting the bills claimed and her use of the \$94,145.48. The Office notified her that she had 15 days to submit the financial documents requested.

In a decision dated April 11, 2005, the Office denied waiver. Noting no response from appellant, the Office found that her expenses were excessive and not sufficiently documented. The Office also found that there was no documentation that she no longer had the \$94,145.48 from her home equity loan. The Office observed that appellant's compensation check every 28 days was \$1,643.00 and that a deduction of \$200.00 was only 12 percent of that amount.

On appeal, appellant states that she submitted the financial documents requested, but the Office did not receive them until April 12, 2005 and the claims examiner informed her that they were submitted too late for review.

LEGAL PRECEDENT -- ISSUE 1

A disabled employee is entitled to compensation equal to two-thirds of her monthly pay, if disability is total.¹ A disabled employee with one or more dependents is entitled to have her basic compensation for disability augmented, so that her compensation is equal to three-fourths of her monthly pay.²

ANALYSIS -- ISSUE 1

Appellant does not contest that she received an overpayment of compensation. The Office paid her compensation at the augmented rate for a dependent after her husband passed away on May 5, 1995. Although she repeatedly reported that she was no longer entitled to compensation for a dependent, the Office continued to make payments at the augmented rate through October 2, 2004. Because the Office paid her more compensation than she was entitled to, the Board finds that appellant received an overpayment.

According to information in the record, the Office paid gross compensation of \$199,793.29 from May 6, 1995 through October 2, 2004. This was compensation paid at the 75 percent augmented rate for dependents. At the correct statutory rate, or two-thirds of her monthly pay, the Office should have paid gross compensation of \$177,371.79. The Board therefore finds that appellant received an overpayment of \$22,421.50 from May 6, 1995 through October 2, 2004. The Board will affirm the Office's March 2, 2005 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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.³ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless

¹ 5 U.S.C. § 8105(a).

² *Id.* § 8110(b).

³ 20 C.F.R. § 10.433(a) (1999).

(1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁴

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁵ Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁶

ANALYSIS -- ISSUE 2

The Office found appellant to be without fault in the creation of the overpayment, as she had reportedly advised it of her husband's death and that she did not claim augmented benefits.⁷ The Office must, by statute, recover the overpayment by decreasing appellant's compensation payments unless she is entitled to waiver. To this end, the Office duly notified appellant on January 19, 2005 that she had 30 days to submit an overpayment recovery questionnaire and supporting financial documents. The Office properly informed her that it would deny waiver if she failed to submit the requested financial information within that time. After 42 days without a response, the Office issued a final decision denying waiver. Regulations specify that failure to submit the requested information within 30 days "shall result in denial of waiver." The Board will therefore affirm the Office's March 2, 2005 decision on the issue of waiver.

The Office later received appellant's completed overpayment recovery questionnaire and financial documents on March 4, 2005. She listed \$3,233.97 in monthly income, including Social Security benefits, her husband's annuity and her workers' compensation benefits. She

⁴ *Id.* Section 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* Section 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* Section 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* Section §10.437(b).

⁵ *Id.* § 10.438(a).

⁶ *Id.* § 10.438(b).

⁷ The fact that the Office was negligent in paying appellant compensation at the augmented rate after notifying it that her dependent status had changed, does not preclude the Office from recovering the overpayment. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Larry D. Strickland*, 48 ECAB 669 (1997).

listed \$4,436.11 in monthly expenses,⁸ including \$275.00 for food, \$100.00 for clothing, \$325.00 for utilities and \$263.37 for hospitalization. She listed 27 creditors, outstanding balances totaling \$143,403.18, one monthly rental and monthly payments totaling \$4,101.52.

Appellant explained that her debts were higher than her income. A bank statement for the period January 25 to February 22, 2005 showed deposits and credits of \$3,155.34, including a Social Security check for \$1,122.00 and other deposits of \$521.97, \$468.00 and \$1,043.24. Checks and debits were \$4,708.50. Her 2004 federal income tax return showed \$8,251.00 in adjusted gross income. Itemized deductions included \$5,418.00 in medical and dental expenses, \$2,695.00 in state and local income taxes and real estate taxes, \$6,981.00 in home mortgage interest and \$250.00 in gifts to charity, for a total of \$15,344.00.

As noted, the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. The overpayment recovery form is designed to obtain this information and the Office properly requested extensive documentation in support of the statements made on the questionnaire.⁹ When appellant submitted no bills or canceled checks to support the specific monthly expenses itemized on her questionnaire, the Office correctly followed procedures by conferencing the case and requesting that additional documentation be submitted.¹⁰

Appellant stated during the conference call that she had all the relevant bills, but she did not submit them within the additional time allowed. The issue of waiver must therefore be judged by the evidence that was before the Office at the time of its April 11, 2005 decision. The Board finds that the documents submitted with appellant's overpayment recovery questionnaire did not support the recurring expenses claimed. Appellant submitted no documentation to support how she spent the \$94,145.48 she received from her home equity loan. The Office reasonably requested that she submit this documentation by April 5, 2005. The Board finds that the Office properly denied waiver when it received no response by April 11, 2005. The Board will affirm the Office's April 11, 2005 decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that, when an overpayment has been made to an individual 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 the individual is entitled.¹¹ The implementing regulations provide that 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 same. If no

⁸ This total includes yearly amounts for property tax, automobile insurance and homeowner's insurance divided by 12.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a.4(b) (October 2004).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8129(a).

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.¹²

ANALYSIS -- ISSUE 3

In setting the rate of recovery at \$200.00 from appellant's continuing compensation, the Office considered how much compensation she was receiving every 28 days and what percentage of that compensation recovery would consume. Because the Office properly took into account relevant factors so as to minimize any hardship under the circumstances, where appellant failed to submit the financial documentation requested, the Board will affirm the Office's March 2 and April 11, 2005 decisions on the issue of rate of recovery.

CONCLUSION

The Office properly determined that appellant received an overpayment of \$22,421.50 from May 6, 1995 through October 2, 2004. The Office properly denied waiver on the grounds that she failed to submit the requested information within the time allowed and when it did receive some information, properly denied waiver based on the insufficiency of that evidence. Further, the Office properly considered relevant factors in setting the rate of recovery so as to minimize any hardship under the circumstances. The Board will affirm the Office's March 2 and April 11, 2005 decisions on all the issues decided.

¹² 20 C.F.R. § 10.441(a) (1999).

ORDER

IT IS HEREBY ORDERED THAT the April 11 and March 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.¹³

Issued: October 13, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹³ On return of the case record, the Office should review the documentation it received on April 12, 2005, together with any additional documentation submitted and further consider appellant's request for waiver. *See* 20 C.F.R. § 10.438(b) ("no further request for waiver shall be considered *until the requested information is furnished*") (Emphasis supplied).