

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

\_\_\_\_\_  
**I.G., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVY  
ACCOUNTING & FINANCE CENTER,  
Washington, DC, Employer**

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-515  
Issued: January 7, 2010**

*Appearances:*  
*Appearance, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On December 15, 2008 appellant filed a timely appeal of the October 29, 2008 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of benefits, for which she was at fault. 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 \$10,102.08 for the period October 13, 2004 through June 7, 2008 because she received compensation at the augmented rate; and (2) whether she was at fault in creating the overpayment and, therefore, not entitled to waiver of recovery of the overpayment.

**FACTUAL HISTORY**

On January 10, 1977 appellant, then a 38-year-old secretary, filed a traumatic injury claim alleging that on January 3, 1977 she injured her neck, back and nerves when the cable on

the elevator she was on broke. The Office accepted the claim for acute lumbosacral and cervical strains and C5-6 herniated nucleus pulposus and authorized surgery for anterior disc removal, anterior cervical interbody fusion and anterior cervical discectomy, which was performed on February 22, 1979.

On December 2, 1997 the Office notified appellant of the conditions under which she would receive compensation every four weeks. It noted that, in order to avoid an overpayment of compensation, she was to contact the Office with any change in address or any change in the status of her dependents.

Over the years, appellant claimed her now-deceased husband as a dependent, as well as their two children, born March 15, 1962 and April 3, 1963. Because she had at least one eligible dependent, the Office paid her wage-loss compensation at the augmented rate of 75 percent.

In an EN1032 form dated August 10, 2005, appellant advised that she was widowed and had no dependents.

By letter dated June 24, 2008, the Office advised appellant that her compensation was reduced to the two-thirds statutory pay rate as she did not have an eligible dependent. It began paying her compensation at the basic rate of 66 2/3 percent beginning June 8, 2008.

In a letter dated July 14, 2008, appellant stated that she was unaware that she had been paid at an incorrect compensation rate. She noted that she had properly completed the forms requested and submitted a copy of her husband's death certificate in August 2005. Enclosed with her letter, appellant submitted a copy of a death certificate for her spouse, dated October 13, 2004.

On August 4, 2008 the Office made a preliminary finding that appellant was overpaid benefits in the amount of \$11,194.99. It noted that the overpayment occurred because her husband died on October 13, 2004 and she was without dependents since October 13, 2004; however, she received augmented compensation at the three-fourths rate instead of the statutory two-thirds rate from October 13, 2004 to June 7, 2008. The Office noted that appellant received net compensation for this period in the amount of \$92,884.47 when she was only entitled to \$81,689.48. It found appellant to be at fault in the creation of the overpayment because she reasonably should have been aware that she was not entitled to receive augmented compensation. The Office noted that appellant had the right to submit evidence or arguments which would affect the preliminary findings.

On August 12, 2008 appellant noted her disagreement and requested a telephone conference. She submitted a Form OWCP-20 overpayment recovery questionnaire with her request. Appellant listed her monthly expenses of \$3,246.71 on the form, but provided no information about her monthly income.

In a conference call dated October 27, 2008, the Office noted telephone calls were made on October 23 and 27, 2008 with appellant. The claims examiner noted that appellant alleged she was very upset by the death of her husband and did not monitor the direct deposits. Appellant also contended that due to her poor health and medical condition she did not monitor the amount of her compensation payments. Lastly, she contended that she was unaware of the

overpayment as her compensation varied due to the cost-of-living adjustments and health insurance deductions and that she “relied on her children for assistance in her financial affairs.”

By decision dated October 29, 2008, the Office modified the amount of the overpayment to reflect that appellant received a \$10,102.08 overpayment of compensation from October 13, 2004 to June 7, 2008 for which she was at fault in creating. It noted that appellant had been paid \$91,795.05 during this period when she should have been paid \$81,692.97.<sup>1</sup> In an accompanying memorandum, the Office determined that appellant was at fault as she knew or should have known that she was not entitled to the higher compensation rate after her husband had died.

### **LEGAL PRECEDENT -- ISSUE 1**

The basic rate of compensation under the Federal Employees’ Compensation Act is 66 2/3 percent of the injured employee’s monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation augmented at the rate of 75 percent of monthly pay.<sup>2</sup> A husband is considered the employee’s dependent if he is a member of the same household; or if he 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.<sup>3</sup> 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 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$10,102.08. The record supports that she continued to receive compensation at the augmented three-fourths rate after her husband’s death on October 13, 2004 until June 7, 2008 and she had no other dependents. For this period, appellant received augmented compensation in the amount of \$91,795.05. As she was not entitled to compensation at the augmented rate after the death of her husband, she should have received compensation of \$81,692.97. The Office properly found that an overpayment in compensation in the amount of \$10,102.08 had been created.<sup>5</sup>

---

<sup>1</sup> This was based on the net of her health care deductions which was code 105 for married individuals for the period October 13 to December 25, 2004 and code 104 for an individual for the period December 26, 2004 to June 7, 2008. The Office noted appellant’s gross compensation was \$86,990.18 less \$5,297.21 for health insurance for single individuals, resulting in a net overpayment amount of \$81,692.97.

<sup>2</sup> 5 U.S.C. §§ 8105(a), 8110(b).

<sup>3</sup> *Id.* at § 8110(a)(2).

<sup>4</sup> *Ralph P. Beachum*, 55 ECAB 442 (2004).

<sup>5</sup> 5 U.S.C. §§ 8101, 8110.

## LEGAL PRECEDENT -- ISSUE 2

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.<sup>6</sup>

Section 10.433(a) of the Office's regulation provides:

“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 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; (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).”<sup>7</sup>

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.<sup>8</sup>

## ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$10,102.08 overpayment, the Office stated that she should have known that the payments she received by direct deposit for the period October 13, 2004 through June 7, 2008 were not proper because they were at the augmented three-fourths rate and, as she had no dependents after her husband's death on October 13, 2004, she was only entitled to compensation at the two-thirds rate.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be

---

<sup>6</sup> 5 U.S.C. § 8129; *see P.M.*, 60 ECAB \_\_\_\_ (Docket No. 07-2169, issued March 3, 2009); *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>7</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>8</sup> *Tammy Craven*, 57 ECAB 689 (2006).

incorrect.<sup>9</sup> The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.<sup>10</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>11</sup>

In this case, appellant continued to receive augmented compensation by direct deposit from the time of her husband's death on October 13, 2004 until June 7, 2008. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.<sup>12</sup> A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period and the case must be remanded for the Office to determine whether she is entitled to waiver for this period.

By her own admission, appellant acknowledged that she was not entitled to augmented compensation. Thus, after her receipt of the first direct deposit for which fault may not be imputed to her, under the reasonableness standard delineated above, for the subsequent direct deposits appellant knew or should have known that the compensation paid by direct deposits issued by the Office after the first direct deposit subsequent to her husband's death on October 13, 2004 were in error and the Board finds that she was at fault under the third standard outlined above for any period after the first direct deposit after her husband's death. Recovery of the overpayment in compensation may not be waived for this time period and the decision dated October 29, 2008 is affirmed in this respect. The record in this case, however, does not show when appellant's individual direct deposits were made. As appellant was not at fault for the first direct deposit after October 13, 2004, the case must be remanded to the Office to determine the exact period appellant would not be at fault and would thus, be entitled to waiver.

### CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$10,102.08 had been created and that appellant was at fault for the overpayment period commencing subsequent to the first direct deposit after appellant's husband's death but was not at fault for the first direct deposit of compensation. The case is

---

<sup>9</sup> *J.K.*, 60 ECAB \_\_\_\_ (Docket No. 08-1761, issued January 8, 2009); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>10</sup> *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>11</sup> *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>12</sup> *See Karen K. Dixon*, *supra* note 10.

remanded for a determination of the exact period covered by the first direct deposit and whether she would be entitled to waiver for this brief period.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 29, 2008 be affirmed in part, vacated in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: January 7, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board