

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

L.G., Appellant)

and)

DEPARTMENT OF THE NAVY,)
MARE ISLAND NAVAL SHIPYARD,)
Vallejo, CA, Employer)

**Docket No. 08-2129
Issued: August 25, 2009**

Appearances:
Appellant, pro se
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 July 29, 2008 appellant filed a timely appeal from a June 3, 2008 merit decision of the Office of Workers' Compensation Programs finding that an overpayment of compensation was created for which he was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$12,475.21 was created; (2) whether the Office properly found that appellant was at fault in creating the overpayment and therefore not entitled to waiver; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$200.00 every 28 days from his continuing compensation.

FACTUAL HISTORY

Appellant has an accepted April 20, 1976 low back strain under, file number xxxxxx421, and an accepted employment injury of March 6, 1978 for low back strain and aggravation of a preexisting disc condition under, file number xxxxxx667. The Office combined the cases into the current, file number xxxxxx642. On March 26, 1982 the Board set aside an April 17, 1981 Office decision concerning appellant's rate of pay and remanded the case for further development.² In a November 2, 1982 decision, the Office awarded appellant wage-loss compensation benefits retroactive to July 28, 1979 under the provisions of the "learners capacity" provisions of 5 U.S.C. § 8113. The record reflects that appellant returned to limited duty and the Office paid appropriate compensation benefits for periods of total and partial disability as well as multiple back surgeries.³ Appellant last worked on August 4, 1988. He was placed on the periodic rolls at the augmented rate and was paid by direct deposit.

Beginning on May 1, 1989 appellant signed Office EN1032/CA1032 forms attesting that his wife and daughter, date of birth October 4, 1986, were dependents. The forms explained the circumstances under which he would be entitled to augmented compensation for his dependent child. Appellant was advised that compensation for a dependent child may continue after the 18th birthday only if the dependent was unmarried and either incapable of self-support due to a mental or physical disability or a student. It noted that compensation was payable until age 23 for an unmarried child who had reached age 18, had not completed four years of education beyond high school, and was a full-time student. In a CA-1032 form signed December 31, 2003, appellant indicated that he was no longer married, but his daughter was still a dependent.

In a letter dated November 17, 2004, the Office noted that augmented compensation for appellant's daughter was scheduled to stop as she was 18 years old. It noted that compensation could continue after her 18th birthday only if she was unmarried and either incapable of self-support or a full-time student. To qualify as a student, a dependent who has reached age 18 must be regularly pursuing a full-time course of study or training and not married. It advised appellant that to claim these educational benefits, he must use the enclosed Form EN1615 and fill out Part A and send both Parts A and B to the school so that an official at the school could fill out Part B after reviewing the completed Part A. The Office requested that the completed form be returned to the Office. It advised that appellant was required to notify the Office immediately if his daughter dies, stops attending school, completes four years of education beyond the high school level, or changes from full-time to part-time student status. Appellant would not be entitled to augmented compensation for a dependent. The Office noted that any compensation check received after a change in dependency status must be returned to the Office.

On November 19, 2004 appellant completed Part A of Form CA1615 advising that his daughter was not married, had not completed four years of education beyond the high school

¹ Appellant was a 25-year-old machinist at the time of the April 20, 1976 employment injury.

² Docket No. 81-1519 (issued March 26, 1982).

³ On August 29, 1984 appellant, now a helper, sustained a right shoulder injury. This employment injury was assigned file number xxxxxx565.

level, and was pursuing a full-time course of study or training at Santa Rosa Junior College. Part B of the form, which was to be completed by school official, was left blank.

In an October 18, 2007 letter, the Office advised appellant that additional information was required in connection with the augmented compensation he was receiving because of his daughter pursuing higher education. It noted that the form he filled out in 2004 did not provide verification that his daughter had been and is a full-time student. The Office advised that confirmation from the college was needed confirming that she was a full-time student from 2004 to the present and provided the appropriate form. It also notified appellant that compensation law prohibited the acceptance of compensation to which a beneficiary was not entitled and requested that the form be returned to the Office within 30 days or his compensation may be suspended. On December 7, 2007 appellant completed his portion of the form, advising that his daughter was not married and was pursuing a full-time course of study or training at Santa Rosa Junior College. Again, Part B of the form, which was to be completed by a school official, was blank.

In a December 26, 2007 letter, the Office advised appellant that it did not receive verification from his daughter's school that she had been a full-time student since 2004 and continued to be a full-time student. Appellant was accorded 30 days to submit documentation from the school verifying that she had been and remained a full-time student since October 4, 2004, when she turned 18. He was informed that, if such documentation was not received within 30 days, his compensation would be adjusted to the basic two-thirds rate and an overpayment retroactive to 2004 would be declared. Appellant did not respond.

On April 21, 2008 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$12,475.21 for the period October 4, 2004 through February 16, 2008. It found that he erroneously received disability compensation at the augmented three-fourths rate, instead of the basic two-thirds rate, as there was no evidence that his daughter was a full-time student for that period. The Office found appellant at fault because he had the responsibility to provide documentation to establish entitlement to augmented compensation but failed to do so. An overpayment worksheet noted that from October 4, 2004 through February 16, 2008, appellant received compensation at the three-fourths rate totaling \$113,314.19 and that compensation paid at the two-thirds rate would total \$100,838.98, which yielded an overpayment in the amount of \$12,475.21. The Office provided instructions for disagreeing with the fact that the overpayment occurred or the amount and how to request a waiver. It requested that appellant complete an enclosed overpayment recovery questionnaire and submit financial documents in support of a request for waiver within 30 days.

On May 6, 2008 appellant disagreed with the Office's preliminary overpayment determination. He contended that he filled out all the papers sent to him and his daughter took them to the school. Appellant believed that the school had forwarded the forms to the Office. He informed the Office that his daughter quit school in February 2008. Appellant also completed the overpayment recovery questionnaire. He indicated that his total monthly income was \$2,233.06. Appellant's monthly expenses were \$2,260.71, which was comprised of \$2,135.71 for a mortgage and \$125.00 for utilities. He indicated that he had \$25.00 in a checking account and owned no valuable property besides his home. Appellant stated that he

borrowed money on a monthly basis and submitted a statement from Bank of the West that noted an average daily balance of \$1,490.00 from March 10 through 26, 2008.

In a June 3, 2008 decision, the Office finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$12,475.21 because he did not have an eligible dependent for augmented compensation. It found that appellant's daughter was not a full-time student since 2004. The Office informed appellant that \$200.00 would be deducted from his continuing compensation payments effective June 8, 2008 until the overpayment was repaid.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act⁵ 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.⁶ 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.⁷

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, or a total of 75 percent of monthly pay.⁸ 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).⁹ 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 two-third compensation rate and the augmented compensation received at the three-fourth rate constitutes an overpayment of compensation.¹⁰

⁴ Following the Office's June 3, 2008 decision, appellant submitted additional new evidence on appeal to the Board. This included financial information as well as an unofficial transcript from Santa Rosa Junior College. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its June 3, 2008 decision. *See* 20 C.F.R. § 501.2(c). The Board has no jurisdiction to review the documents submitted on appeal as these documents were not before the Office when it issued its final decision.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8110(b).

⁹ *Id.* at § 8110(a)(3). Section 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.

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

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic rolls in 1988 and on May 1, 1989 began submitting EN1032/CA1032 forms. He was no longer married after December 2003 and had only one possible dependent, his daughter, who became 18 years old on October 4, 2004. The record contains no evidence that appellant's daughter was disabled due to a mental or physical condition. Therefore, his daughter would not qualify as a dependent unless she was an 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 she became 23 years old.¹¹

By letters dated November 17, 2004 and October 18, 2007, the Office informed appellant that additional information was required to determine whether his daughter was an eligible dependent. Appellant was asked to provide a statement and certification of school enrollment using attached forms. While he completed part of the form (Part A), the remainder of the form which was to be completed by a school official was blank. There is no documentation of record, such as college transcripts, to establish that appellant's daughter was enrolled as a full-time student. The evidence does not establish that appellant's daughter was pursuing a full-time course of study as defined under section 8101(17) of the Act during the period of the overpayment.¹² Therefore, she was not a dependent after October 4, 2004, when she turned 18.

The record establishes that appellant received compensation at the augmented three-fourth rate until February 16, 2008, although he had no dependent. Appellant received augmented compensation at the three-fourth rate in the amount of \$113,314.19, when he should have received compensation at the two-third rate of \$100,838.98. The \$12,475.21 difference constitutes an overpayment in compensation.¹³ The Board finds that the Office properly determined the fact and amount of overpayment in this case.

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.¹⁴

Section 10.433(a) of the Office's regulations provide 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

¹¹ *Supra* note 9.

¹² 5 U.S.C. § 8101(17); *see Denise L. Crouch*, 57 ECAB 161 (2005).

¹³ *Id.* at §§ 8101(17), 8110.

¹⁴ *Id.* at § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

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).¹⁵

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁶

ANALYSIS -- ISSUE 2

In this case, appellant received augmented compensation by direct deposit following his daughter's 18th birthday on October 4, 2004 until February 16, 2008. As noted his daughter did not remain an eligible dependent after her 18th birthday. The Office found that appellant was at fault, under the second standard, for failing to provide documentation regarding his daughter's student status since 2004. Appellant knew or should have known that this information was material. The EN1032 forms mailed to appellant by the Office and submitted by him since 1989 clearly explained the circumstances under which he would be entitled to augmented compensation, which would end when a dependent child turned 18 and was no longer a full-time student. The Office sent appellant requests on November 17, 2004 and October 18, 2007 for documentation regarding his daughter's student status and provided the appropriate form which both appellant and his daughter's school needed to fill out to verify her student status since 2004. Each of the letters made clear that the Office would use the information requested on the enclosed form to decide whether he was entitled to receive compensation for a dependent or whether his benefits should be adjusted. On December 26, 2007 the Office sent appellant a letter explaining the deficiency in his claim for augmented compensation and afforded him 30 days to provide such documentation. Again, the Office informed appellant that his compensation would be adjusted to the two-thirds basic rate if such documentation was not received. Warnings that changes in his compensation would occur if his daughter failed to qualify as a student underscored the importance of this information and appellant's responsibility to disclose it. Appellant's failure to properly submit documentation regarding his daughter's student status is evidence supporting that appellant was not forthcoming with providing information that was material.

The Board will affirm the Office's June 3, 2008 decision finding that appellant was at fault in creating the overpayment that arose from his failure to furnish information which he

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

¹⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

knew or should have known to be material. Appellant's fault in the matter precludes any consideration of waiver. The law requires the Office to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁷ When an overpayment of compensation 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 attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking 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.¹⁸

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that this case is not in posture for determination on the issue of recovery. In the June 3, 2008 decision, the Office stated that the overpayment would be recovered by withholding \$200.00 from each of appellant's continuing compensation checks until the payment was repaid in full. However, in requiring repayment of the overpayment, it is unclear whether the Office took into consideration the financial information submitted by appellant in finding that this method of recovery would minimize any resulting hardship on appellant.

Appellant submitted an overpayment recovery questionnaire on May 6, 2008 along with some documents to support his current financial status. This evidence was before the Office when it issued the June 3, 2008 decision. The overpayment questionnaire indicates that appellant has monthly income of \$2,233.06 and his expenses were \$2,260.71. It is unclear whether the Office considered the financial documentation that appellant submitted or that it took into account relevant factors so as to minimize (but not necessarily eliminate)²⁰ and hardship when it decreased his compensation to recover the overpayment.²¹

¹⁷ 5 U.S.C. § 8129(a).

¹⁸ 20 C.F.R. § 10.441.

¹⁹ *Id.* at § 10.438(a).

²⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4.d(1)(b) (May 2004).

²¹ In judging whether repayment of the uncompromised portion of the debt would cause hardship, the Office should assess the debtor's income and assets, and the debtor should be required to submit a current financial report (OWCP-20) if one has not been provided within the previous six months. *Id.* at *Debt Liquidation*, Chapter 6.300.6(a). See *J.S.*, 58 ECAB ____ (Docket No. 06-2113, May 10, 2007).

The Board will remand the case for further development on the issue of recovery. After further development, the Office shall issue a final decision on an appropriate rate of recovery from continuing compensation.

CONCLUSION

The Board finds that appellant was at fault in creating a \$12,475.21 overpayment of compensation. The Board further finds that further development is warranted on the issue of recovery of the overpayment from continuing compensation. The Office must assess appellant's current financial status and consider relevant factors so as to minimize any hardship.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this opinion.

Issued: August 25, 2009
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