

FACTUAL HISTORY

The Office accepted that on November 1, 1979 appellant, then a 45-year-old nursing assistant, sustained a lumbar sprain and lumbar disc herniations requiring L4-6 laminectomies and fusion. Appellant did not return to work after the injury. She received compensation on the periodic rolls at the two-thirds rate as she had no eligible dependents. The record indicates that appellant married in early 1989. The Office then paid compensation at the augmented three-fourths rate.

In a November 26, 2003 health benefits election form, appellant advised the Office that her husband died on October 13, 2003 and that she had no other eligible dependents.¹ However, the Office continued to pay compensation at the augmented rate. The record contains periodic roll worksheets for the periods January 25 to February 21, 2004, October 31 to November 27, 2004 and January 21 to February 17, 2007 showing that compensation was paid at the three-fourths rate in the amounts of \$1,244.20, \$1,265.20 and \$1,466.00 respectively. The Office reduced appellant's compensation rate to the two-thirds rate on January 20, 2008.

By notice dated January 30, 2008, the Office advised appellant of its preliminary determination that \$9,011.25 overpayment of compensation was created as she received compensation at the augmented rate from October 14, 2003 to January 19, 2008 although she had no eligible dependents. It noted that from October 14, 2003 to January 19, 2008 appellant was paid \$73,596.64 in compensation but was only entitled to \$64,585.39. The Office afforded appellant 30 days to provide financial information and to request a hearing. Appellant did not respond.

By decision dated April 29, 2008, the Office finalized the overpayment determination in the amount of \$9,011.25 for the period October 14, 2003 to January 19, 2008, as she received augmented compensation while having no eligible dependents. It found appellant not at fault as she promptly notified the Office of her husband's death. However, as appellant did not submit any financial information as requested, the Office directed recovery of the overpayment by deducting \$125.00 from her continuing compensation every 28 days. It noted that it would recover the entire \$9,011.25 principal and \$1,499.33 in interest, for a total repayment of \$10,510.58.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² 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.³ Section 8129(a) of the Act provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter

¹ Appellant also noted her husband's death on EN1032 forms signed on September 23, 2005, January 26 and October 24, 2007.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

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.”⁴ If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁵

ANALYSIS

The Board finds that appellant received an overpayment of compensation. The record supports that appellant was paid wage-loss compensation at the augmented three-quarters rate after her husband passed away on October 13, 2003 and that she had no other qualifying dependents. Appellant timely informed the Office of her husband’s death. However, it continued to pay appellant compensation at the augmented three-quarters rate through January 19, 2008.

The Board finds that appellant was not entitled to compensation at the augmented three-quarters rate after her husband died on October 13, 2003. Appellant was only entitled to receive compensation at the statutory two-thirds rate. An overpayment in compensation was created once her husband died.⁶

The Board finds, however, that this case is not in posture for decision regarding the amount of the overpayment. The Office found that appellant received \$73,596.64 in compensation from October 14, 2003 to January 19, 2008 but was only entitled to \$64,585.39. However, the record is insufficient to confirm either amount. There are payment records only for the periods January 25 to February 21, 2004, October 31 to November 27, 2004 and January 21 to February 17, 2007. There are no records for the remainder of the period of the overpayment. Therefore, the record is insufficient to establish that appellant received \$73,596.64 in compensation. Also, the Office did not explain how it calculated the \$64,585.39 amount. The case will be remanded to the Office for further development to determine the amount of the overpayment.

As the case will be remanded for further development regarding the amount of overpayment, it is premature for the Board to address the issues of waiver and recovery.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the amount of the overpayment. The case will be remanded to the Office for additional development. As the case is not in posture regarding the amount of the overpayment, it is premature for the Board to address the issues of waiver and recovery.

⁴ 5 U.S.C. § 8129(a).

⁵ *Diana L. Booth*, 52 ECAB 370 (2001).

⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2008 is set aside and the case remanded to the Office for additional development consistent with this decision of the Board.

Issued: March 19, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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