

On August 31, 2006 the Office issued a schedule award for a 13 percent permanent impairment of appellant's right upper extremity. The period of the award ran from June 20, 2006 through March 20, 2007. The schedule award showed that the Office would be paying appellant at the compensation rate of 75 percent. Weekly compensation, adjusted for cost-of-living, was \$752.00. Appellant would receive an initial payment of \$8,048.55 covering the period June 20 to September 2, 2006. She would receive \$3,008.00 each four weeks thereafter. The Office notified appellant as follows:

“4. CHANGE IN STATUS OF DEPENDENTS -- If your award is paid at the augmented rate of 3/4 because you have one or more dependents, you are required to provide written notification immediately of any change in status of your dependents, to the address on the first page of this letter. The notice must be signed by you and include your file number, the name of the dependent whose status changed, the effective date of the change and the nature of the change in status. If you originally claimed only one dependent and there is a change in the status of your sole dependent, do not cash any checks you received after the change in status of that dependent. Return the checks promptly for adjustment by this Office.”

Appellant telephoned the Office on September 26, 2006 requesting the status of her \$8,048.55 initial payment. The Office advised her that a direct deposit for that amount was certified and scheduled for release to her bank account on September 29, 2006.

On September 29, 2006 the Office directly deposited \$8,048.55 to appellant's bank account for the period June 20 to September 2, 2006. Appellant thereafter received seven periodic deposits of \$3,008.00 and a final payment, on April 6, 2007, of \$1,421.20.

On July 26, 2007 the Office made a preliminary finding that appellant was at fault in creating a \$2,899.75 overpayment. It stated that on May 23, 2007 it received a Form CA-1032 from appellant indicating that she had no dependents as of July 28, 2006 because her child had reached the age of 18. The Office found that appellant was aware or should have reasonably been aware that she was no longer entitled to the augmented rate for dependents when her child turned 18. It noted that the August 31, 2006 schedule award provided calculation information and informed appellant that she should contact the Office if there were any changes in the status of dependents.

On August 7, 2007 appellant requested waiver. She indicated that the overpayment occurred through no fault of her own. Appellant signed an overpayment recovery questionnaire but offered no information on her monthly income, expenses or assets.

In a decision dated April 7, 2008, an Office hearing representative found that appellant was at fault in creating a \$2,899.75 overpayment. The hearing representative found that although appellant had repeatedly notified the Office that her dependent son would turn 18 on July 28, 2006, she continued to accept payments at the augmented rate when she was thoroughly aware that she was not entitled to such compensation.

On April 16, 2008 the Office notified appellant that it would collect the overpayment by deducting \$150.00 from continuing compensation in File No. xxxxxx827, under which she is receiving compensation for a loss of wage-earning capacity.¹

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² A disabled employee with one or more dependents is entitled to have her basic compensation for disability augmented from 66 2/3 percent to 75 percent of monthly pay.³ A dependent” includes an unmarried child, while living with the employee or receiving regular contributions from the employee toward his support and who is under the age of 18 or over 18 years of age and incapable of self-support because of physical or mental disability. Compensation payable for a child that would otherwise end because the child has reached 18 years of age shall continue if he is a student at the time he reaches 18 years of age for so long as he continues to be such a student or until he marries.⁴

The Office may 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 she received 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁵

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that she is being overpaid.⁶ The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁷

¹ Appellant is not appealing the recovery of the overpayment.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8110(b).

⁴ *Id.* at § 8110(a).

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.435(a).

When an overpayment 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 her attention is called to 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.⁸

ANALYSIS

Appellant was entitled to compensation at the augmented rate for dependents from June 20, 2006, when the schedule award began, to July 28, 2006, when her son turned 18. The Office did not account for the change in the status of her dependent and paid the entire schedule award, into March 2007, at the augmented rate. This caused an overpayment.

Appellant does not dispute the fact or amount of the overpayment. What she disputes is the Office's finding that she was at fault in its creation. Appellant argues that the Office was fully aware that her son would be turning 18 on July 28, 2006, "therefore the overpayment was created by the Office." Her argument is without merit.

It appears that the Office was aware or should have been, that appellant's son turned 18 on July 28, 2006. The hearing representative acknowledged that appellant had repeatedly notified the Office of this fact. So the Office was in error when it paid the entire schedule award at the 75 percent augmented rate for dependents. But this does not relieve appellant from liability for repayment if she was also at fault in accepting the overpayment. So the question is whether she was also at fault.

Before the Office made its first schedule award payment, on September 29, 2006, appellant knew that her son had already turned 18 and that she was not entitled to receive compensation at the augmented rate for dependents for any period after July 28, 2006. On appeal, appellant points to a February 23, 2006 letter from the Office informing her as follows: "Your compensation at the augmented rate is scheduled to stop soon because your dependent son will become 18[-]years[-]old." Further, the August 31, 2006 schedule award indicated that the Office would be paying her at the 75 percent rate for the entire period of the award, including an initial payment of \$8,048.55 covering the period June 20 to September 2, 2006 and regular payments of \$3,008.00 each four weeks. It directed appellant to provide written notification immediately of any change in status of her dependents and to return any checks promptly if there was such a change.

The record establishes that appellant was well aware of the status of her dependent on July 28, 2006. However, beginning September 29, 2006 and continuing for the next six months, she accepted compensation at the augmented rate for dependents even though she knew she was not entitled to such compensation after July 28, 2006. Therefore, appellant accepted payments that she knew or should have known were incorrect. She was responsible for taking all reasonable measures to ensure that payments she received from the Office were proper. Although appellant had informed the Office that her son would turn 18 on July 28, 2006, she

⁸ *Id.* at § 10.441(a).

accepted compensation payments that were clearly based on having one or more dependants. She accepted payments that she knew or should have known were incorrect. For this reason, the Board finds that appellant was at fault in creating the overpayment. The Board will affirm the Office's April 7, 2008 decision.

Because appellant was at fault under the third criterion listed above, she is not entitled to consideration of waiver.

CONCLUSION

The Board finds that appellant was at fault in creating a \$2,899.75 overpayment of compensation. Appellant is therefore not entitled to consideration of waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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