

aggravation of a right knee strain due to the repetitive duties of her job.¹ Appellant has not worked since May 10, 2004 and received wage-loss compensation from the Office.

In a Form EN1032 covering the 15 months prior to its completion on October 1, 2005, appellant claimed her daughter, born on September 22, 1984, as a dependent for compensation purposes. The form included the definition of a dependent under Federal Employees' Compensation Act. Appellant indicated "not applicable" in response to a question regarding whether she was receiving compensation for a dependent and was no longer entitled to receive that compensation. In a Form EN1032 completed on September 8, 2006 she again claimed her daughter as a dependent.² In a Form EN1032 completed on September 15, 2007, appellant indicated that her daughter stopped being a dependent in July 2005 because she stopped school at that time. However, appellant now claimed her grandson, born on July 15, 2005, as a dependent because she was "supporting and raising" him.³

The record contains a memorandum of a telephone call between an Office claims examiner and appellant held on August 22, 2008. The claims examiner stated:

"It is not clear what the actual date that [appellant's] daughter stopped going to school. It was around the time that the daughter had a child. The date of birth of the child is July 15, 2005. The [daughter] was on maternity leave at that time, but did not go back to school after that date. It appears that the date of birth is a reasonable date to argue that the worker's augmented wage loss ended."

In an August 27, 2008 letter, the Office advised appellant of its preliminary determination that she received an \$11,611.55 overpayment of compensation for the period July 15, 2005 to April 12, 2008 because she received payments at the augmented rate of 75 percent when she was not eligible. It also made a preliminary determination that she was at fault in the creation of the overpayment because she claimed her daughter as a dependent when she knew or should have reasonably known that she was not an eligible dependent under the Act. The Office found that appellant was appropriately paid wage-loss compensation until July 15, 2005. It indicated that, prior to this time, appellant's daughter had been in school but she had a child on July 15, 2005 and never returned to school.⁴ The Office found that a reasonable date for terminating appellant's augmented wage-loss compensation was July 15, 2005. It noted that its procedure provides that when a student is prevented by reasons beyond her control (such as brief but incapacitating illness) from continuing in school, compensation may be continued for a period of reasonable duration. However, any such period would be counted toward the four years of

¹ The Office had previously accepted that appellant sustained other work-related neck and right knee conditions.

² In a June 1, 2006 letter, the Office requested that appellant provide confirmation that her daughter continued to be a student. It is unclear whether she responded to this letter.

³ In August 2008, appellant submitted a December 27, 2007 medical report, which she indicated showed that her grandson had autism. She wrote on the report that she was raising him and financially supporting him and that she was claiming him as a dependent for compensation purposes.

⁴ The Office stated that appellant advised that her daughter had been on maternity leave from her school before the birth of her child, but did not return to school after the birth of the child.

entitlement and the Office claim examiner will determine what constitutes “reasons beyond the control” of the beneficiary and decide what may be considered a period of reasonable duration during which compensation may be continued.

The Office further indicated that it was reasonable to continue augmented compensation for appellant until her daughter’s child was born. It indicated that “the extraordinary duties of caring for a child would to a reasonable person supersede the quest for additional schooling” absent a positive demonstration that the dependent had returned to school. The Office noted that appellant claimed that she supported her grandchild but the child was not known to have been adopted by her. Appellant completed several Forms EN1032 in which she claimed her daughter as a dependent after she was aware that her daughter had not returned to school. The Office included calculations that showed that she received \$102,293.63 in compensation at the 3/4 rate for the period July 15, 2005 to April 12, 2008 but that she should have received \$90,682.08 in compensation at the 2/3 statutory rate for the same period. The difference of \$11,611.55 represented the overpayment of compensation. The Office requested that appellant complete an attached financial information questionnaire (Form OWCP-20) and submit other evidence and argument if she wished to contest the overpayment.

Appellant submitted a completed Form OWCP-20 in which she indicated that she had \$2,673.00 in monthly income and \$2,520.00 in monthly expenses.⁵ She asserted that she did not realize that the Office did not change her pay when she stopped claiming her daughter as a dependent. Appellant stated, “I thought I was being paid my cost of living and contract pay increases over the years.”

In a Form EN1032 completed on September 29, 2009, appellant advised that her daughter stopped being a dependent in July 2005 because she stopped school at that time. However, she indicated that she was claiming a dependent without identifying the individual she was claiming. On the form, appellant wrote, “I claim my daughter as a dependent only during 2004 until July 2005 as she stopped school at this time, [due] to the birth of her child. I am not claiming her at this time or after July 2005.”

In an October 6, 2008 decision, the Office determined that appellant received an \$11,611.55 overpayment of compensation for the period July 15, 2005 to April 12, 2008 and that she was at fault in the creation of the overpayment. It further found that her monthly income exceeded her monthly expenses by \$151.20 and that the overpayment was not subject to waiver. The overpayment would be recovered by deducting \$75.00 from her continuing compensation payments every 28 days. Regarding its determination that appellant was at fault in the creation of the overpayment, the Office stated:

“The Office submits [a Form] EN1032 yearly to workers who are on the periodic roll. This document clearly describes the conditions of a dependent the Part C of the EN1032 [form] presents an extensive description of who a dependent is and what that requirements for a dependent are. In this case, the EN1032 [form] closest in date to July 2005 is the EN1032 [form] completed on October 1, 2005. This document clearly states that the daughter is a dependent. There is no

⁵ All of appellant’s income came from her continuing Office compensation benefits.

information that the daughter was no longer attending school. There is no evidence in the file that the worker communicated the change in her daughter's school status at the time of the change. This is also true for the next EN1032 [form] completed on September 8, 2006. The first indication that there was a change in the [appellant's] dependent status was September 15, 2007.

“[Appellant] indicated in her response to the Office that she thought that her payments included the cost[-]of[-]living increases and ‘contract’ pay. She noted that her base pay at the employer had increased overtime. This is intuitively not credible -- a reasonable person should have expected a decrease in pay from 75 percent to 66 percent of their compensation when a dependent stopped being a dependent -- a decrease was expected not an increase in payments.”

LEGAL PRECEDENT -- ISSUE 1

The Act⁶ 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.⁷ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic compensation for total disability.⁸ Where the employee has one or more dependents as defined in the Act, he or she is entitled to have her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁹ A student may be a dependent, which under 5 U.S.C. § 8101(17) means an individual under 23 years of age who has not completed four years of education beyond high school and is regularly pursuing a full-time course of study or training at an accredited institution.¹⁰ If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation 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.¹¹

The Federal (FECA) Procedure Manual states:

“Where a student is prevented by reasons beyond his or her control (such as a brief but serious illness) from continuing in school, compensation may be continued for a period of reasonable duration. However, any such period would

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8102(a).

⁸ *Id.* at § 8105(a)

⁹ *Id.* at § 8110(b).

¹⁰ *Id.* at §§ 8101(17), 8110(a). A dependent may also be a husband or wife (under certain circumstances); an unmarried child, including an adopted child or stepchild, who lives with a claimant and is under 18 years of age; an unmarried child who younger 18 or over 18, but who cannot support himself or herself because of mental or physical disability; or a parent who totally depends on a claimant for support. 5 U.S.C. §§ 8101(9), 8110(a).

¹¹ *Diana L. Booth*, 52 ECAB 370 (2001).

be counted toward the four years of entitlement. The claims examiner will determine what constitutes ‘reason beyond the control’ of the beneficiary and decide what may be considered a period of reasonable duration during which compensation may be continued. The claims examiner will also place a memorandum in the file outlining the circumstances of the case and the reasons for the decision.”¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant received an \$11,611.55 overpayment of compensation. Between July 15, 2005 and April 12, 2008, appellant received wage-loss compensation at the augmented 3/4 rate for those who claim at least one eligible dependent within the meaning of the Act.¹³ The record reveals that her daughter stopped pursuing a full-time course of study (post high school) around the time that she gave birth to her son on July 15, 2005. The Office properly determined that after July 15, 2000 appellant could not claim her daughter as a dependent under student status within the meaning of the Act.¹⁴ Appellant contended that she could claim her grandson as a dependent after July 15, 2005, but she did not provide any evidence that she had adopted her grandson or otherwise present a valid argument that she could claim her grandson or some other individual as a dependent.¹⁵ The Office record contains evidence showing that appellant received \$102,293.63 in compensation at the 3/4 rate for the period July 15, 2005 to April 12, 2008 but that she should have received \$90,682.08 in compensation at the 2/3 rate for the same period. Therefore, the difference of \$11,611.55 represents the amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dependents*, Chapter 2.811.10(a)(4) (February 2002).

¹³ *See supra* note 9 and accompanying text.

¹⁴ *See supra* note 10 and accompanying text. Appellant might have actually stopped her schooling prior to July 15, 2005 but the Office reasonably determined that her dependent status did not end until July 15, 2005. The Office indicated that Office procedure provides that, when a student is prevented by reasons beyond her control from continuing in school, compensation may be continued for a period of reasonable duration. The Office claims examiner has the discretion to determine what constitutes a reason beyond the control of an individual and what constitutes a reasonable duration for augmented compensation to be continued. *See supra* note 12 and accompanying text. In this case, the Office claims examiner found that the pregnancy of appellant’s daughter was a reason beyond her control for stopping school and that a reasonable duration for continuing augmented compensation lasted up through the birth of her child on July 15, 2005. The Board notes that the Office claims examiner’s actions in this regard seem reasonable and do not present an abuse of discretion.

¹⁵ *See supra* note 10.

¹⁶ 5 U.S.C. § 8129(a).

who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁷ No waiver of payment is possible if appellant is not “without fault” in helping to create the overpayment.¹⁸

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who --

- (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....”¹⁹

Section 10.433(c) of the Office’s regulations provides:

“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 he or she is being overpaid.”²⁰

ANALYSIS -- ISSUE 2

In several EN1032 forms, including those completed by appellant on October 1, 2005, September 8, 2006 and September 15, 2007, the Office specifically advised her of the standards under the Act for claiming a dependent. Appellant had no reason to believe that she could claim a dependent after July 15, 2005. In fact, on an EN1032 form completed on September 15, 2007 she stated that she was not claiming her daughter as a dependent after July 15, 2005 because her daughter had stopped attending school. Appellant maintained that she could claim her grandson as a dependent after July 15, 2005 but she did not present any reason for this argument. Therefore, she knew or should have known that she was not entitled to augmented Office compensation after July 15, 2005.

In addition, appellant knew or should have known that after July 15, 2005 she accepted augmented compensation to which she was not entitled due to the lack of a qualifying

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ *Id.* at § 10.433(c).

dependent.²¹ The difference between compensation at the augmented 3/4 rate and the unaugmented 2/3 rate is substantial and appellant knew or should have known that she was receiving payments to which she was not entitled, particularly since she received such unwarranted payments for close to three years. Appellant asserted that she did not realize that the Office did not change her pay when she stopped claiming her daughter as a dependent and stated, "I thought I was being paid my cost of living and contract pay increases over the years." However, such a statement would not support appellant's lack of fault in receiving unwarranted payments as such increases occur gradually and could not explain why her Office compensation did not decrease dramatically (from the augmented 3/4 rate and the unaugmented 2/3 rate) around July 2005.²² For these reasons, appellant is at fault in the creation of the \$11,611.55 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

"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 his or her 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."²³

ANALYSIS -- ISSUE 3

The record supports that in requiring repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.²⁴ Therefore, the Office properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

²¹ Therefore, appellant's situation falls under the third prong of 20 C.F.R. § 10.433(a). *See supra* note 19 and accompanying text.

²² On appeal, appellant argued that she was not at fault in creating the overpayment because the Office should have monitored and corrected her compensation payments. However, any negligence by the Office in continuing to issue her checks for augmented compensation after she no longer had a dependent does not excuse her acceptance of amounts which she knew or should have known were unwarranted. *Robert W. O'Brien, supra* note 18.

²³ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

²⁴ A financial information questionnaire completed by appellant showed that her monthly income exceeded her monthly expenses by more than \$150.00.

CONCLUSION

The Board finds that the Office properly determined that appellant received an \$11,611.55 overpayment of compensation. The Board finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment by deducting \$75.00 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 6, 2008 decision is affirmed.

Issued: November 10, 2009
Washington, DC

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

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

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