



On August 31, 2006 the Office issued a schedule award for a 13 percent permanent impairment of appellant's left upper extremity. The period of the award ran from September 3, 2006 through June 13, 2007. The schedule award provided 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 payments of \$3,008.00 each four weeks. 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 authorized the Office to deposit her payments directly into her bank account.

On May 7, 2007 appellant completed a Form CA-1032 advising that her child turned 18 on July 28, 2006 and was no longer a dependent.

On July 30, 2007 the Office made a preliminary finding that appellant was at fault in creating a \$3,437.01 overpayment. It found that appellant accepted payments that she knew or should have known were incorrect. The Office noted that the August 31, 2006 schedule award informed appellant that she was being paid at the 75 percent rate, and she was instructed to notify the Office immediately of any change in dependent status and to return any checks paid at the incorrect rate.

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. She argued that she kept the Office informed on an annual basis of her dependent's status. Appellant stated that she was not liable for an overpayment that the Office created: “The Office was well aware of my dependent status and the Office has the responsibility of computing lost wages. The overpayment was through no fault of my own.”

In a decision dated April 7, 2008, an Office hearing representative found that appellant was at fault in creating a \$3,437.01 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 accepted payments at the augmented rate when she was thoroughly aware that she was not entitled to such compensation.

On April 24, 2008 the Office notified appellant that it would collect the overpayment by deducting \$150.00 from continuing compensation for loss of wage-earning capacity.<sup>1</sup>

### **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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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; or (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).<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> Appellant is not appealing the recovery of the overpayment.

<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8110(b).

<sup>4</sup> *Id.* at § 8110(a).

<sup>5</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>6</sup> *Id.* at § 10.433(b).

<sup>7</sup> *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.<sup>8</sup>

### ANALYSIS

Appellant's son turned 18 on July 28, 2006, so she was not entitled to compensation paid at the 75 percent augmented rate for dependents. Nonetheless, the Office paid the August 31, 2006 schedule award at the augmented rate. This caused an overpayment of compensation from September 3, 2006 through June 13, 2007, the period of the award.

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 her son would turn 18 on July 28, 2006, "therefore the overpayment was created by the Office."

It appears that the Office was fully 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 made a mistake when it erroneously paid the schedule award at the 75 percent augmented rate for dependents. This does not, by itself, relieve appellant from liability for repayment if she was also at fault in accepting the overpayment.<sup>9</sup> So the question is whether appellant was also at fault.

Appellant knew, or should have known, that the schedule award payments were incorrect. She knew that her son turned 18 on July 28, 2006 and that she was not entitled to compensation at the 75 percent augmented rate for dependents. So when appellant received the August 31, 2006 schedule award, she should have seen that the Office was going to pay her compensation at the incorrect rate, at the 75 percent rate, from September 3, 2006 through June 13, 2007. She did nothing to stop it. Appellant authorized the Office to make direct deposits of this augmented compensation and sat quietly by as the payments rolled in. She did not return them, as the Office directed.

Appellant argues that she is not liable for the Office's mistakes. But she is liable for her own mistakes. Appellant accepted payments that she knew or should have known were incorrect. The Board therefore finds that she was at fault in creating the overpayment. The Board will affirm the Office's April 7, 2008 decision.

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<sup>8</sup> *Id.* at § 10.441(a).

<sup>9</sup> The fact that an overpayment resulted from the negligence of the Office does not excuse an employee from accepting payments that she knew or should have known she was not entitled. *See Danny E. Haley*, 56 ECAB 393 (2005); *Judith A. Cariddo*, 55 ECAB 348 (2004).

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 \$3,437.01 overpayment of compensation. She 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 16, 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