

FACTUAL HISTORY

On May 6, 1996 appellant, then a 47-year-old air traffic controller, filed two traumatic injury claims attributing his emotional condition to witnessing fatal airplane crashes on April 12 and 16, 1996. The Office developed his claim as an occupational disease and accepted that appellant developed post-traumatic stress disorder on October 23, 1996. The Office entered appellant on the periodic rolls on November 4, 1996 at the augmented rate. Appellant listed his dependents as his wife and his stepdaughter, Jennifer M. Shelow, who was born April 22, 1983.

Appellant returned to light-duty work. The Office issued decisions dated May 22, 1998 and August 30, 1999 reducing appellant's compensation benefits to reflect his actual earnings as a support specialist with a loss of wage-earning capacity of \$173.49 per week entitling him to compensation of \$130.21 per week plus cost-of-living adjustments for total weekly compensation of \$134.00.

Appellant continued to complete EN1032 forms attesting to his marriage from June 29, 1999 through June 8, 2003. On a form report dated June 10, 2004 appellant indicated that he was no longer married and no longer had dependents. He stated that his dependent graduated on June 9, 2004. In a letter dated February 17, 2005, the Office informed appellant that augmented compensation benefits for his dependent were scheduled to stop on the date she became 18. The Office requested information regarding any continuing education following high school. He did not respond to this request. Appellant completed EN1032 forms on August 3, 2005 and May 9, 2006 indicating that he was not married and did not have any other dependent.

In a letter dated August 29, 2006, the Office provided appellant with preliminary notice that he had received an overpayment of compensation in the amount of \$640.36 from June 9, 2004 through March 19, 2005, because his child and dependent graduated on June 9, 2004. The Office found that he was at fault in the creation of the overpayment as he continued to accept compensation payments at the augmented rate. The Office noted that appellant received augmented compensation in the amount of \$6,089.15 during the period June 9, 2004 through March 19, 2005 and that he was entitled to receive basic compensation benefits in the amount of \$5,448.79 during this period. The Office concluded that appellant received an overpayment in the amount of \$640.36.

Appellant replied on September 18, 2006 and indicated that he disagreed that the overpayment occurred. He stated that his dependent graduated high school on June 9, 2004 and that she then became a full-time student at Miami Dade College. Appellant stated that his dependent finished her associate degree on July 17, 2006.

By decision dated January 5, 2007, the Office found that appellant had received an overpayment of compensation in the amount of \$640.36. It concluded that he was at fault in the creation of the overpayment as he accepted a payment which he knew or reasonably should have known was incorrect. The Office noted that appellant alleged that his dependent was a full-time student and received her associate degree in 2006. However, it stated that appellant failed to claim a dependent after June 9, 2004 and found that there was no evidence supporting appellant's

claim of an eligible dependent after that date. The Office determined to deduct \$400.00 from appellant's monthly compensation benefits beginning December 24, 2006.¹

LEGAL PRECEDENT -- ISSUE 1

The Federal Employee's Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² 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, which is known as his basic compensation for total disability.³ Under section 8107 of the Act, an employee is entitled to compensation at the augmented rate of 3/4 of his weekly pay if he has one or more dependents. A child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.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 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁵

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation has been created because appellant was paid compensation at a rate applicable to compensationers with dependents after he had no dependents. On forms dated June 29, 1999 through June 8, 2003 appellant listed his wife as a dependent. On a form report dated June 10, 2004, he indicated that he was no longer married and no longer had dependents. Appellant stated that his dependent graduated on June 9, 2004.

Appellant alleged that his dependent graduated high school on June 9, 2004 and that she then became a full-time student at Miami Dade College. He stated that his dependent finished her associates degree on July 17, 2006. The Board notes that appellant's dependent of record was born April 22, 1983 and thus, was 21 years old in 2004. Appellant did not offer any explanation for his dependent's delay in finishing high school and did not comply with the Office's February 17, 2005 request regarding his dependent's educational status. The Board

¹ Following the Office's January 5, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8105(a); see also *Ralph P. Beachum, Sr.*, 55 ECAB 442,445 (2004).

⁴ 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405.

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).

finds that appellant's unsupported allegation that his daughter had not finished high school in 2004 is not persuasive evidence that his dependent was a full-time student in an approved program for any period after June 9, 2004.

The Office continued to pay appellant compensation at the augmented rate from June 9, 2004 through March 19, 2005. Thus, the \$640.36 difference between the \$6,089.15 augmented payment in compensation that appellant received and the \$5,448.79, based on basic compensation that he should have received constituted an overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides: Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act of would be against equity and good conscience."

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 received 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; or (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).⁷

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard under section 10.433, finding appellant at fault in creation of the overpayment as he knew or should have known he was not entitled to receive augmented compensation if he had no eligible dependents for the period June 9, 2004 through March 19, 2005.

The Board finds that appellant had actual notice of the criteria for student dependents, as they were set forth in the Forms EN1032 that he signed and returned from 1999 through June 10, 2004. The Office advised appellant of these eligibility requirements in the February 17,

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

2005 letter. The Board finds that appellant knew his daughter's age and the date when she graduated June 4, 2004.

Therefore, the Office's finding of fault is correct under the facts and the circumstances of this case, as appellant should have been aware of the criteria for student dependents and his daughter's enrollment status.

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.⁹

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 January 5, 2007 overpayment decision. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.¹⁰ 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.¹¹

As appellant did not submit any financial information to the Office as requested, the Board finds that there is no evidence in the record to show that a recovery rate of \$400.00 every 28 days was unreasonable. He has not shown that the Office improperly required withholding \$400.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$640.36, as he received augmented compensation from June 9, 2004 to March 19, 2005 when he had no dependents. The Board further finds that appellant was at fault in the creation of the overpayment. The Board finds that the Office properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days.

⁹ 20 C.F.R. § 10.441(a).

¹⁰ 20 C.F.R. § 10.438.

¹¹ *Beachum, supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board