

when she stopped and did not return. Appellant filed CA-7 forms, claims for compensation, claiming one dependent, her son, Robert L. Bidelman, whose date of birth was March 14, 1987. She was placed on the periodic rolls at the augmented 3/4 rate, effective June 28, 2004, and in August 2004 moved to Michigan.¹

On July 14, 2005 appellant signed an Office Form EN1032, attesting that her son was a dependent. The form explained the circumstances under which she would be entitled to augmented compensation for her dependent child.² Appellant was referred to vocational rehabilitation in May 2006 and in December 2006 moved back to Tennessee. By letter dated May 17, 2007, the Office noted that appellant had been reemployed as a modified mail processing clerk effective May 14, 2007 and, as her wages met or exceeded the wages held when injured, terminated her compensation. In a June 1, 2007 letter, the Office informed appellant that, because her son Robert turned 18 years old on March 14, 2005 and she reported that he did not graduate high school, an overpayment in compensation would be declared because she continued to receive compensation at the augmented rate until she returned to work. By decision dated July 26, 2007, the Office found that appellant's actual wages as a mail processing clerk fairly and reasonably represented her wage-earning capacity.³

On July 31, 2007 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$6,692.24 for the period from her son's eighteenth birthday on March 14, 2005 to May 13, 2007 because she continued to receive disability compensation at the augmented 3/4 rate when there was no evidence that appellant's son was enrolled in school full time for that period. The Office found her at fault because she should have reasonably been aware that her son was not an eligible dependent after turning 18 years of age. An Office overpayment worksheet contained in the record provides that during this period appellant received compensation at the 3/4 rate totaling \$56,324.54 and that compensation at the 2/3 rate would total \$49,632.30, which yielded an overpayment in compensation of \$6,692.24.

In a response dated August 30, 2007, appellant stated that she thought her son qualified as a disabled adult because he had narcolepsy and that she would not have accepted the payments had she known they were in error. She stated that she helped support her son and his daughter, and submitted an overpayment questionnaire. Appellant elected a decision on the written record. On September 25, 2007 the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$6,692.24 because she should have known she was not entitled to receive wage-loss compensation at the augmented 3/4 rate. It requested that she forward payment for the full amount of the overpayment.

¹ The record indicates that under file number xxxxxx914 appellant had an accepted tenosynovitis of the right wrist.

² Appellant also submitted a EN1032 form dated August 3, 2006 in which she claimed no dependents.

³ Appellant did not file an appeal of this decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ 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.⁶

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.⁷ Section 8110(a)(3) of the Act provides that 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, as defined under section 8101(17).⁸ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation to which he or she was entitled at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.⁹

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic rolls in June 2004 and submitted an Office EN1032 form on July 14, 2005 in which she claimed her son Robert as a dependent. She had only one possible dependent, her son Robert, who became 18 years old on March 14, 2005. While appellant contended that Robert was disabled due to narcolepsy, she submitted no evidence to support that he was disabled from that condition on or after his 18th birthday. The only medical report she submitted was a report dated June 27, 2002, when Robert was 15 years of age, in which Dr. Lawrence T. Ch'ien, a sleep medicine specialist, diagnosed narcolepsy and advised that he should not be punished at school for his narcolepsy. Office procedures require that medical evidence in support of disability be current and describe his past and current condition.¹⁰ Appellant submitted no such evidence. Robert could also qualify as a dependent if he was an

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8102(a).

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8110(b).

⁸ 5 U.S.C. § 8110(a)(3). 5 U.S.C. § 8101(17) defines a student as an individual 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.

⁹ 5 U.S.C. § 8110(a)(3); *see Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10.5(c)(3) (February 2002).

unmarried student attending an approved full-time course of study, had not completed four years of post high school education, and had not completed the academic semester in which he became 23 years old.¹¹ There is evidence of record, including a lease agreement indicating that Robert is married.¹² Furthermore, he did not complete high school and therefore did not continue his education until he reached 23 years of age. The fact that appellant served as a guarantor on a lease and carried Robert on her health insurance is insufficient to establish that Robert qualified as a dependent.¹³

The Board therefore finds that appellant should only have received compensation at the basic 2/3 rate after her son Robert reached the age of 18. The Office's failure to reduce the compensation from the augmented rate to the basic rate resulted in an overpayment to appellant. The record supports that appellant continued to receive compensation at the augmented 3/4 rate until May 13, 2007, although she had no qualifying dependent. For this period she received augmented compensation at the 3/4 rate totaling \$56,324.54, when she should have received compensation at the 2/3 rate or \$49,632.30. Thus the \$6,692.24 difference constitutes an overpayment in compensation,¹⁴ and the Board finds that the Office correctly determined the fact and amount of overpaid compensation in this case.¹⁵

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."¹⁶

Section 10.433(a) of the Office's regulation provides that the Office:

"[M]ay 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

¹¹ *Id.*

¹² The undated lease agreement states that the lessees are Robert and Leslie Bidelman and that Sumer Bidelman would also reside at the rental unit.

¹³ *Supra* note 9.

¹⁴ 5 U.S.C. §§ 8101(17), 8110.

¹⁵ *See Ralph P. Beachum, Sr., supra* note 9.

¹⁶ 5 U.S.C. § 8129; *see Joan Ross, 57 ECAB 694 (2006).*

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).”¹⁷

Section 10.433 also provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances.¹⁸ In applying the tests to determine fault, the Office applies a “reasonable person” test.¹⁹ Whether an individual was at fault in creating an overpayment depends on the circumstances of 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.²⁰

ANALYSIS -- ISSUE 2

The Office found appellant at fault in the creation of the overpayment and therefore not entitled to waiver based on the third criterion above, that she should have reasonably known, based on her review and signature on Office EN1032 forms, that she was not entitled to compensation at the augmented rate after March 14, 2005. The record includes 1032 forms signed by appellant on July 14, 2005 and August 3, 2006. Under the certification portion of these forms, appellant certified that she understood “that I must immediately report to [the Office] ... any change in the status of claimed dependents....” By signing the forms, she is deemed to have acknowledged her duty to report any change in the status of her claimed dependents. Appellant continued to receive compensation at the augmented rate until May 13, 2007 and did not provide documentation to show that her son was incapable of self-support or that he continued his education after his 18th birthday. Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment that the employee knew or should have been expected to know he or she was not entitled.²¹ The Board thus finds appellant at fault in the creation of the overpayment. As appellant was at fault, waiver of recovery of the overpayment is precluded.²²

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$6,692.24 for the period March 14, 2005 to May 13, 2007, and that the Office properly

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

¹⁸ 20 C.F.R. § 10.433; *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008).

¹⁹ *L.D.*, 59 ECAB ____ (Docket No. 08-678, issued August 7, 2008).

²⁰ *J.S.*, 58 ECAB ____ (Docket No. 06-2113, issued May 10, 2007).

²¹ *Danny E. Haley*, 56 ECAB 393 (2005).

²² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007). With respect to the recovery of an overpayment, the Board’s jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. *L.D.*, *supra* note 19.

determined that she was at fault in accepting the overpayment and was therefore not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2007 be affirmed.

Issued: December 11, 2008
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