

FACTUAL HISTORY

On January 19, 1995 appellant, then a 46-year-old analyst, filed a traumatic injury claim alleging that he sustained a back injury at work on January 18, 1995. The Office accepted the claim for subluxations of the cervical spine at C6-7, the thoracic spine at T5-7 and the lumbar spine at L4-5. Appellant underwent surgery on May 12, 1995 and was placed on the periodic rolls in receipt of compensation for total disability. The Office has not accepted that his right knee and emotional conditions are related to the January 18, 1995 employment injury. Appellant has not worked since January 19, 1995. In a periodic request for compensation (Form CA-7), he indicated that his son, Aaron Andrew Burton, date of birth May 18, 1982, was a dependent. Consequently, appellant received compensation at the three-fourths augmented rate.

In EN1032 form letters dated June 25, 1998 and continuing, the Office advised appellant of the terms under which he would continue to receive compensation. The form letter stated at Part C, that compensation at the augmented rate may be paid for an unmarried child who lives with the claimant and is under 18 years of age; who is 18 or over, but who cannot support himself or herself because of mental or physical disability; and who is under 23 years of age and a full-time student who has not completed four years of school beyond the high school level.

In a Form EN1032 dated July 31, 2000, appellant claimed his son was a dependent. In a Form EN1032 dated June 5, 2001, he advised the Office that his son was married on February 17, 2001 and appellant no longer claimed him as a dependent.¹ In subsequent EN1032 forms dated May 14, 2002, June 1, 2003, May 22, 2004 and May 25, 2005, appellant advised the Office that he had no dependents.

In a letter dated August 5, 2005, the Office noted that appellant's son was to turn 18 years old on May 18, 2000. He was requested to provide his son's status regarding graduation from high school, attending college, marriage, *etc.*, since May 18, 2000. If appellant's compensation should have been reduced to the statutory two-thirds rate on May 18, 2000, then his future compensation, effective August 7, 2005, would be paid at the statutory rate.

By notice dated October 6, 2005, the Office advised appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$21,325.55, for the period February 17, 2001 to August 6, 2005, because he received compensation at the augmented three-fourths rate instead of the basic two-thirds rate to which he was entitled as a person with no dependents. The Office also determined that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. The Office afforded appellant 30 days in which to submit arguments, evidence and financial information and to request a telephone conference or prerecoupment hearing. He did not respond.

By decision dated November 7, 2005, the Office finalized the \$21,325.55 overpayment of compensation for the period February 17, 2001 to August 6, 2005, for which appellant was at fault. It found that appellant accepted wage-loss compensation which he knew or should of

¹ Appellant did not indicate the nature of his son's dependent status from May 18, 2000, his 18th birthday, until February 17, 2001.

known to be incorrect. The Office directed recovery through withholding \$400.00 from appellant's continuing compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 1

Section 8105 of the Federal Employees' Compensation Act provides that, if the disability is total, compensation is payable at 66 2/3 percent of the monthly pay or basic compensation for total disability.² However, if a disabled employee has a dependent, defined to include an unmarried child under 18 years of age³ or a student who is regularly pursuing a full-time course of study,⁴ then the employee is entitled to have his basic compensation for disability augmented⁵ to 75 percent of the monthly pay.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment in compensation in the amount of \$21,325.55, for the period February 17, 2001 to August 8, 2005.

The record establishes that appellant received augmented compensation at the three-fourths rate for a claimant with dependents from February 17, 2001 to August 8, 2005.⁷ Appellant acknowledges that he did not have an eligible dependent during this period. He noted on the EN1032 form dated June 5, 2001 that his son was married on February 17, 2001 and did not claim any dependents on his subsequent EN1032 forms dated May 14, 2002, June 1, 2003, May 22, 2004 and May 24, 2005. As of February 17, 2001, when his son was married, appellant was no longer eligible to claim him as a dependent. However, the Office erroneously continued to pay compensation at the augmented three-fourth rate. As a result of this error, appellant received an overpayment in the amount of \$21,325.55. This was based on the difference between the \$193,816.12 in compensation appellant received at the augmented rate and \$172,480.57 he should have been paid at the 66 2/3 statutory rate.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows: Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without

² 5 U.S.C. §§ 8101-8193, 8105.

³ 5 U.S.C. § 8110(a)(3). *See also* 5 U.S.C. § 8101(9) (provides that the term "child" means one who is under 18 years of age or over that age and incapable of self-support ... but does not include married children.)

⁴ 5 U.S.C. §§ 8101(17), 8110.

⁵ 5 U.S.C. § 8110(b).

⁶ 20 C.F.R. § 10.403(b).

⁷ Although the record also establishes that appellant received augmented compensation for the period May 18, 2000, the date his son turned 18, to February 16, 2001, the Office has not issued a decision on whether an overpayment of compensation occurred. Thus, this issue is not before the Board.

fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁸ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁹

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁰

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part: (b) 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.¹¹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that he was with fault in creating the overpayment of compensation, the Office must establish that, at the time he received the compensation in question, he knew or should have known that the payments were incorrect.¹² The record establishes such knowledge.

The Board notes that, where an overpayment results from negligence on the part of the Office, this does not excuse the employee from accepting payments he knew or should have known to be incorrect.¹³ On appeal appellant contends that he informed the Office on June 5, 2001 in an EN1032 form that his son was no longer a dependent and noted that his son was married on February 17, 2001. Therefore, appellant knew that, as of February 17, 2001, the date of his son's marriage, he was no longer entitled to compensation at the augmented three-fourths rate. Additionally, he regularly completed a Form EN1032, which states that a claimant must immediately inform the Office of any change in the status of claimed dependents. The form also states that claimants without dependents would be paid at the statutory two thirds rate. Appellant was aware of these provisions, as shown by his notice to the Office that his son's dependent

⁸ 5 U.S.C. § 8129(b).

⁹ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁰ *Kenneth E. Rush*, 51 ECAB 116 (1999).

¹¹ 20 C.F.R. § 10.433(b).

¹² *See Claude T. Green*, 42 ECAB 174 (1990).

¹³ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

status had changed on the EN1032 form dated June 5, 2001. The Board finds that he knew or should have known that he was accepting incorrect payments following his son's marriage on February 17, 2001. In this case, he accepted compensation at the augmented rate from February 17, 2001 to August 6, 2005, approximately four and a half years. Upon receipt of the compensation at the augmented rate after February 17, 2001, appellant had a duty to return payments made at the augmented rate. Instead, he accepted payments made at the augmented rate from February 17, 2001 through August 5, 2005, resulting in an overpayment of \$21,325.55.¹⁴ The fact that the Office was negligent in issuing such payments does not excuse appellant's knowledge that the payments he accepted were incorrect.

The Board finds that the Office properly found that appellant knew or should have known that compensation paid from February 17, 2001 to August 5, 2005 was incorrect. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$21,325.55 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 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."¹⁵

ANALYSIS -- ISSUE 3

With respect to the \$400.00 withheld from appellant's continuing compensation payments to recoup the amount of the outstanding payment, the Office regulation notes the factors to be considered in determining repayment from continuing compensation.¹⁶ The implementing regulation provides that the Office must take 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.¹⁷

¹⁴ *Otha J. Brown*, 56 ECAB ____ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004); *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁵ 20 C.F.R. § 10.441(a).

¹⁶ *Id.*, See *Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

¹⁷ *Id.*

At the time of the Office's November 7, 2005 decision, the Office had not received any response to the preliminary overpayment notice.¹⁸ The Board notes that it is the responsibility of the overpaid individual to submit financial information used to determine a repayment schedule.¹⁹ As appellant submitted no financial data, there is no evidence in the record to suggest that recovery of the overpayment by deducting \$400.00 from each of appellant's continuing compensation checks until the overpayment is recovered would result in financial hardship. Consequently, the Office properly set the rate of recovery from continuing compensation payments.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$21,325.55 overpayment of compensation from February 17, 2001 to August 6, 2005 as he received augmented compensation without having an eligible dependent. The Board further finds that appellant was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment. Additionally, the Board finds that the Office properly determined that appellant should repay the overpayment by deducting \$400.00 from each of appellant's continuing compensation checks until the overpayment is recovered.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2007
Washington, DC

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

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

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

¹⁸ On November 8, 2005, following the November 7, 2005 decision, the Office received appellant's overpayment recovery questionnaire. 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).

¹⁹ *See* 20 C.F.R. § 10.438(a).