

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

M.C., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Andover, MA, Employer**

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**Docket No. 10-936
Issued: January 20, 2011**

Appearances:
Steve E. Connor, 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 February 19, 2010 appellant, through her representative, filed a timely appeal from the December 9, 2009 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether the Office properly denied a timely request for a prerecoumpment telephone conference; (2) whether appellant received a \$17,112.36 overpayment of compensation from September 14, 2004 through June 6, 2009; (3) whether she was at fault in creating that portion of the overpayment resulting from augmented compensation; (4) whether the Office properly denied waiver of that portion of the overpayment resulting from an incorrect pay rate; and (5) whether the Office properly found that recovery should be made by deducting \$150.00 from continuing compensation payments.

FACTUAL HISTORY

On February 28, 1995 appellant, a 62-year-old mail clerk, filed a claim alleging that exposure to chemical fumes in the course of her federal employment caused chronic laryngitis. The Office accepted her claim for rhinitis and blepharitis. Appellant received compensation for temporary total disability on the periodic rolls.

On April 24, 2007 a physician completing a work capacity evaluation advised that appellant had Alzheimer's disease. On March 24, 2009 another physician, also completing a work capacity evaluation, advised that appellant was a 76-year-old woman who suffered from an advanced dementia.

As appellant continued to report that she was married and living with her husband,¹ the Office continued to pay compensation at the augmented rate for dependents. In June 2009, it received a copy of a Final Decree of Divorce showing that appellant and her husband were granted a divorce on September 14, 2004. Effective June 7, 2009, the Office paid compensation at the basic rate for no dependents.

The Office issued a preliminary decision finding that appellant received a \$17,112.36 overpayment of compensation from September 14, 2004 through June 6, 2009, not only because she received augmented compensation for dependents after her divorce, but also because the Office had been paying her at an incorrect pay rate. It found her at fault for that portion of the overpayment resulting from augmented compensation because she continued to report each year after her divorce that she was married and still living with her husband. The Office found that appellant was not at fault for that portion of the overpayment resulting from the incorrect pay rate.

Appellant's son, claiming power of attorney, timely requested a prerecouplment telephone conference with the Office. He stated that appellant had Alzheimer's disease and dementia: "She needs my care 24/7. Therefore I can't go to work (she can't be left alone). I am 2nd person reliant on her income. I am trying to keep her out of nursing home and at home as long as possible." Appellant's son completed and submitted an overpayment recovery questionnaire, which showed \$1,585.64 in monthly income and \$2,722.09 in monthly expenses.

The Office wrote to appellant and to her attorney-at-law, to explain that it could not recognize her son as an authorized representative in the absence of a legal document appointing him power of attorney. It thereafter received a March 8, 2001 durable power of attorney, which stated in part: "This Power of Attorney shall become effective upon any subsequent disability or incapacity, mental or physical, which renders me unable to administer to my own affairs. Such disability shall be certified in writing by an accredited medical doctor."

The Office wrote to appellant's attorney-at-law to inquire whether she was still the attorney of record for appellant. It also asked whether appellant was unable to administer her own affairs, and if so, for certification from an accredited doctor. Appellant's attorney at law advised that she was still the attorney of record for appellant; "however, I am the attorney

¹ Appellant's son, claiming power of attorney, completed the Form EN1032 on March 18, 2009.

through [her son] who has power of attorney due to [appellant's] mental disability.” The attorney-at-law further advised that she would provide medical records under separate cover.

On December 2, 2009 appellant's son telephoned the Office and left his number. The Office attempted to return his call but noted: “No one at that number knows [the son] or [appellant].”

In a decision dated December 9, 2009, the Office finalized its preliminary findings. It found that appellant was at fault in creating that portion of the overpayment resulting from the misreported marital status but not at fault in creating that portion of the overpayment resulting from the Office's use of an incorrect pay rate. The Office denied waiver of the latter: “In that you failed to submit a completed OWCP-20 and the Office has been unable to contact you or your Power of Attorney regarding this overpayment, we are unable to determine that repayment of the debt would cause severe financial hardship or defeat the purpose of the [Federal Employees' Compensation] Act.” It determined that it should recover the debt by deducting \$150.00 from continuing compensation payments.

On appeal, appellant's son² argues that he disagreed with the overpayment for the same reasons he cited in his request for a telephone conference. He added that reducing appellant's compensation was taking away his ability to keep her at home as long as possible. Appellant's son explained that the telephone number he left for the Office to return his call was the correct number.

LEGAL PRECEDENT -- ISSUE 1

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.³ Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁴ The Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki*, 422 U.S. 682 (1979), is applicable to the recovery of overpayments under the Act and requires an opportunity for a prerecoupment hearing.⁵ Office regulations therefore provide a right to a prerecoupment hearing if requested within 30 days of the date of the written notice of overpayment.⁶

² The Board recognized the son's power of attorney upon receipt of a medical report supporting the need for such.

³ 5 U.S.C. § 8129(a).

⁴ See generally FECA Circular No. 82-48, *Overpayments and Waiver* (December 1, 1982).

⁵ *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoupment hearing does not arise under 5 U.S.C. § 8124(b)).

⁶ 20 C.F.R. §§ 10.432, 10.439.

ANALYSIS -- ISSUE 1

After the Office issued its preliminary determination that appellant received an overpayment and was at fault for that portion arising from augmented compensation, her son timely requested a prerecoupment telephone conference with the Office. The question is whether he had authority to represent appellant and to request a prerecoupment telephone conference on her behalf.

The son claimed power of attorney and explained that appellant had Alzheimer's disease and dementia. Responding to a request by the Office, he submitted a durable power of attorney, which by its terms became effective in the event that appellant was unable to administer to her own affairs. The instrument also provided that such disability shall be certified in writing by an accredited medical doctor.

Appellant's attorney-at-law advised that she was still the attorney of record and would send the medical certification under a separate cover. When the Office received no further correspondence from the attorney-at-law, it determined that it could not recognize appellant's son as her representative. The Office denied the timely request for a prerecoupment telephone conference, discounted the overpayment recovery questionnaire the son had completed and issued its final decision finding fault.

After reviewing the record on appeal, however, the Board notes that it is not devoid of medical documentation bearing on appellant's capacity to administer to her own affairs. In 2007 the Office received medical documentation that appellant had Alzheimer's disease. On March 24, 2009 a physician advised that appellant was a 76-year-old woman who suffered from advanced dementia. The Office did not address this evidence or make relevant findings of fact.⁷ It appears to have considered only the attorney-at-law's failure to submit medical certification.

The Board finds that the medical evidence already of record raises a substantial question whether the Office afforded appellant due process, that is, whether appellant was by March 24, 2009 unable to administer to her own affairs, such that the son had power of attorney when he timely requested a prerecoupment telephone conference. The Board will therefore set aside the Office's December 9, 2009 decision and remand the case for further development.

This medical evidence may also bear on the issue of fault. In the case of *R.C.*,⁸ the Office found the employee at fault in an overpayment because she was aware or should have reasonably been aware that she cashed two checks for the same amount and for the same period. The Board noted, however, that the facts of the case strongly suggested that the employee suffered from dementia at the time; her daughter held a durable power of attorney. The Board found that the Office could not determine, using a reasonable person test, what the employee knew or should have known without further developing the record concerning her mental capacity.

⁷ See 20 C.F.R. § 10.126 (an Office decision shall contain findings of fact and a statement of reasons).

⁸ Docket No. 09-523 (issued November 20, 2009).

Here, the Office found that appellant was at fault on the grounds that she made an incorrect statement as to a material fact, namely, that she was still married and living with her husband, which she knew or should have known to be incorrect. Its regulations provide that the degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that she is being overpaid.⁹ The Office cannot make a finding on what appellant knew or should have known during the period of the overpayment without addressing the issue of mental capacity raised by the medical evidence of record.

Further, the Office has found fault with respect to the misinformation reported on the Form EN1032 completed by appellant's son, whom the Office did not recognize as an authorized representative. It appears to have treated him as an authorized representative for the purpose of finding fault but not as an authorized representative for the purpose of timely requesting a prerecoupment hearing or completing an overpayment recovery questionnaire. Whatever status the Office accords him, after further development, it should apply that status consistently.

The issue of Alzheimer's disease and advanced dementia also impacts the issues of waiver and recovery. Because the Office did not recognize appellant's son as an authorized representative, it discounted the overpayment recovery questionnaire he completed, which showed that monthly expenses exceeded monthly income. Without a valid overpayment recovery questionnaire, it denied waiver and began recovering the debt from appellant's continuing compensation payments.

Appellant's mental capacity is a significant issue and one that warrants further development by the Office, not only because it bears on the extensive due process rights afforded claimants in overpayment cases, but also because it bears on the findings of fault and waiver and recovery. On remand, the Office shall further develop the evidence as necessary and shall issue an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development is warranted.

⁹ 20 C.F.R. § 10.433(b).

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 20, 2011
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