

FACTUAL HISTORY

The Office accepted that on December 29, 1980 appellant, then a 53-year-old medical machine worker, sustained a chronic lumbosacral strain due to pulling a patient forward at work.¹ Appellant received wage-loss compensation from the Office for periods of disability at the 3/4 augmented rate based on the fact that she had a dependent, a minor daughter.

Appellant's daughter graduated from college in 1982 and she was no longer considered to be a dependent under the Act. Appellant married in August 1994 and her husband qualified as a dependent but he died on May 9, 2001 and she no longer had any qualifying dependents after that point. In a Form EN1032 signed on January 23, 2002 and covering the prior 15-month period, appellant indicated that she did not have a husband or other dependent under the Act.²

On October 20, 2008 an Office official telephoned appellant and advised her that effective September 28, 2008 her compensation had been reduced to the 2/3 statutory rate. Appellant stated to the official that her husband died in 2001. In an August 7, 2009 telephone conversation, she asserted that she had advised the Office of her husband's death on May 9, 2001 and that she should not have to repay any overpayment due to a mistake on the part of the Office.

In an August 10, 2009 letter, the Office advised appellant of its preliminary determination that she received a \$19,530.54 overpayment of compensation because she received compensation at the 3/4 augmented rate after her husband died on May 9, 2001 but no longer had any eligible dependent.³ It also advised appellant that she was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect given that she did not have an eligible dependent after May 8, 2001 which would entitle her to compensation at the augmented rate. The Office stated that the difference between the augmented compensation that appellant received for the period May 9, 2001 to September 27, 2008 and the statutory rate of compensation she should have received was \$19,530.04. Regarding the calculation of the overpayment, it noted:

“Your weekly pay rate is \$297.44 as of December 29, [19]80 and with cost of living increases as of March 1, 2001 at the augmented rate it was \$423.50 per week. At the single rate it was \$376.50 per week. Your compensation had been increased 33 percent as of March 1, 2001 with cost-of-living increases up to 43

¹ Appellant had sustained two prior work-related low back injuries. In various forms, including EN1032 forms she periodically completed, appellant was advised of the standards for qualifying for augmented compensation and was directed to report to the Office when she no longer had a qualifying dependent under the Act.

² In later EN1032 forms, appellant also indicated that she did not have a qualifying dependent.

³ The record contains payment records and worksheets showing that appellant received \$176,448.89 in compensation for the period May 9, 2001 to September 27, 2008, but should have received \$156,918.35 at the statutory rate for this period. The difference between the two figures is \$19,530.54.

percent as of March 1, 2008. Your compensation was adjusted to the single rate as of September 28, 2008. It is now \$453.75 per week at the 2/3 rate.”⁴

Appellant requested waiver of the claimed overpayment, contending that she was not at fault in its creation due to the fact that she had accurately reported whether she had a dependent. She submitted a financial information questionnaire, signed on August 17, 2009, in which she listed monthly income, monthly expenses and assets. The Office advised appellant that it had questions regarding her finances and, during an October 28, 2009 telephone conference, it was determined that she had \$3,152.87 in monthly income, \$1,979.56 in monthly expenses and \$128,920.31 in assets.

In an October 28, 2009 decision, the Office determined that appellant received a \$19,530.54 overpayment of compensation from May 9, 2001 to September 27, 2008. It found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.⁵ The Office determined that the overpayment would be recovered by deducting \$690.00 from her continuing compensation payments every four weeks beginning November 21, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act 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.⁶ Section 8129(a) of the Act provides, in pertinent part, “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.”⁷ The basic rate of compensation under the Act is 66 2/3 percent of the injured employee’s monthly pay.⁸ When the employee has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at the rate of 8 1/3 percent of her monthly pay.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$19,530.54 overpayment of compensation. The record establishes that until her husband’s death on May 9, 2001, she was in receipt of wage-loss

⁴ The Office provided appellant 30 days from the date of the letter to provide evidence and argument contesting the fact, amount and fault findings of its preliminary determination. It directed her to complete an enclosed financial information questionnaire.

⁵ The Office indicated that it had considered appellant’s argument that she was not at fault in the creation of the overpayment because she had correctly filed out the required EN1032 forms.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8105(a).

⁹ *Id.* at § 8110(b).

compensation at the augmented rate of 75 percent. The record establishes that, subsequent to her husband's death, appellant continued to receive compensation at the augmented rate, thereby creating an overpayment in the amount of \$19,530.54, the difference between \$176,448.89, the amount appellant was paid for the period May 9, 2001 to September 27, 2008, and \$156,918.35, the amount she should have been paid for this period at the basic statutory rate.¹⁰ The Board finds that appellant received a \$19,530.54 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment 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."¹² No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹³

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

"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...."¹⁴

Section 10.433(c) of the Office's regulations provide:

"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. The degree of care expected may vary with the

¹⁰ See *supra* notes 9 and 10 regarding the standards for qualifying for augmented compensation. The record contains pay records and worksheets documenting the Office's calculations.

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁴ 20 C.F.R. § 10.433(a).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."¹⁵

Even though the Office may have been negligent in continuing to issue appellant improper compensation checks, this does not excuse appellant's acceptance of such checks which she knew or should have been expected to know should have been returned to the Office.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that the Office properly found appellant at fault in the creation of the \$19,530.54 overpayment under the third standard because she accepted payments that she knew or should have known to be incorrect. Appellant had been apprised on numerous occasions, including through the language of EN1032 she periodically completed, of the standards for qualifying for compensation at the 3/4 augmented rate and of the fact that she would only be entitled to compensation at the 2/3 basic statutory rate in the absence of a qualifying dependent.¹⁷ She knew or should have known that she did not have a qualifying dependent after her husband died on May 9, 2001. On appeal appellant argued that she thought her continuing compensation payments after May 9, 2001 were as high as they were due to her cost-of-living adjustment (COLA) payments. However, COLA payments are increased on a gradual basis and her argument would not explain why she would not have noticed that her payments did not decrease substantially after May 9, 2001. The length of time that appellant received the augmented payments also militates against her claim that she did not know they were improper. Appellant argued that she was not at fault because she timely reported that she did not have a dependent after May 9, 2001. As noted above, the Office's negligence in issuing incorrect compensation checks would not negate fault on the part of a claimant when the claimant knew or should have been expected to know that she had to return improper payments. For these reasons, appellant was at fault in creating the overpayment of compensation and, therefore, the overpayment was not subject to waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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 the 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

¹⁵ *Id.* at § 10.433(c).

¹⁶ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁷ *See Steven R. Cofrancesco*, 57 ECAB 662 (2006).

of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹⁸

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$690.00 from appellant’s compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.¹⁹ Therefore, the Office properly required repayment of the overpayment by deducting \$690.00 from appellant’s compensation payments every 28 days.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$19,530.54 overpayment of compensation. The Board finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment by deducting \$690.00 from appellant’s compensation payments every 28 days.

¹⁸ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁹ After receiving appellant’s financial information questionnaire, the Office indicated that it had further questions regarding her finances. During an October 28, 2009 telephone conference, it was determined that she had \$3,152.87 in monthly income, \$1,979.56 in monthly expenses and \$128,920.31 in assets. On appeal appellant argued that it would be a hardship for her to repay the overpayment, but the record reflects that the Office properly considered the relevant factors, including the financial information of record, and properly found that no such hardship had been established.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 28, 2009 is affirmed.

Issued: October 19, 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