

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

J.H., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
PARADISE STEAM PLANT, Chattanooga, TN,
Employer**

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**Docket No. 09-1031
Issued: February 5, 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 March 10, 2009 appellant filed a timely appeal from a February 19, 2009 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and that he was at fault in its creation.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$5,921.86 for the period June 14, 2005 through October 28, 2006 because he received compensation at the augmented rate; (2) whether he was at fault in the creation of the overpayment; and (3) whether

¹ The record contains a January 15, 2009 decision modifying a November 25, 2008 termination decision. The Office found that appellant had no further disability due to his accepted conditions of lumbar strain and lumbar radiculitis. It determined that he was entitled to wage-loss compensation and medical benefits for degenerative disc disease of the lumbar spine. Appellant has not appealed this decision and it is not before the Board at this time. 20 C.F.R. § 501.2(c); *see L.S.*, 59 ECAB ____ (Docket No. 07-196, issued February 14, 2008).

the Office properly determined that it would recover the overpayment by deducting \$200.00 per month from continuing compensation payments.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed a September 20, 2006 decision finding that appellant forfeited entitlement to compensation from February 28, 2001 through May 19, 2003 and September 2, 2003 to June 13, 2005 because he knowingly failed to report earnings from employment.² The Board set aside a November 2, 2006 overpayment decision because the Office had not provided him with a timely requested telephone conference.³ The findings of fact from the prior decision are hereby incorporated by reference.

The Office paid appellant compensation at the three-fourths rate or 75 percent of the applicable pay rate, for claimants with dependents. Appellant claimed his son, born March 28, 1984, as a dependent in EN1032 forms until June 13, 2005. In EN1032 forms dated June 13, 2005, April 17, 2006 and July 31, 2007, he indicated that he was unmarried and that he did not make regular support payments. Appellant did not claim compensation for other dependents. The EN1032 form explained that compensation was paid at 66 2/3 percent of the applicable pay rate if the claimant had no dependents and at 75 percent if the claimant had one or more dependents. The EN1032 form further provided that a dependent included a spouse who resided with the claimant or received direct payments for support, an unmarried child under the age of 18 or an unmarried child over the age of 18 who either attended school full time or was unable to support himself or herself because of a disability.

On September 4, 2007 the Office requested updated financial information from appellant. It noted that his son graduated high school on May 25, 2004 but he received compensation at the augmented rate until October 28, 2006.

On November 13, 2007 the Office calculated that appellant received an overpayment of compensation in the amount of \$10,269.00 because he received compensation at the augmented rate from May 26, 2004 to October 28, 2006. It noted that he already had an overpayment of \$110,000.00 that he could not repay.

On January 16, 2009 the Office notified appellant of its preliminary determination that he received a \$10,269.40 overpayment of compensation for the period May 26, 2004 to October 28, 2006 because he received compensation at the augmented rate even though he did not have any dependents. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it

² Docket No. 07-686 (issued September 20, 2006). The Office accepted that on June 14, 1983 appellant, then a 34-year-old electrician, sustained a back condition due to factors of his federal employment. He stopped work on June 6, 1983 and returned to work with restrictions on June 15, 1983. Appellant resigned, citing personal reasons, on June 20, 1983. The Office paid him compensation for total disability beginning June 1983.

³ On remand, the Office held a telephone conference on September 10, 2007. It agreed to lower the amount it deducted each month for repayment of the overpayment.

notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On January 26, 2009 appellant contested that he was at fault in creating the overpayment. He indicated that he was “hospitalized several times during these time periods.” Appellant submitted an overpayment recovery questionnaire. He listed no income and \$795.00 per month in expenses. Appellant indicated that he was willing to have \$250.00 per month deducted from his gross compensation to repay the overpayment. On January 28, 2008 he questioned why he was being asked to pay back an overpayment of \$10,000.00 for the period 2004 to 2006.

By decision dated February 19, 2009, the Office determined that appellant received an overpayment of \$5,921.86 for the period June 14, 2005 through October 28, 2006. It noted that the preliminary determination that he received an overpayment of \$10,269.40 was inaccurate, as it had previously found that he had forfeited entitlement to compensation for part of the period. The Office found the period of the overpayment to be June 14, 2005 through October 28, 2006 that did not overlap the period of forfeited compensation. It subtracted the compensation it paid appellant from June 14, 2005 through October 28, 2006, \$53,304.72, from what he should have received as a claimant without dependents, \$47,382.86, to find an overpayment of \$5,921.86. The Office noted that he had not submitted any evidence showing that he was hospitalized during the period of the overpayment. It finalized its finding that appellant was at fault in the creation of the overpayment. The Office indicated that it would withhold \$200.00 from continuing compensation as repayment.

On appeal, appellant contends that the Board could verify that he was in the hospital during the relevant time frame by writing to the hospital. He also argues that \$200.00 per month would create a financial hardship and noted that the Office was already deducting \$986.67 from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act⁴ 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.⁵ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁶ Where the employee has one or more dependents as defined in the Act, he or she 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.⁷ A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8105(a).

⁷ *Id.* at § 8110(b).

full-time course of study.⁸ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation. Appellant claimed his son as a dependent on EN1032 form until June 13, 2005. The Office, however, paid him wage-loss compensation at the augmented three-quarters rate until October 28, 2006. If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation to which he was entitled at the 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.¹⁰ The Office initially determined that appellant received a \$10,269.40 overpayment of compensation for the period May 26, 2004 to October 28, 2006. It found, however, that it had previously determined that he forfeited entitlement to compensation from February 28, 2001 through May 19, 2003 and September 2, 2003 to June 13, 2005. The Office adjusted the period of the overpayment to June 14, 2005 through October 28, 2006 so that it did not overlap the period of the forfeiture. It calculated the overpayment by subtracting the amount of compensation appellant received for this period, \$53,304.72, from what he should have received as a claimant without dependents, \$47,382.86, to find an overpayment of \$5,921.86. Appellant has not challenged the fact or amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹¹ provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations¹² provide that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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

⁸ *Id.* at § 8110(a).

⁹ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁰ *Ralph P. Beachum*, 55 ECAB 442 (2004).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. In order for it to establish that he was at fault in creating the overpayment of compensation, the Office must show that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹³ 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 creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual’s capacity to realize that he or she is being overpaid.¹⁴

The Board finds that appellant was at fault in creating the overpayment from June 14, 2005 through October 28, 2006. Appellant completed EN1032 forms on June 13, 2005, April 17, 2006 and July 31, 2007, which provided him with the definition of a dependent and explained that he was not entitled to receive compensation at the augmented rate if he did not have dependents. He did not claim dependents on the EN1032 forms beginning June 13, 2005.¹⁵ By signing the EN1032 forms, appellant had notice that he was not entitled to compensation at the augmented rate if he did not have a dependent. He knew or should have known that the compensation he received after June 13, 2005 was incorrect. Even if an overpayment resulted from negligence by the Office, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.¹⁶ As appellant is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover the overpayment.¹⁷

On appeal, appellant argues that he was in the hospital during the period of the overpayment. He asserts that the Board can obtain verification by writing to the hospital. Appellant, however, has the burden of submitting evidence in support of his contentions.

¹³ *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁴ 20 C.F.R. § 10.433(b); *F.A.*, 60 ECAB ___ (Docket No. 08-1519, issued December 18, 2008); *see also Otha J. Brown*, 56 ECAB (2004) (each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she receives from the Office are proper).

¹⁵ The forms cover the 15 months prior to signature.

¹⁶ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁷ 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).

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹⁸ Section 10.441(a) of the regulations provide:

“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 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.”¹⁹

ANALYSIS -- ISSUE 3

On appeal, appellant argues that deducting \$200.00 would constitute a hardship and noted that the Office was already deducting \$986.67 from his continuing compensation. The Office found that recovery of the overpayment should be made by an adjustment against continuing compensation at the rate of \$200.00 per payment. It gave no indication of how it arrived at this figure or whether it gave due regard to the factors described above.²⁰ The Office did not consider the financial documentation submitted by appellant or the fact that it was already deducting from his compensation payments to repay a prior overpayment created by a forfeiture of compensation. It is required to take into account relevant factors so as to minimize (but not necessarily eliminate)²¹ any hardship when it decreased his compensation to recover the overpayment.²²

The Board will remand the case for further development on the issue of recovery. Pending further development of appellant's financial status and the Office's consideration of relevant factors so as to minimize any hardship in setting the rate of recovery, the Office should suspend its collection of the overpayment. After further development, the Office shall issue a final decision on an appropriate rate of recovery from continuing compensation.

¹⁸ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁹ 20 C.F.R. § 10.441(a).

²⁰ *Darlene A. Luck*, 54 ECAB 740 (2003).

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4(d)(1)(b) (May 2004).

²² In judging whether repayment of the uncompromised portion of the debt would create hardship, the Office should assess the debtor's income and assets and the debtor should be required to submit a current financial report (OWCP-20) if one has not been provided within the previous six months. *Id.* at *Debt Liquidation*, Chapter 6.300.6(a); *see J.S.*, 58 ECAB 280 (2007).

CONCLUSION

The Board finds that appellant received an overpayment of \$5,921.86 for the period June 14, 2005 through October 28, 2006 because he received compensation at the augmented rate and that he was at fault in the creation of the overpayment. The Board further finds that case is not in posture for decision on the rate of recovery of the overpayment. On remand, the Office should review appellant's financial information and determine based on the factors listed in 20 C.F.R. § 10.441(a) an appropriate overpayment recovery schedule.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2009 is affirmed, in part and set aside in part and remanded for further action consistent with this decision of the Board.

Issued: February 5, 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