

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS D. WILSON and GOVERNMENT PRINTING OFFICE,
Washington, DC

*Docket No. 98-1326; Submitted on the Record;
Issued February 9, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant received an overpayment of compensation in the amount of \$5,102.63, and, if appellant received an overpayment of compensation, whether she was without fault in the matter of the overpayment.

The Office of Workers' Compensation Programs accepted that appellant's October 28, 1991 employment injury resulted in a lumbosacral strain, a herniated disc at L4-5 and lumbar radiculopathy. Appellant received continuation of pay from October 29 to December 12, 1991, after which the Office began paying her compensation for temporary total disability. She returned to work at the employing establishment on April 5, 1993, working about 12 hours per week. The Office reduced appellant's compensation based on her actual earnings.

On a form she completed on May 13, 1993 appellant claimed additional compensation for a dependent, listing her son who was born on August 29, 1970 as her dependent. This form stated that compensation was payable at 66 2/3 percent of the applicable pay rate if the claimant has no eligible dependents and at 75 percent of the applicable pay rate if one or more dependents is eligible for compensation. The form noted that appellant may claim compensation for a dependent if she had "an unmarried child under 23 years of age who is a full-time student and has not completed four years of schooling beyond the high school level." By letter dated June 16, 1993, the Office advised appellant that compensation for her son could only be paid after he was 18 years old if he was a full-time student and unmarried, and that compensation for a dependent may not be paid "beyond the end of the semester or enrollment period in which the dependent reaches the age of 23." Appellant completed the form attached to this letter on July 1, 1993, stating that her son who was born on August 29, 1970 was unmarried, had not completed four years of education beyond the high school level and was now regularly pursuing a full-time course of study at Alabama State University. Appellant listed the beginning and ending dates of the present school year as "August 1992 to August 1993," and the date her dependent expected to complete education at this school as "December 1993"; she answered "yes" to the question whether the dependent intended to go to school next year.

On July 21, 1997 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$5,102.63 which arose because she was incorrectly paid at the augmented rate of 75 percent during the period August 30, 1993 to June 21, 1997. The Office preliminarily found that appellant was at fault in the matter of the overpayment for the reason that she accepted a payment which she knew or should have known was incorrect. The Office noted that appellant had advised the Office on July 1, 1993 that her son was due to graduate the following semester, and that the Office erred in not changing the compensation rate to 2/3. The Office found that appellant “should have been aware that her compensation check should have been reduced as she no longer had a qualified dependent in her household,” and that she therefore was at fault for accepting payments she knew or should have known were incorrect. The Office allotted appellant 30 days to respond to the preliminary determination of an overpayment of compensation. Having received no response, the Office, by decision dated February 26, 1998, found that appellant had received an overpayment of compensation in the amount of \$5,102.63 which arose because she was incorrectly paid at the augmented rate of 75 percent during the period August 30, 1993 to June 21, 1997. The Office also found that appellant was at fault in the matter of the overpayment for the reason that she failed to present any evidence or arguments which would support that she was not at fault in the creation of the overpayment.

The Board finds appellant received an overpayment of compensation, but that further development of the evidence is needed on the amount of the overpayment.

Section 8110 of the Federal Employees’ Compensation Act¹ provides that a disabled employee with one or more dependents is entitled to have his or her basic compensation for disability augmented by 8 1/3 percent, and defines “dependent” to include an unmarried child over 18 years of age who is a student. Section 8101(7) of the Act defines “student” as “an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training. A student whose 23rd birthday occurs during a semester or other enrollment period is deemed a student until the end of the semester or other enrollment period.”

Appellant received the augmented compensation provided for by section 8110(c) of the Act during the period -- August 30, 1993 to June 21, 1997 -- which created the overpayment found by the Office, with the exception of the period January 1 to February 28, 1994. As appellant’s youngest son, an unmarried full-time student, reached 23 years of age on August 29, 1993, appellant was not entitled to augmented compensation during this entire period, and she therefore received an overpayment of compensation. However, the record is unclear as to whether appellant’s son’s 23rd birthday on August 29, 1993 occurred during a semester. Appellant’s July 1, 1993 answers on an Office form are ambiguous, as they indicate that the ending date of the present school year was “August 1993,” and also stated that the date her dependent expected to complete education at this school was “December 1993.” The Office should further develop the evidence to determine whether appellant’s son’s 23rd birthday occurred during a semester or other enrollment period. If it did, appellant was entitled to

¹ 5 U.S.C. § 8110.

augmented compensation until the end of that semester and the Office should recompute the amount of the overpayment.

The Board further finds that appellant was with fault in the matter of the overpayment of compensation for the period after December 1993.

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. 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 the Act or would be against equity and good conscience.”² No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

“(2) Failed to furnish information which the individual knew or should have known to be material; or

“(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”³

In the present case, the Office applied the third standard listed above to find appellant at fault in the creation of the overpayment: acceptance of a payment she knew or should have been expected to know was incorrect. The Office was correct in finding that appellant knew or should have known that she was not entitled to receive augmented compensation after the December 1993 semester in which her son, an unmarried full-time student, reached 23 years of age and was expected to complete his education. The Office’s forms which appellant completed clearly apprise her of this provision of the law. Therefore, appellant is at fault with regard to the creation of the overpayment after December 1993.

This showing, however, is not sufficient to establish that appellant accepted a payment she knew or should have known was incorrect, for the period August 30 to December 1993, as noted above. In the present case, the checks appellant received immediately after August 30, 1993 were \$931.00 for the period August 9 to September 3, 1993, \$1,509.29 for the period September 6 to October 15, 1993, and \$578.29 for the period October 18 to 29, 1993. The check

² 5 U.S.C. § 8129.

³ 20 C.F.R. § 10.320(b).

she received for the period July 26 to August 6, 1993 was in the amount of \$465.50. The amounts of these checks do not support a finding that appellant knew or should have known she was receiving incorrect payments.⁴ As the evidence is not clear as to the ending date of the semester in which appellant's son's 23rd birthday occurred, the Office should make a further determination with regard to this period of the overpayment. The case will be remanded to the Office for consideration of the overpayment of compensation with regard to the period August 30 through December 1993.

The decision of the Office of Workers' Compensation Programs dated February 26, 1998 is affirmed in part and set aside in part and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, D.C.
February 9, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁴ *Grady L. Frazier*, 40 ECAB 1298 (1989).