

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

M.W., Appellant)

and)

U.S. POSTAL SERVICE, TAMPA POST)
OFFICE, Tampa, FL, Employer)

**Docket No. 09-2144
Issued: May 20, 2010**

Appearances:
Peter E. Gould, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2009 appellant filed a timely appeal from a July 10, 2009 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly found a \$7,635.06 overpayment of compensation for the period June 12, 2005 to April 11, 2009 due to the payment of augmented compensation; (2) whether the Office properly found that appellant was at fault in creating the overpayment and therefore not entitled to waiver; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$100.00 every 28 days from his continuing compensation.

On appeal, appellant asserts that he submitted transcripts establishing that his daughter was a full-time student and eligible dependent during the period of the overpayment.

FACTUAL HISTORY

The Office accepted that on October 23, 2002 appellant, then a 46-year-old bulk mail technician, sustained cervical, lumbar, thoracic and bilateral shoulder sprains when he fell down a flight of stairs.¹ Appellant stopped work that day. He received wage-loss compensation on the daily rolls beginning December 13, 2002. Appellant attempted a trial of part-time light-duty work for one week in February 2003 and two weeks in March 2005. He again stopped work and did not return. Beginning in late March 2005, appellant received total disability compensation on the periodic rolls at the augmented, 75 percent rate as he had a dependent daughter, born on June 12, 1987.

Appellant submitted affidavits of earnings and employment (Form CA-1032) on February 16, 2004 and February 28, 2005 listing his daughter as a dependent. The forms explained the circumstances under which he would be entitled to augmented compensation for his dependent child. Appellant was advised that compensation for a dependent child may continue after the 18th birthday only if the dependent was unmarried and either incapable of self-support due to a mental or physical disability or a full-time student. The forms noted that compensation was payable until age 23 for an unmarried child who had reached age 18, had not completed four years of education beyond high school and was a full-time student at an approved educational institution.

Appellant's daughter turned 18 on June 12, 2005. Appellant continued to receive augmented compensation. He listed no dependents on Forms CA-1032 dated May 26 and June 2, 2008. However, on June 6, 2008, appellant advised the Office that his daughter was a full-time student at the University of South Florida. He provided her financial support.

In a June 6, 2008 letter, the Office advised appellant that, to qualify as a student, a dependent who had reached age 18 must be regularly pursuing a full-time course of study or training and not be married. It explained that, to claim augmented compensation, appellant must complete an enclosed Form EN1615, complete Part A and then send both Parts A and B to his daughter's school so that an official could complete Part B.

Appellant completed Part A of Form EN1615 on June 15, 2008. He stated that his daughter was unmarried and had not completed four years of education beyond high school. Appellant's daughter pursued a full-time course of study at the University of South Florida beginning with the fall semester of 2005. She also enrolled in a "short summer semester" with a reduced course load. Appellant noted that he provided financial support to his daughter while she attended university. On August 15, 2008 he submitted a certificate of enrollment signed by the registrar of the University of South Florida.² The registrar attested that appellant's daughter was a full-time student in good academic standing for the period January 7 to May 2, 2008. She

¹ Under File No. xxxxxx090, the Office accepted that, on October 19, 1998, appellant sustained a lumbar strain, lumbar radiculopathy and herniated L4-5 and L5-S1 discs. It designated File No. xxxxxx090 as a subfile under the present claim, File No. xxxxxx268.

² The University of South Florida is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools.

had completed 76.00 credit hours toward a bachelor's degree and was in her junior year, with graduation scheduled for August 2010. Attached unofficial transcripts showed that appellant's daughter attended the University of South Florida beginning with the fall of 2005 semester and was enrolled full time from August 25 to December 5, 2008.

Effective April 12, 2009, the Office changed appellant's compensation rate from the 75 percent augmented rate to the 66 2/3 percent rate for claimants with no eligible dependents. On April 15, 2009 it requested that he complete a new Form EN1615.

By notice dated June 4, 2009, the Office advised appellant of its preliminary determination of a \$7,635.06 overpayment of compensation as he received augmented compensation from June 12, 2005 to April 11, 2009 while he had no eligible dependents. It calculated that he received \$69,470.61 in compensation from June 12, 2005 to April 11, 2009 but was only entitled to \$61,835.55, a difference of \$7,635.06. The Office noted that appellant's daughter attained the age of 18 years on June 12, 2005 but that there was no evidence that she was a full-time student or incapable of self-support. It found him at fault in creating the overpayment and was aware or should have been aware he was not entitled to augmented compensation when he had no eligible dependents. The Office afforded appellant 30 days to submit additional evidence, argument and financial information.

On July 7, 2009 appellant filed a claim for compensation (Form CA-7) for wage loss for the period March 31, 2005 to July 31, 2009. He did not otherwise respond to the preliminary notice of overpayment.

By decision dated July 10, 2009, the Office finalized the overpayment determination, finding a \$7,635.06 overpayment of compensation for the period June 12, 2005 to April 11, 2009 due to the payment of augmented compensation while appellant had no eligible dependents. It directed recovery of the overpaid amount by deducting \$100.00 every 28 days from his continuing compensation payments.

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act³ 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 his duty.⁴ Section 8129(a) of the Act provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁵

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 dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

percent or a total of 75 percent of monthly pay.⁶ 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).⁷ 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 two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁸

ANALYSIS

The Office accepted that appellant sustained shoulder and spinal sprains on October 23, 2002. Appellant received wage-loss compensation for those injuries at the augmented, 75 percent rate as he had an eligible dependent, a minor daughter. Appellant's daughter reached 18 years of age on June 12, 2005. The Office continued to issue appellant's compensation at the augmented rate through April 11, 2009.

In its July 10, 2009 decision, the Office found a \$7,635.06 overpayment from June 12, 2005 to April 11, 2009 as appellant received augmented compensation while he had no eligible dependents. It found that appellant's daughter had turned 18 and there was no evidence that she was either incapable of self-support or a full-time student. On appeal, appellant asserts that he submitted transcripts establishing that his daughter was a full-time student and eligible dependent during the period of the overpayment.

Appellant submitted an official certificate of enrollment signed by the registrar of the University of South Florida, an accredited university.⁹ This document states that appellant's daughter was a full-time student and had completed 76.00 credit hours toward a bachelor's degree. Most recently, she completed 15.00 credit hours during the spring of 2008 semester as a full-time student from January 7 to May 2, 2008. Unofficial transcripts show that appellant's daughter began her studies in the fall of 2005 semester and was registered as a full-time student from August 25 to December 5, 2008. She planned to continue her studies through graduation in August 2010. Additionally, in compliance with the Office's instructions, appellant completed Part A of Form EN1615, stating that his daughter had been a full-time student at the University of South Florida beginning with the fall of 2005 semester.

⁶ *Id.* at § 8110(b).

⁷ *Id.* at § 8110(a)(3). Section 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.

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

⁹ 20 C.F.R. § 10.5(aa)(1) provides, in pertinent part, that the educational institution attended by the student must be "accredited or licensed by the United States Government or a State Government or any political subdivision thereof...." *See also G.H.*, (Docket No. 09-606, issued December 18, 2009) (the Board found an overpayment of compensation where appellant received augmented compensation during a period where his unmarried child over the age of 18 attended a nonaccredited education institution).

The Board finds that the registrar's official certificate, in conjunction with the unofficial transcripts and Form EN1615, establish that appellant's daughter may have been a full-time student at a qualifying college beginning with the fall of 2005 semester. Appellant's daughter completed 76.00 credit hours and was a junior as of August 2008. The term "junior" indicates that she completed at least two years of college. The registrar's certificate indicates that a full-time course load was 15.00 credit hours a semester. Allowing 30.00 credit hours for a complete academic year, it follows that 76.00 hours comprised approximately two-and-a-half full-time academic years of study as of August 2008. This comports with the fall of 2005 start date noted on the transcript and appellant's statement on Form EN1615. It appears from the record that appellant's daughter may have been a full-time student from approximately August 2005 to December 5, 2008, a substantial portion of the adjudicated period of overpayment from June 12, 2005 to April 11, 2009. The Office should confirm the acted dates based upon the records of the educational institution. The fact, period and amount of the overpayment through December 5, 2008 are therefore in question. As the registrar's certificate indicates that appellant's daughter planned to continue her studies through August 2010, the remainder of the period of the overpayment through April 11, 2009 is also in doubt.

The Board notes that the Office did not mention the Form EN1615, the enrollment certificate or transcripts either in the preliminary notice of overpayment or the final decision. Considering the relevance and probative quality of some of this evidence, the case will be remanded to the Office for appropriate review. The Office will then issue an appropriate decision in the case.¹⁰

ISSUES 2 and 3

As the case is not in posture regarding the fact and amount of overpayment because the record regarding the full-time student status from 2005 to 2009 is not established. The Office should obtain records from the educational institutions named by appellant to establish that status. It is premature for the Board to address Issue 2 regarding fault and Issue 3 regarding recovery of the overpayment.

CONCLUSION

The Board finds that the case is not in posture for a decision.

¹⁰ Appellant submitted new evidence accompanying his request for appeal. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 10, 2009 is set aside and the case remanded for additional development consistent with this decision and order.

Issued: May 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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