

He died on March 13, 1991. On March 27, 1992 the Office accepted that the employee's death was due to his employment-related exposure to chemicals. It awarded benefits on behalf of appellant's husband for November 13, 1990 through March 13, 1991 and survivor benefits to appellant and her children commencing March 14, 1991.

On August 5, 2003 the Office requested that appellant submit a Form EN-1617 concerning the status of her children as full-time students. On September 4, 2003 appellant advised that her son, born May 30, 1981, had graduated from high school in 1999 and had attempted full-time studies in August 1999, from which he later withdrew. Her son was a full-time student again from January to June, 2000 but dropped from a full-time status in November or December 2000. Appellant's daughter, born September 16, 1979, graduated from high school in 1997. Appellant's belief was that her daughter was a part-time student as of August 1997 but by January 1998 was a full time student through August 1999. In January, 2000 her daughter again attempted a full-time status but withdrew. From August to December 2000, appellant's daughter was again a full-time student. Appellant noted that she had informed the Office at the time as to their status.

In a November 7, 2003 memorandum, an Office claims examiner noted that an overpayment had been created as appellant's children had not been removed as dependents and her son's date of birth had been erroneously entered. The Office noted that appellant was in receipt of compensation as a widow with two dependents, or a total of 75 percent. Her daughter turned 18 in September 1997 and her son turned 18 in May 1999. Appellant's daughter became a full-time student at college from September to November 1997, at which point she dropped out but resumed full-time status in January 1998 and remained in that status until July 1999. Because her break in attendance was less than five months, the Office allowed appellant the benefit of the 75 percent rate (widow with two dependents) through July 1999. Her son attempted full-time studies in September 1999 but withdrew. Therefore, the Office allowed her the 60 percent rate (widow with one dependent) from July to December 1999, as her son's break from full-time studies was less than five months but her daughter's second break was more than five months.

By January 2000 both children resumed full-time studies, but her daughter dropped out of school. The Office allowed appellant the 75 percent rate for January and February 2000 and at the 60 percent rate until July 2000. As of August 2000, her daughter was again a full-time student as was her son. The Office allowed the 75 percent rate from August to December 2000, until both children went part-time or dropped out. Starting in January 2001, appellant was entitled to compensation at the 50 percent (widow with no dependents) rate. The Office found that appellant should have received compensation of \$36,592.00 during the period August 1, 1999 to December 31, 2000 and \$58,593.43 from January 1, 2001 to November 1, 2003, or a total of \$95,185.43. However, during these periods, she received \$106,349.76, resulting in an overpayment of \$11,164.33.

On November 20, 2003 the Office issued a preliminary determination finding that an overpayment was created in the amount of \$11,164.33 because appellant received compensation as the employee's surviving spouse at the wrong rate during the period August 1, 1999 to August 10, 2003 due to the change in her children's status as dependents. It found that appellant was not at fault in the creation of the overpayment and advised that she could request a

prerecoupment hearing and submit financial information if she sought waiver of the overpayment.

On December 6, 2003 appellant requested waiver of recovery of the overpayment. In a January 12, 2004 letter, she noted that she had relied upon the receipt of the survivor's benefit to become a full-time mother and raise her children. Therefore, appellant left the workforce and was not employed. She also noted that repayment of the overpayment would cause a severe financial hardship as the funds use to raise her family were not at her disposal to repay. Appellant noted that she had contacted the Office on several occasions to correct the date of her son's birth. In an attached overpayment recovery questionnaire, she listed total monthly income of \$2,191.00 and monthly expenses of \$2,200.00. Appellant listed the value of cash, checking, savings, stocks and bonds and other personal property as \$224,519.00.

The record reflects that no further action was taken on appellant's request for waiver until April 25, 2007, when the Office advised her that an audit of her case revealed the unresolved overpayment. She was requested to submit updated financial information in support of her request for waiver.

In a May 21, 2007 letter, appellant again requested waiver of the overpayment. She reiterated that she had attempted to keep the Office informed of any changes that would affect her benefits and that she had relied upon erroneous information from the Office in setting the rate at which she received survivor benefits. Appellant noted that her son's date of birth had been entered into the computer system as May 30, 1991 rather than May 30, 1981, and which was not corrected by the Office until some three years after she notified it of the mistake. She addressed the Office's implementing federal regulations, contending that she believed the Office had waived the overpayment in 2004 as she did not hear back in response to her prior request. Appellant noted that she recently purchased a home in reliance of receipt of her benefits and that repayment would cause a severe financial hardship. Moreover, she had relied upon the receipt of benefits when she left her job in 1993 to raise her children. Appellant submitted materials pertaining to her income and expenses, listing monthly income of \$2,498.32 and monthly expenses of \$3,132.00. She listed the value of other assets as \$126,267.00.

In an August 22, 2007 decision, the Office finalized the overpayment in the amount of \$11,164.33 for which appellant was without fault. It found that she was not entitled to waiver of recovery of the overpayment and that \$270.00 would be withheld from her continuing compensation benefits every 28 days.

LEGAL PRECEDENT

Section 8133(a) of the Federal Employees' Compensation Act provides that, if an employee's death results from an injury sustained in the performance of duty, the United States will pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule: (1) to the widow or widower, if there is no child, 50 percent; (2) to the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child, not to exceed 75 percent; (3) to the children, if there is no widow or

widower, 40 percent for one child and 15 percent for each additional child, not to exceed a total of 75 percent.¹

Section 8133(b) provides in pertinent part that the compensation payable under subsection (a) is paid from the time of death until a child dies, marries or becomes 18 years of age. Notwithstanding, compensation that would otherwise end because the child has reached 18 years of age shall continue if he or she is a student as defined by section 8101 for as long as the child continues to be a student, up until age 23 or until marriage.²

In turn, section 8101(17) provides that student means an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an accredited institution.³ Such an individual is not deemed to have ceased to be a student during an interim between school years if the interim is not more than four months and he or she has a bona fide intent to continue to pursue a full-time course of study.⁴

ANALYSIS

The Office accepted that the employee was exposed to chemicals in his federal employment which contributed to his death on March 13, 1991. It awarded benefits to the employee from November 13, 1990 through the time of death in 1991. Thereafter, the Office awarded compensation benefits under section 8133(b) to appellant as the surviving spouse with two dependents. Under this section, benefits were awarded to appellant of 45 percent as the employee's widow with an additional 15 percent allowed for each child, the statutory maximum total of 75 percent. The record reflects that compensation was paid at this rate through the time that appellant's children turned 18 years of age. Thereafter, to continue receiving the 15 percent allowed for each child, it was incumbent that her children continue as full-time students regularly pursuing a course of study at an accredited institution.

As noted, appellant's daughter turned 18 on September 16, 1997 and her son turned 18 on May 30, 1999. The overpayment of compensation arose as appellant received benefits at the 75 percent rate for a widow with two dependent children although her children did not maintain their full-time student status during the period August 1, 1999 to August 10, 2003. Appellant's daughter became a full-time student from September to November 1997, at which she dropped out. However, she resumed a full-time status in January 1998 and remained so until July 1999. As her break in attendance was less than five months, the Office allowed appellant survivor benefits at the 75 percent rate through July 1999. Thereafter, appellant's son attempted full-time studies in September 1999 but withdrew. The Office found that she was entitled to benefits at 60 percent (widow and one dependent) from July to December 1999, as her son returned to full-time studies in January 2000. However, as her daughter's attendance break was greater than five months, she did not qualify as a dependent. For the five months from August 1 to December 31,

¹ 5 U.S.C. § 8133(a).

² 5 U.S.C. § 8133(b).

³ 5 U.S.C. § 8101(17).

⁴ *Id.* See 20 C.F.R. § 10.5(a)(25) which defines "student."

1999, appellant should have received monthly benefits of \$1,898.00, or a total of \$9,490.00, at the 60 percent rate rather than compensation at the 75 percent rate, or \$2,411.00, or a total of \$12,055.00, a difference of \$2,565.00.

In January 2000, both children were full-time students; however, appellant's daughter dropped out. The Office found that appellant was entitled to benefits at the 75 percent rate for January and February 2000. Thereafter, benefits should have been paid at the 60 percent rate (\$1,980.00 per month or a total of \$9,900.00) based on her son continuing his full-time studies until July 2000, a period of five months. As appellant received benefits of \$2,476.00 per month for this period, a total of \$12,380.00, this created a difference of \$2,480.00.

In August 2000, her daughter again became a full-time student and the Office allowed the 75 percent rate for two dependents from August through December 2000, until her children went part time or dropped out. As of January 2001, appellant was entitled to survivor benefits at the 50 percent rate for a widow with no dependents.

The Board finds that the Office properly determined that appellant received an overpayment of compensation based on the improper calculation of survivor benefits for the period in question based on the status of her children as eligible dependents. Although appellant contends that the overpayment arose based on the negligence of the Office in administering her benefits, this does not preclude the finding of overpayment in this case. She was found to be without fault in the creation of the overpayment, thereby allowing consideration of waiver of the overpayment. The record establishes that appellant received survivor benefits in excess of those to which her family was eligible based on her children's status as full-time students after they reached age 18.

The Board also finds, however, that the Office's decision is not explained well as to how the amount of the overpayment was calculated. While the brief memorandum of record does note applicable pay rates from 1993 to 2000 and the status of appellant's children, it does not make adequate findings of fact. If appellant was in receipt of compensation at the 75 percent rate during the entire period of the overpayment, it is not readily apparent why the Office added the two months of January 1 to February 29, 2000 and the five months from August 1 to December 31, 2000, for which the family was eligible to receive compensation at the 75 percent rate, into the amount overpaid. The memorandum reveals an error in transcribing the five months of compensation paid from August 1 to December 31, 2000 at \$2,476.00 as \$13,480.00. Moreover, no applicable pay rates are listed after March, 2000 nor any specific findings made as to the compensation paid through August 10, 2003. In short, the Office's memorandum does not adequately apprise appellant of how the amount of overpayment was determined. The case will be remanded to the Office for a further determination as to the amount of overpayment created in this case. This should be followed by a *de novo* decision setting forth adequate factual findings as to the amount and appellant's eligibility for waiver.

CONCLUSION

The Board finds that the Office properly determined that an overpayment of compensation was created in this case; however, the Office did not make adequate factual findings on how the amount of the overpayment was determined. The case is not in posture for

decision as to whether the Office properly denied waiver of the overpayment or the rate of recovery from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2007 decision of the Office of Workers' Compensation Programs be affirmed as to fact of overpayment. The decision is set aside as to the issue of amount of the overpayment and the case remanded for further development consistent with this decision.

Issued: September 5, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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