

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ELIZABETH POSTON and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, MN

*Docket No. 01-228; Submitted on the Record;  
Issued November 26, 2001*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$3,731.76 during the period July 29, 1998 through May 20, 2000.

On November 23, 1983 appellant, then a 50-year-old laundry worker, injured her back when a co-worker inadvertently pushed a laundry cart into her. The Office approved the claim for thoracic strain. Appellant stopped work on December 5, 1983 and returned on December 16, 1983. She stopped again on June 18, 1984 and did not return. Appellant received medical treatment and compensation for several years following the accepted injury.

On June 22, 1999 appellant submitted a Form CA-1032 for benefits as annually required by the Office when receiving compensation benefits. Appellant indicated on the Office form that her husband passed away on July 28, 1998.

By decision dated August 24, 2000, the Office determined that appellant received an overpayment in the amount of \$3,731.76. The Office found that it paid appellant compensation at the dependant rate of 75 percent for the period July 29, 1998 through May 20, 2000 instead of the nondependant rate of 66 2/3 percent. The Office determined that she received compensation at the dependent rate after her husband died on July 28, 1998.

The Board finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$3,731.76 during the period July 29, 1998 through May 20, 2000.

In the present case, the record reveals that appellant received an overpayment in compensation for disability during the period July 29, 1998 through May 20, 2000 because the Office continued to pay appellant benefits at the dependant rate during that period, although appellant's husband died on July 28, 1998. The Office properly determined retroactively that

appellant should not have received compensation at the dependant rate during this time period. Therefore, an overpayment was created in the amount of \$3,731.76.

Additionally, the Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment in the amount of \$3,731.76.

Section 8129(a) of the Federal Employees' Compensation 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.<sup>1</sup> The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."<sup>2</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>3</sup>

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 furnish 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 been expected to know was incorrect."<sup>4</sup>

In this case, the Office properly applied the second and third standards -- appellant failed to furnish information that she should have known to be material and accepted a payment, which she knew or should have known was incorrect. On June 22, 1999 appellant signed a Form CA-1032 instructing her to report information regarding employment, benefits, dependents and other pertinent information. The form indicated that the signer understood that he or she must immediately report to the Office any change in the status of claimed dependents and appellant signed and dated the forms. Although appellant advised the Office on June 22, 1999 that her husband died in July 1998, the manner in which she completed the June 22, 1999 Form CA-1032 shows that she understood or should have understood the circumstances under which augmented

---

<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> *Harold W. Steele*, 38 ECAB 245 (1986).

<sup>4</sup> 20 C.F.R. § 10.433(a).

compensation could be claimed and that she received an incorrect payment based on her previous dependent status. Inasmuch as appellant completed the Form CA-1032 on June 22, 1999, almost a year from the date of her husband's death, the Board finds that appellant knew or should have been aware that she was still receiving compensation at an augmented rate after her husband died on July 28, 1998. For these reasons, the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

The Board further finds that the Office properly determined that appellant should repay the overpayment by deducting \$170.00 every four weeks from her continuing compensation.

Section 10.441 of the Code of Federal Regulations states in relevant part:

“Whenever 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 same. If no refund is made, [the Office] shall decrease later payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other factors so as to minimize any resulting hardship upon such individual.”<sup>5</sup>

In the present case, the Office considered appellant's financial circumstances, finding that she had a gross monthly compensation of approximately \$1,298.00. The Office concluded that appellant could reasonably afford to repay the overpayment by deducting \$170.00 from her continuing compensation every four weeks. It is evident that the Office gave due regard to the factors enumerated in section 10.441(a), and there is no indication that the Office failed to consider other factors with respect to minimizing the financial hardship on appellant. The Board therefore finds that the Office properly determined the rate of repayment in this case.

---

<sup>5</sup> 20 C.F.R. § 10.441.

The decision of the Office of Workers' Compensation Programs dated August 24, 2000 is affirmed.

Dated, Washington, DC  
November 26, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member