

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

N.T., claiming as widow of J.R., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Tallahassee, FL, Employer)

**Docket No. 13-2050
Issued: April 25, 2014**

Appearances:

Ronald Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2013 appellant, through counsel, filed a timely appeal from a July 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly determined that an overpayment of \$53,541.67 occurred from June 18, 2010 to October 21, 2012; and (2) whether OWCP properly determined that appellant was at fault in creating the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on prior appeals. In an order dated September 24, 1993, the Board granted the Director's motion to remand the case on the issue of whether the employee's death on March 18, 1989 was causally related to his employment injuries.² By decision dated April 23, 1996, the Board found that a conflict in the medical evidence existed on the issue of causal relationship between the employee's death and the employment injuries, and the case was remanded for resolution of the conflict.³ The history of the case as provided in the prior order and decision of the Board is incorporated herein by reference.

On October 9, 1996 OWCP accepted that the employee's death was employment related. The record contains a memorandum dated October 15, 1996 of a conference held between appellant and an OWCP claims examiner with respect to compensation under 5 U.S.C. § 8133. OWCP's claims examiner indicated that appellant was not entitled to compensation as of August 7, 1994, the date she had remarried.⁴ The memorandum indicated that the issue of entitlement under 5 U.S.C. § 8133 was discussed with respect to son Jason (born June 18, 1987), daughter Sarah (born July 18, 1980 of a prior marriage) and stepdaughter Kristi (born June 10, 1976). It was noted that Kristi had turned 18 years of age as of June 10, 1994, but the claims examiner explained that under FECA a child included "a full-time student under 23 years of age." The memorandum reviewed the issue of what constituted a full-time student and the necessary forms needed to establish student status were discussed.

The record indicates that appellant began receiving compensation under 5 U.S.C. § 8133 as guardian of Jason.⁵ Appellant submitted Form CA-12 annually and identified Jason as the eligible dependent. In a memorandum of telephone call (CA-110) dated July 12, 2005, OWCP indicated that Jason born on June 18, 1987 had turned 18 years of age and was no longer an eligible dependent. Appellant submitted evidence that appellant was a full-time student and continued to receive compensation. In a Form CA-12 received on October 11, 2011, appellant noted that Jason was 24 years old and she reported that he was a college student.

By letter dated December 4, 2012, OWCP advised appellant of a preliminary determination that an overpayment of compensation had occurred from June 18, 2010 to October 21, 2012. It found that appellant was not entitled to compensation when Jason turned 23 years of age, as he was then no longer a child dependent. According to OWCP, the amount of compensation paid from June 18, 2010 to October 21, 2012 was \$53,541.67. In addition, OWCP found that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to compensation after her son's 23rd birthday.

² Docket No. 93-691 (issued September 24, 1993).

³ Docket No. 94-1163 (issued April 23, 1996).

⁴ 5 U.S.C. § 8133 provides that compensation to a widow ends with a remarriage before reaching age 55. Appellant was 41 years old at the time of remarriage.

⁵ Payments were also made to Kristi directly, and to the guardian of Sarah.

Appellant requested a hearing before an OWCP hearing representative, which was held on May 14, 2013. By decision dated July 30, 2013, the hearing representative finalized the preliminary determination that an overpayment of \$53,541.67 was created and appellant was at fault in creating the overpayment. Based on the financial evidence of record, the hearing representative found the overpayment should be recovered by requiring payment of \$1,000.00 per month.

LEGAL PRECEDENT -- ISSUE 1

According to 5 U.S.C. § 8133, “compensation payable to or for a child, a brother or sister, or grandchild that would otherwise end because the child, brother or sister, or grandchild has reached 18 years of age shall continue if he is a student as defined by section 8101 of this title at the time he reaches 18 years of age for as long as he continues to be such a student or until her marries.” The term “student” as defined by 5 U.S.C. § 8101(17) is “an individual under 23 years of age” who has not completed four years of education beyond high school and who is regularly pursuing a full-time course of study.

ANALYSIS -- ISSUE 1

The record indicates that appellant had been receiving compensation under 5 U.S.C. § 8133 as guardian of son Jason, who turned 18 years of age on June 18, 2005. Jason remained a child under 5 U.S.C. § 8133 as long as he met the definition of a “student” under 5 U.S.C. § 8101(17): (1) he was under 23 years of age, and (2) he was pursuing a full-time course of study. On June 18, 2010 Jason was no longer “under 23 years of age” and therefore he was not a student under FECA. Since appellant was receiving compensation solely as guardian of Jason, there was no continuing entitlement to compensation under 5 U.S.C. § 8133.

Therefore the record indicates that any compensation received on and after June 18, 2010 represented an overpayment of compensation. OWCP provided a worksheet showing that the compensation paid from June 18, 2010 to October 21, 2012 was \$53,541.67. This is consistent with evidence in the record as to compensation payments made and no contrary evidence was presented. The Board accordingly finds that an overpayment of \$53,541.67 was created.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) provides: “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 FECA or would be against equity and good conscience.”⁶ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁷ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(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

⁶ 5 U.S.C. § 8129(b).

⁷ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault as she accepted payments she knew or should have known were incorrect. The October 15, 1996 memorandum of conference discussed the issue of a “student” under FECA and the claims examiner indicated that appellant was advised as to the requirements that must be met for student status. As noted above, a student must be both under 23 years of age and pursuing full-time course of study. The October 15, 1996 memorandum specifically noted that the requirement that a student must be under 23 years of age was discussed.

The finding that appellant should have known that any compensation received after Jason turned 23 years of age is therefore supported by the record. Appellant continued to receive compensation on behalf of Jason and should have known that one of the requirements for student status was that the individual must be under 23 years of age. Pursuant to 20 C.F.R. § 10.433(3), an individual is at fault if she accepts a payment she knew or should have known was incorrect.

On appeal, appellant’s representative states that appellant was not herself receiving compensation benefits, but the funds were used for the education and benefit of her son Jason. To the extent the representative is arguing that the overpayment is not appellant’s responsibility because she was receiving compensation on behalf of her son, there is no support for this argument. When compensation is paid to a widow under 5 U.S.C. § 8133 on behalf of a child who turned 18 but was not a student, the overpayment of compensation is an overpayment to the widow.⁸ The compensation in this case was paid to appellant and she is the overpaid individual. Appellant also argues that she was truthful and did not attempt to conceal information from OWCP regarding Jason’s age. The finding of fault in this case was not based on a failure to provide information or an incorrect statement, but on acceptance of payments she should have known were incorrect. Although the discussion of student status with OWCP took place in 1996, it is not unreasonable to find that while appellant continued to receive compensation for a student she should have known of the two requirements for student status: full-time study and under 23 years of age. Both of these requirements were explained to appellant in the October 15, 1996 conference. For the reasons noted above, the Board finds a \$53,541.67 overpayment was created and appellant was at fault in creating the overpayment. Since appellant is at fault in creating the overpayment, she is not entitled to waiver of the overpayment.

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$53,541.67 was created from June 18, 2010 to October 21, 2012. The Board further finds that OWCP properly found appellant was not entitled to waiver as she was at fault in creating the overpayment.

⁸ See, e.g., *D.G. (G.G.)*, Docket No. 08-409 (issued September 5, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2013 is affirmed.

Issued: April 25, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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