

**United States Department of Labor
Employees' Compensation Appeals Board**

K.T., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Norfolk, VA**

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**Docket No. 09-2075
Issued: August 23, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2009 appellant filed a timely appeal of the March 30, 2009 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$29,260.12; and (2) whether the Office properly found that she was at fault in creation of the overpayment and ineligible for waiver of recovery.

FACTUAL HISTORY

On December 1, 1986 appellant, then a 29-year-old pipe fitter apprentice, injured her back during the course of her federal employment. The Office accepted her claim for a lumbar strain, bipolar affective disorder and dysuria. It paid compensation for wage-loss and medical benefits.

Appellant was initially paid benefits at the basic statutory rate of $66 \frac{2}{3}^{\text{rd}}$ based on her status as having no dependents. In a Form CA-1032 completed on January 27, 1995, she advised the Office of her marriage on June 18, 1994 and submitted her marriage certificate. The Office adjusted appellant's compensation benefits to reflect the augmented compensation rate of 75 percent. In response to requests by the Office, appellant submitted annual CA-1032 forms. On April 1, 1997 she advised that she was married but not living with or supporting her husband.

By letter dated March 26, 2008, the Office requested that appellant verify her entitlement to augmented compensation based on her marriage as her most recent CA-1032 forms indicated that her husband did not reside with her or receive direct payments from her. It asked her to submit information with regard to her marital status within 30 days.

In a CA-1032 form completed on April 17, 2008 appellant noted that she was married but that her husband did not live with her. She noted that a court ordered her husband to pay spousal support, but he had not done so and had disappeared. Appellant submitted a court order from a civil court in Virginia that directed her husband to pay spousal support of \$150.00 a month commencing November 15, 1998.

On February 25, 2009 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$29,260.12 because she received payment at the augmented rate but should have been paid at the statutory rate. It found that she was not entitled to compensation at the 75 percent augmented rate from April 1, 1997 through January 17, 2009. Appellant was at fault in the creation of the overpayment as she was not entitled to augmented compensation because her marital status and living arrangements did not meet the criteria for three-fourths compensation. In an accompanying memorandum, the Office explained the amount of the overpayment.¹ It sent appellant instructions for appealing the overpayment or to request waiver, together with financial forms. Appellant did not file a timely response.

By decision dated March 30, 2009, the Office finalized the overpayment in the amount of \$29,260.12, for which appellant was at fault in the creation and not eligible for waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.²

¹ The Office noted that, for the period April 1, 1997 through December 4, 1999, the difference between payment of compensation at a $\frac{3}{4}$ rate (\$49,462.69) and the $\frac{2}{3}$ rate (\$55,747.84) was \$6,285.15. For the period from December 5, 1999 through December 27, 2003, the difference was \$10,294.75 (\$88,968.13 minus 78,673.38). For the period from December 28, 2003 through January 19, 2008, the amount the overpayment was calculated to be \$11,459.76 (\$96,727.91 minus \$85,268.15). The Office calculated the overpayment for the period January 20, 2008 through January 17, 2009 as \$1,220.46 (\$25,427.79 minus \$24,207.33). Adding these amounts together, the Office found that the total amount of the overpayment was \$29,260.12.

² 5 U.S.C. § 8129.

The Act provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ If the disability is total, the United States shall pay the employee monthly monetary compensation for total disability.⁴ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependants.⁵ If a claimant receives augmented compensation during a period when 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-fourths rate constitutes an overpayment of compensation.⁶

A husband is considered an employee's dependent if he is a member of the same household, is receiving regular contributions from the employee for his support or if the employee has been ordered by a court to contribute to his support.⁷ In determining dependency under the Act, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation from April 1, 1997 through January 17, 2009. The evidence establishes that she received wage-loss compensation at the 75 percent augmented rate for employees with dependents during this period. Appellant separated from her husband before she completed the CA-1032 form on April 1, 1997 and did not reside with him; she did not provide any means of support to him and a court order from a civil court in the Commonwealth of Virginia noted that he was to provide spousal support to her. The Board finds that, as none of the three individual criteria under 5 U.S.C. § 8110(a)(2) may be applied in appellant's circumstances, she was not entitled to augmented compensation after that date. The Office provided a detailed accounting of the amount of compensation she should have received at the statutory 66 2/3rd percent rate since there were no qualified dependents. The Board finds that the Office's calculation of a \$29,260.12 overpayment was correct.⁹ Accordingly, the Office properly determined the fact and amount of the overpayment.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8105(a); *see also* *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁵ *Id.* at § 8110.

⁶ *See Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment because she received compensation at the augmented rate during a period when she had no dependents following her divorce).

⁷ 5 U.S.C. § 8110(a)(2).

⁸ *See Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

⁹ *See supra* note 1.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its implementing regulations, an overpayment must be recovered 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.¹⁰

Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from the Office are proper.¹² 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.¹³

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion, that she accepted payments which she knew or should have known to be incorrect.¹⁴

For the Office to establish that appellant was at fault in creating the overpayment, it must show that, when she received the compensation in question, she knew or should have known that the payment was incorrect.¹⁵ With respect to whether an individual is with fault, section 10.433(b) of the Office’s regulations provide that whether or not the Office determines that an individual was with fault with respect to the receipt 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 individuals’ capacity to realize that he or she was being overpaid.¹⁶

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ *Id.* at § 10.433(a).

¹² *Id.*

¹³ *Id.* at § 10.433(b).

¹⁴ *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

¹⁵ *See Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ 20 C.F.R. § 10.433(b).

The Board finds that appellant was at fault in creating the overpayment. The EN1032 forms provided information notifying her as to the status of dependents for augmented compensation. Appellant was advised as to the requirements for claiming a spouse as a dependent and informed that a claimant with no dependents was paid at the 66 2/3rd percent basic rate, not the 75 percent augmented rate. The evidence establishes that, when placed on compensation, she received it at the two-thirds statutory rate. When appellant got married, she received compensation at the augmented 75 percent rate. The Board finds that, when she ceased living with her husband, she knew or reasonably should have known that the rate of compensation she was receiving was incorrect. The Board notes that the Office informed appellant on an annual basis as to her receipt of compensation and the basis on which dependents were determined. The record reflects that she initially asked for the increased rate when she was married. Therefore, appellant received compensation at the 75 percent augmented rate for about three years after. After her separation from her husband, she knew or should have known that the payments made at the augmented rates were incorrect. Appellant is at fault and not eligible for waiver of recovery. The Office is required by law to recover the overpayment.

Appellant contends on appeal that she informed the Office about the change in her marital status, that she did not mislead the Office and depended on it to properly interpret the rules. Even though the Office may have been negligent in paying compensation at the augmented rate after it had received notice of her separation, this does not excuse her acceptance of payments which she knew or should have known to be incorrect.¹⁷ Appellant also contends that her debt can be forgiven in case of financial hardship. However, as she was at fault in the creation of the overpayment, waiver of the overpayment is precluded.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$29,260.12. The Board further finds that the Office properly found that she was at fault in the creation of the overpayment and therefore ineligible for waiver.

¹⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁸ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB __ (Docket No. 07-1844, issued December 11, 2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 30, 2009 is affirmed.

Issued: August 23, 2010
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