

FACTUAL HISTORY

On September 6, 1988 appellant, then a 40-year-old distribution clerk, sustained employment-related cervical and lumbar strains in the performance of her federal duties. On May 10, 1993 she filed a Form CA-2, occupational disease claim, for bilateral pain, numbness and swelling in her shoulders, arms and hands. On September 10, 1993 the claim was accepted for bilateral carpal tunnel syndrome. Appellant underwent surgery for a right carpal tunnel release in 1993 and a left release in 1994.¹ She was placed on the periodic rolls at the 3/4 augmented rate effective November 9, 1993. Appellant advised that her daughter, whose date of birth was August 16, 1974, was a full-time student. The Office subsequently accepted a cervical herniated disc, cervical failed syndrome, lumbar herniated disc and spondylosis with myelopathy. Appellant underwent authorized cervical discectomy and fusion in 1996. She returned to modified duty for four hours a day in August 1998 and continued to receive wage-loss compensation for four hours daily at the augmented rate.

Appellant stopped work on December 17, 1998 and returned on March 13, 1999. By decision dated June 11, 1999, the Office denied her claim for total disability for the period December 17, 1998 to March 8, 1999.

On June 11, 1999 it adjusted appellant's compensation, based on her actual part-time earnings. Appellant submitted an Office EN1032 form on July 2, 1999 and noted that she was no longer claiming her daughter as a dependent as she had graduated in February 1999. She continued to receive compensation at the augmented rate.

On August 18, 2000 appellant submitted a Form CA-2a claim, alleging that she sustained a recurrence of disability on February 10, 2000 when she stopped work. On September 17, 2000 she filed a recurrence claim, alleging that she sustained a recurrence of disability on November 1, 1999 when she stopped work. The employing establishment noted that she stopped work on November 1, 1999.

By decision dated January 17, 2001, the Office denied appellant's claim that she sustained a recurrence of total disability on February 10, 2000. On May 10, 2004 appellant filed a third CA-2a, stating that the recurrence occurred in December 1999.² By decision dated August 30, 2004, the Office denied that she sustained a recurrence of total disability. In merit decisions dated January 10 and May 5, 2005, the Office denied modification of the prior

¹ The 1988 traumatic injury claim was adjudicated under Office file number xxxxxx169 and the 1993 occupational disease claim under file number xxxxxx270. The claims were doubled, and the latter became the master file.

² On June 15, 2004 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$1,586.56 had been created because basic life insurance deductions were not made. The record does not contain a final overpayment decision.

decisions. Appellant submitted EN1032 forms claiming no dependents and received compensation for four hours a day at the augmented rate.³

On September 29, 2005 appellant underwent lumbar laminectomy and decompression surgery. She began receiving compensation for total disability, effective that day. Appellant continued to receive wage loss for total disability. On June 10, 2007 appellant's compensation rate was changed from 3/4 to 2/3.⁴

On September 26, 2007 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$11,477.54 from February 28, 1999 through June 9, 2007 as she received wage-loss compensation at the augmented 3/4 rate. It found her to be at fault because she knew or should have known that she was not entitled to compensation at the augmented rate. Appellant was given 30 days to respond and was provided an overpayment action request form and an overpayment questionnaire. An Office overpayment worksheet noted that, during this period, she received compensation at the 3/4 rate totaling \$151,915.08 and that compensation at the 2/3 rate would total \$140,437.54, which resulted in an overpayment of compensation in the amount of \$11,477.54.⁵

By letter dated October 1, 2007, appellant requested copies of her EN1032 forms from February 28, 1999 through June 9, 2007. She telephoned the Office on October 3, 2007 and was instructed on how to proceed with the preliminary overpayment finding. Appellant again contacted the Office on October 23, 2007, and was told that she would receive the requested documentation when it became available and that an extension of time would be considered.

In an October 30, 2007 decision, the Office finalized the determination that she was at fault in the creation of an overpayment in compensation in the amount of \$11,477.54 because she knew or should have known she was not entitled to receive wage-loss compensation at the augmented 3/4 rate. It found that she had not responded to the preliminary notice of overpayment. The Office determined that \$200.00 would be deducted from her continuing compensation each payment period to repay the overpayment.

In correspondence received by the Office Branch of Hearings and Review on January 30, 2008, appellant requested a prerecoupment hearing. She contended that she was told she would have an extension of time to file a response to the preliminary overpayment notice and argued that she was not at fault because she did not claim a dependent on her EN1032 forms. Appellant also submitted an overpayment questionnaire.

³ On February 2, 2004 appellant filed a schedule award claim. By letter dated August 31, 2005, the Office informed her that, as she had not reached maximum medical improvement, she was not as yet entitled to a schedule award.

⁴ Appellant, who had previously received compensation payments by check, requested that they be directly deposited on March 23, 2007. Direct deposits were begun on March 18, 2007.

⁵ Appellant received partial wage-loss compensation from February 28, 1999 through September 28, 2005 and received total disability compensation from September 29, 2005 to June 9, 2007.

By decision dated March 12, 2008, the Office denied the request, noting that she did not request a hearing of the preliminary overpayment determination and that the final overpayment was not subject to the hearing provision found in section 8124(b) of the Federal Employees' Compensation Act.

LEGAL PRECEDENT -- ISSUE 1

Office regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.⁶ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.⁷ The only right to a review of a final overpayment decision is with the Board.⁸ The hearing provisions of section 8124(b) of the Act⁹ do not apply to final overpayment decisions.¹⁰

ANALYSIS -- ISSUE 1

The September 26, 2007 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. As noted, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing.¹¹ When the final overpayment decision is issued, there is no right to a hearing or a review of the written record, and the Office does not have discretion to grant such a request. The only right to appeal is with the Board.¹² In this case, appellant requested a prerecoupment hearing on January 30, 2008, four months after the preliminary overpayment finding. Once the Office issued the final overpayment decision on October 30, 2007, her only appeal right was to the Board. The Board finds that appellant's January 30, 2008 request properly denied as she was not entitled to a hearing with respect to a final overpayment decision.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of the Act¹⁴ 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.¹⁵ When an overpayment has been made to an individual because of an

⁶ 20 C.F.R. § 10.432.

⁷ *Id.*

⁸ *Id.* at § 10.440(b).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Supra* note 8.

¹¹ 20 C.F.R. § 10.432.

¹² *Id.* at § 10.440(b).

¹³ *Id.*

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Id.* at § 8102(a).

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.¹⁶

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 dependent 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 for a total of 75 percent of monthly pay.¹⁷ 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).¹⁸ 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 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.¹⁹

ANALYSIS -- ISSUE 2

Appellant was placed on the periodic rolls in November 1993 at the 3/4 augmented rate. In June 1994 she submitted an Office EN1032 form and identified her daughter, born August 16, 1974, as a dependent. The daughter would therefore become 18 years of age on August 16, 1992. The record contains no evidence that appellant's daughter was disabled due to a mental or physical condition. Appellant's daughter would, therefore, not qualify as a dependent after August 16, 1992 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.²⁰ On EN1032 forms submitted by appellant in July 1995, June 1996, January 1998 and July 1998, she certified that her daughter was a full-time college student. On an EN1032 form submitted by appellant in July 1999, she reported that her daughter had graduated from college the previous February.

The record supports that appellant continued to receive compensation at the augmented 3/4 rate from February 28, 1999, when she no longer had an eligible dependent, to June 9, 2007. For this period she received augmented compensation at the 3/4 rate totaling \$151,915.08, when she should have received compensation at the 2/3 rate of \$140,437.54. Thus the \$11,477.54

¹⁶ *Id.* at § 8129(a).

¹⁷ 5 U.S.C. § 8110(b).

¹⁸ *Id.* at § 8110(a)(3). *Id.* at § 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.

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

²⁰ *Id.*

difference constitutes an overpayment in compensation.²¹ The Board finds that Office properly determined the fact and amount of overpaid compensation in this case.²²

LEGAL PRECEDENT -- ISSUE 3

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.”²³

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 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).”²⁴

Section 10.438(b) of Office regulations provides that failure to submit requested financial information within 30 days shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.²⁵

ANALYSIS -- ISSUE 3

The record supports that appellant received augmented compensation following her daughter’s graduation from college in February 1999. The Board finds however that appellant is not at fault in the creation of the overpayment.

²¹ 5 U.S.C. §§ 8101(17), 8110.

²² See *Ralph P. Beachum, Sr.*, *supra* note 19. The Board notes that appellant’s daughter became 23 years of age on August 16, 1997.

²³ 5 U.S.C. § 8129; see *Joan Ross*, 57 ECAB 694 (2006).

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

²⁵ 20 C.F.R. § 10.438(b); see *John Skarbek*, 53 ECAB 630 (2002).

Whether or not an individual is 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.²⁶ In this case, on July 2, 1999 appellant notified the Office, on an EN1032 form, that she no longer claimed her daughter as a dependent as she had graduated from college the previous February. Appellant submitted additional EN1032 forms claiming no dependents. The record establishes that appellant properly advised the Office as to the status of her dependents. Furthermore, when amortized over an eight-year period, the difference between augmented and nonaugmented compensation is approximately \$110.00 a month, not an amount that would necessarily put one on notice, given cost-of-living increases. The Board finds that under the circumstances of this case appellant was not at fault in the creation of the overpayment. The case will be remanded to the Office for consideration of the issue of waiver.²⁷ In light of the holding on this issue, the fourth issue is moot.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing and that she received an overpayment in compensation in the amount of \$11,477.54 because she received augmented compensation after her daughter was no longer an eligible dependent. The Board further finds that appellant was not at fault in the creation of the overpayment.

²⁶ *Danny E. Haley*, 56 ECAB 393 (2005).

²⁷ *See Otha J. Brown*, 56 ECAB 228 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 12, 2008 and October 30, 2007 be affirmed in part and set aside in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: September 21, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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