

FACTUAL HISTORY

On July 19, 1976 appellant, then a 41-year-old clerk, injured both wrists when she dropped a postage meter. The Office accepted that she sustained an employment-related strain of both arms and wrists and bilateral carpal tunnel syndrome. Appellant sustained a recurrence of disability on December 2, 1976 and did not return to work. She received compensation at the augmented three-fourths rate and on September 10, 1984 the Office expanded the claim to include an employment-related emotional condition. On August 21, 1995 appellant submitted a form authorizing that her compensation payments should be directly deposited. By letters dated April 24, 2003 and May 28, 2004, she informed the Office that her husband died on March 26, 2003 and included a copy of his death certificate. Office EN1032 forms contained in the record indicated that she has no other dependents. Compensation payments at the two thirds rate became effective August 8, 2004.

On August 12, 2004 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$4,987.14, for the period March 27, 2003 through August 7, 2004 because she continued to receive disability compensation at the augmented three-fourths rate after her husband's death. The Office found appellant to be at fault in the creation of the overpayment because she reasonably should have been aware that she was not entitled to receive augmented compensation. Office forms and printouts contained in the record provide that, during this period, appellant received compensation at the three-fourths rate totaling \$44,817.85 and that compensation at the two-thirds rate would total \$39,830.71, which yielded an overpayment in compensation of \$4,987.14. In a September 16, 2004 letter, appellant stated that, since she had timely informed the Office of her husband's death, the overpayment was created by negligence on the Office's part and advised that it would be a financial hardship to repay the debt.

A telephone conference was held on August 17, 2006 between an Office claims examiner and appellant. Appellant was informed that her overpayment was being finalized, that she would be found at fault and that repayment would be deducted from her continuing compensation. The conference memorandum stated that she would repay the overpayment and that she could afford a repayment of \$200.00 per compensation period. By decision dated August 17, 2006, the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$4,987.14, because she should have known that she was not entitled to receive wage-loss compensation at the augmented three-fourths rate after her husband's death on March 26, 2003. Appellant was advised that repayment would be made by deducting \$200.00 every four weeks from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal

¹ 5 U.S.C. §§ 8101-8193.

injury sustained while in the performance of his duty.² Section 8129(a) of the Act provides, in pertinent part:

“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.”³

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee’s monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.⁴ Section 8110(a)(2) of the Act provides that a husband qualifies as a dependent if he is a member of the same household as the employee, is receiving regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation in the amount of \$4,987.14. The record supports that appellant continued to receive compensation at the augmented three-fourths rate after her husband’s death on March 26, 2003 until August 17, 2004 and she had no other dependents. For this period she received augmented compensation in the amount of \$44,817.85. As appellant was not entitled to compensation at the augmented rate after the death of her husband, she should have received compensation of \$39,830.71. The Office properly found that an overpayment in compensation in the amount of \$4,987.14 had been created.⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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

² 5 U.S.C. § 8102(a).

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8110(b).

⁵ 5 U.S.C. § 8110(a)(2); *see Nancy J. Masterson*, 52 ECAB 507 (2001).

⁶ 5 U.S.C. §§ 8101, 8110.

⁷ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulation provides that 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 in 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).”⁸

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.⁹

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$4,987.14 overpayment, the Office stated that she should have known that the payments she received by direct deposit for the period March 27, 2003 through August 7, 2004 were not proper because they were at the augmented three-fourths rate and, as she had no dependents after her husband's death on March 26, 2003, she was only entitled to compensation at the two-thirds rate.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁰ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.¹¹ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from

⁸ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁹ *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

¹⁰ *William E. McCarty*, 54 ECAB 525 (2003).

¹¹ *See Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹²

In this case, appellant continued to receive augmented compensation by direct deposit from the time of her husband's death on March 26, 2003 until August 7, 2004. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.¹³ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period and the case must be remanded for the Office to determine whether she is entitled to waiver for this period.

By her own admission, appellant acknowledged that she was not entitled to augmented compensation. Thus, after her receipt of the first direct deposit for which fault may not be imputed to her, under the reasonableness standard delineated above, for the subsequent direct deposits appellant knew or should have known that the compensation paid by direct deposits issued by the Office after the first direct deposit subsequent to her husband's death on March 26, 2003 were in error and the Board finds that she was at fault under the third standard outlined above for any period after the first direct deposit after her husband's death. Recovery of the overpayment in compensation may not be waived for this time period and the decision dated August 17, 2006 is affirmed in this respect. The record in this case, however, does not show when appellant's individual direct deposits were made. As she was not at fault for the first direct deposit after March 26, 2003, the case must be remanded to the Office to determine the exact period appellant would not be at fault and would thus, be entitled to waiver.

Based on the Board's determination in the second issue in this case, issue three need not be addressed at this time.¹⁴

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$4,987.14 had been created and that appellant was at fault for the overpayment period commencing subsequent to the first direct deposit after appellant's

¹² See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹³ See *Karen K. Dixon*, *supra* note 11.

¹⁴ Regarding appellant's argument on appeal that she should not have to pay interest, the Board notes that the statutory authority for the Office to charge interest on an overpayment is found in 31 U.S.C. § 3717(a)(1) and (g)(1). Section 3717(a)(1) provides in relevant part that the head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person. Subsection (g)(1) states that section 3717 does not apply if a statute, regulation required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges. Since the Act does not prohibit the charging of interest on overpayments, the Office has the requisite statutory authority to assess interest on an overpayment and the Office did not abuse its discretion by charging interest in this case. 5 U.S.C. § 3717(a)(1), (g)(1); see *Jorge O. Diaz*, 51 ECAB 124 (1999).

husband's death but was not at fault for the first direct deposit of compensation. The case is remanded for a determination of whether she would be entitled to waiver for this brief period.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2006 be affirmed in part, vacated in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: March 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