

**United States Department of Labor  
Employees' Compensation Appeals Board**

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S.M., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Airville, PA, Employer )

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**Docket No. 07-1355  
Issued: April 2, 2008**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 25, 2007 appellant, through counsel, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 17, 2007 finding an overpayment of compensation in the amount of \$2,263.75. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,263.75, for which she was found to be without fault, because she received compensation at the augmented rate; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly required repayment by deducting \$100.00 every four weeks from her continuing compensation.

**FACTUAL HISTORY**

On September 10, 2002 appellant, then a 37-year-old mail carrier, sustained injury to her low back, abdomen, right shoulder and neck when a truck ran into her jeep while she was

delivering mail. The Office accepted the claim for cervical strain and right shoulder strain, an aggravation of spondylolisthesis and degenerative disc disease and recurrent major depressive disorder in partial remission. Appellant underwent surgery on January 24, 2003 for an L5-S1 lumbar fusion. The Office placed appellant on the periodic rolls for temporary total disability beginning September 5, 2004.

On September 29, 2006 appellant completed a request for information (Form EN1032) indicating that she was married but her spouse did not live with her and she did not provide him with any support. She and her spouse separated on December 21, 2005. The form explained that compensation is paid at 66 2/3 percent of the applicable pay rate if the beneficiary has no dependents and 75 percent for a claimant with one or more dependents and provided the definition of an eligible dependent.

In a letter dated October 5, 2006, the Office advised appellant that her compensation was being reduced as she had no qualifying dependents for the augmented rate of 75 percent. Appellant would receive compensation at the statutory rate of 66 2/3 percent. She was advised that she was paid compensation at the augmented rate of 75 percent for the period December 21, 2005 through September 30, 2006 in the amount of \$20,421.85 when she should have been paid at the 66 2/3 rate in the amount of \$18,158.10. The Office informed appellant that the difference between what she was incorrectly paid and the correct payment resulted in an overpayment of \$2,263.75.

In a letter dated March 6, 2007, the Office made a preliminary determination that an overpayment of \$2,263.75 was created from December 21, 2005 to September 30, 2006. The Office explained that appellant was paid at the augmented compensation rate, but she did not have any dependents during that period. The Office determined that appellant was not at fault. Appellant was advised to complete the enclosed overpayment recovery questionnaire (Form OWCP-20), and to attach supporting financial documents, such as bank account statements and bills, to support the income and expenses listed.

The Office received a completed Form OWCP-20 dated March 13, 2007. Appellant reported \$2,910.00 in income, \$1,939.51 in available funds and \$3,343.00 in expenses. She noted that she had approximately \$15,600.00 in a credit union account, but that this money was to be returned to Erie Insurance and enclosed a letter from March 29, 2007 letter from Erie Insurance. Appellant did not provide any supporting financial documents, stating on the form that she did not have any documents. She requested waiver of the recovery of the overpayment and that the Office make a decision on the written record.

In a letter dated April 10, 2007, the Office requested that appellant clarify the rental apartments owned jointly with her husband and her involvement in the management of the rental apartments since December 21, 2005. The Office noted that she failed to list the income and expenses from this rental property on her overpayment form. The Office requested that appellant submit copies of tax returns from the filing years of 2004, 2005 and 2006.

By decision dated April 17 2007, the Office finalized the \$2,263.75 overpayment. The Office denied waiver of recovery of the overpayment as no evidence was submitted regarding the expense or income of the jointly-owned rental apartments. It also noted that appellant failed to

provide any supporting documentation for her expenses. With respect to repayment, the Office determined that \$100.00 would be deducted from her continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

The basic rate of compensation paid under the Federal Employees' Compensation 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,<sup>1</sup> 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.<sup>2</sup>

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 or is receiving regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.<sup>3</sup> The Board has held that the test for determining dependency under the Act is whether the person claimed as a dependent looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment in the amount of \$2,263.75. Appellant was separated from her husband beginning December 21, 2005. However, she continued to receive compensation at the augmented three-fourths rate from December 21, 2005 to September 30, 2006, whereas the rate of compensation should have been reduced to the two-thirds statutory rate. The Office properly calculated the amount of the overpayment. Appellant received compensation for this period in the amount of \$20,421.85 whereas she should have received compensation in the amount of \$18,158.10. Accordingly, the Office properly determined that an overpayment was made in the amount of \$2,263.75, as this was the difference between the amount of compensation she actually received and the amount of compensation she was entitled to receive.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>5</sup> 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] or would be against equity

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8110(b).

<sup>3</sup> 5 U.S.C. § 8110(a); *Nancy J. Masterson*, 52 ECAB 507 (2001).

<sup>4</sup> *Helyn E. Girmann*, 11 ECAB 557 (1960).

<sup>5</sup> 5 U.S.C. § 8129(b).

and good conscience.<sup>6</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>7</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.<sup>8</sup>

Section 10.438 of the Office's regulations provides:

“(a) 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 be used to determine the repayment schedule, if necessary.

“(b) 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.”<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the case is not in posture for a decision as to whether waiver of the recovery of the overpayment is warranted. On April 10, 2007 the Office requested that appellant complete an OWCP-20 questionnaire. Appellant submitted a completed OWCP-20 questionnaire dated March 13, 2007, but did not submit any supporting documentation. In a letter dated April 10, 2007, the Office requested that appellant clarify the rental apartments owned jointly by her and her husband and the management of the rental apartments since December 21, 2005 and her involvement with this property. It also requested that she provide copies of her tax returns for the filing years 2004, 2005 and 2006 and provide information on the income and expenses from the jointly-owned rental property. The Office issued a decision on April 17, 2007 denying appellant's waiver request without allowing her the opportunity to provide the documents requested by the Office in its April 10, 2007 letter. Section 10.438 states that the Office will deny waiver of an overpayment when a claimant fails to submit information requested by the Office within 30 days. Appellant was not afforded 30 days to submit the information as the Office issued its decision finalizing the overpayment and denying waiver within 7 days of the April 10, 2007 letter. As the Office failed to follow the regulations allowing

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<sup>6</sup> 5 U.S.C. § 8129(b). See *Terry A. Keister*, 56 ECAB 559 (2005).

<sup>7</sup> *Tammy Craven*, 57 ECAB \_\_\_ (Docket No. 05-249, issued July 24, 2006).

<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> 20 C.F.R. § 10.438.

appellant 30 days to submit information requested by the Office, it abused its discretion in adjudicating appellant's request for waiver.<sup>10</sup>

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,263.75 for the period December 21, 2005 to September 30, 2006 because she was not entitled to compensation at the augmented rate. The Board finds that the Office did not properly adjudicate waiver of the recovery of the overpayment. The Board set aside the Office's repayment schedule for further evaluation of waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2007 decision of the Office of Workers' Compensation Programs be affirmed in part and remanded in part, consistent with this decision of the Board.

Issued: April 2, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>10</sup> In view of the Board's determination that waiver of the recovery of the overpayment is not in posture for decision, it is premature to address the issue of whether the Office properly required recovery of \$100.00 from continuing compensation benefits.