

FACTUAL HISTORY

On May 1, 1967 the employee, then a 42-year-old electromechanical technician, filed a traumatic injury claim alleging that on April 28, 1967 he sustained electrical burns on his left leg and hand when he came into contact with high voltage and fell onto a steel deck tower. The Office accepted the claim for burns and a generalized anxiety disorder. It paid the employee compensation for disability at the three-quarters rate applicable to claimants with dependents beginning September 28, 1967. The form advised that he must promptly notify the Office of change in dependents.

The employee's wife died on April 22, 1985. In EN1032 forms dated 1986 to February 19, 2008, the employee listed the wife as his dependent. The EN1032 forms explained that compensation was paid at 66 2/3 percent of the applicable pay rate if the claimant had no dependents and 75 percent if the claimant had one or more dependents. The EN1032 forms further provided that a dependent included a wife 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.

In a telephone call dated April 2, 2009, Barbara Laporte, the employee's niece by marriage, informed the Office that the employee's wife died on April 22, 1985. The employee's sister, who took care of him, died on January 1, 2009.

On April 15, 2009 the Office notified appellant of its preliminary determination that the employee received an overpayment of \$56,428.97 for the period April 23, 1985 to January 17, 2009 because he received compensation at the augmented rate when he had no eligible dependent. It calculated the overpayment by subtracting the compensation he should have received at the proper pay rate, \$427,731.65 from the amount that he actually received from April 23, 1985 to January 17, 2009, \$484,160.62, to find an overpayment of \$56,428.97. The Office further advised appellant of its preliminary determination that the employee was at fault in the creation of the overpayment. It noted that the employee fraudulently completed EN1032 forms stating that he was married and resided with his wife. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it 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 May 11, 2009 appellant submitted an overpayment recovery questionnaire and contended that the employee was not at fault in creating the overpayment. He requested a decision on the written evidence. In an attached letter, Ms. LaPorte related that the employee's sister took care of him following his wife's death on April 22, 1985 until her death on January 1, 2009. She described the employee's precarious mental condition. Ms. LaPorte related that, after his sister's death, the employee telephoned her requesting assistance filling out forms. She stated:

“On or about January 25, 2009, I spoke with [the employee] by telephone. He was extremely concerned about his health and welfare. [The employee] asked if I

could help him pay his bills and ‘fill out forms.’ Since [his sister] died, he was unable to ‘do anything.’ I told him that since I lived in South Carolina, I would have to get his Power of Attorney to pay his bills and access his checking account, [etcetera]. At that time, he told me that he was concerned about bills, medical forms and forms that needed to be ‘filled out for the government.’ [The employee] said that [his wife and sister] did it for him every year. He was extremely agitated and said that ‘now I need help.’ I accepted his Power of Attorney on January 31, 2009. [The employee] died unexpectedly on February 8, 2009.”

Ms. LaPorte related that after his death the family learned that he had incurred large expenses obtaining care and that there was no money for funeral expenses. She maintained that he was not dishonest and that his “annual paper work from [the Office] was apparently completed first by his wife and then copied by a sister.”

By decision dated May 14, 2009, the Office finalized its finding that the employee received an overpayment of \$56,428.97 for the period April 23, 1985 to January 17, 2009 and that he was at fault in its creation. It noted that there was no medical evidence showing that the employee did not have the capacity to complete the EN1032 forms. The Office determined that the overpayment was due and payable.

On appeal appellant contends that the employee lacked the mental capacity to understand that he was receiving an overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act² 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.³ 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.⁴ 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.⁵ 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 full-time course of study.⁶ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

⁶ *Id.* at § 8110(a).

receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that the employee received an overpayment of compensation in the amount of \$56,428.97 for the period April 23, 1985 to January 17, 2009. His wife died on April 22, 1985 yet he continued to receive compensation at the augmented rate of 75 percent of his monthly pay until January 7, 2009. The employee should have received compensation during this period at the 66 2/3 rate for employees with no qualifying dependents. Accordingly, the employee received an overpayment of compensation.

The Office paid the employee \$484,160.62 at the augmented rate for the period April 23, 1985 to January 7, 2009. He should have been paid \$427,731.65 during this time. The employee consequently received an overpayment of \$56,428.97, the difference between the compensation to which he was entitled at the two-thirds rate and the augmented compensation he received at the three-quarters rate.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁹ 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 regulations¹⁰ 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

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

ANALYSIS -- ISSUE 2

The Office found that the employee 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

⁷ *Diana L. Booth*, 52 ECAB 370 (2001).

⁸ *Id.*

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433.

for the Office 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.¹¹ With respect to whether an individual is with fault, section 10.433(b) of the Office's regulations provides 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.¹²

The Board finds that the employee was at fault in creating the overpayment from April 23, 1985 to January 7, 2009. He completed EN1032 forms dating from 1985 to 2009 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.¹³ By signing the EN1032 forms, the employee 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 his wife's death on April 22, 1985 was incorrect. In a statement accompanying the May 11, 2009 overpayment questionnaire, the employee's niece related that the employee asked for her assistance in completing government forms after his sister's death on January 1, 2009. She obtained Power of Attorney for him on January 31, 2009. She also related that the employee told her that his wife and sister had completed the EN1032 forms for him each year. There is no evidence, however, showing that the employee did not fill out the Forms EN1032 completed from 1986 to 2008 or that he lacked understanding of the content of the forms.¹⁴ As the employee 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.¹⁵

On appeal appellant argues that the employee was mentally incompetent to understand that he was receiving an overpayment of compensation. He has not, however, submitted any medical or factual evidence establishing that the employee lacked the capacity to complete the EN1032 forms dated 1986 to 2008.

¹¹ *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹² 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 228 (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).

¹³ The forms cover the 15 months prior to signature.

¹⁴ In a September 18, 1991 report, Dr. Steven R. Kafrissen, a Board-certified psychiatrist who provided an impartial medical examination for the Office in 1982, found that the employee had increased symptoms of anxiety and depression. He diagnosed post-traumatic stress disorder and found that he was "still obviously not able to work or function independently." Dr. Kafrissen, however, did not find that the employee's condition rendered him mentally incompetent to manage his affairs.

¹⁵ 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).

CONCLUSION

The Board finds that the Office properly determined that the employee received an overpayment of \$56,428.97 for the period April 23, 1985 to January 7, 2009 because it paid him compensation at the augmented rate when he had no dependents. The Board further finds that the Office properly found that he was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2009 is affirmed.

Issued: March 2, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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