

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

D.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lancaster, PA, Employer**

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**Docket No. 08-18
Issued: July 7, 2008**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 25, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 30, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant was not entitled to augmented compensation based on claiming her husband, from whom she is separated, as a dependent under section 8110 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

This is the second appeal before the Board. On September 25, 2002 appellant, a 61-year-old mail clerk, injured her left arm and shoulder while casing mail. The Office accepted the claim for bicipital tendinitis of the left shoulder and commenced compensation for total disability as of December 2002 at the rate of 66 and 2/3 percent of her applicable pay rate. It noted in

February 2004 that deductions for health benefits for appellant and her family were included in her monthly compensation checks.

In an October 18, 2006 letter to the Office, appellant's attorney asserted that appellant was entitled to the augmented three-quarters compensation rate because, although separated from her husband, he was still covered by her health insurance. The attorney stated that "this was a regular expense that cost [appellant] a significant percentage of her periodic compensation payment. [Appellant] did not contribute in any other way to her husband's support."

By decision dated October 27, 2006, the Office found that appellant was being properly compensated at the two-thirds rate and that her husband did not qualify as a dependent under the Act. The Office reasoned that, because she was separated from her husband, she was not entitled to receive compensation at the three-quarters rate unless she was able to establish that she was paying him support payments. The Office stated the fact that her estranged husband was still receiving health benefits from her compensation benefits was immaterial.

In a decision dated June 11, 2007, the Board set aside the October 27, 2006 Office decision.¹ The Board noted that the test for determining dependency under the Act is whether the person claimed as a dependent "looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living."² The Board stated that it had previously found that a situation wherein an employee made regular contributions for health insurance that covered both the employee could establish dependency for an estranged spouse. The Board noted that, because appellant had been paying health insurance premiums since December 2002 for a plan that covered both her and her family, including her estranged spouse, the case required further factual development because the record contained little evidence regarding the financial situation of her husband. The Board instructed the Office on remand to request additional relevant factual information, including her husband's current employment (if any), the amount of his income and monthly expenses (including medical expenses), and any opportunity he had to purchase health insurance on his own. The Board stated that such information was necessary for the Office to determine whether her husband relied on the health insurance. The complete facts of this case are set forth in the Board's June 11, 2007 decision and are herein incorporated by reference.

By letters dated June 20 and July 10, 2007, the Office asked appellant and her attorney to provide additional, specific information in order to determine whether appellant's estranged husband received regular contributions from appellant for his support, thus establishing him as a dependent under the Act. In the July 10, 2007 letter, it requested that appellant's husband provide a detailed statement, including his signature, current address and telephone number, which would include the following information:

"(1) For the period December 27, 2002 to September 2, 2006, a list of all employers with specific dates of employment and an indication as to whether or not he was eligible for or had any opportunity to purchase or obtain health benefit

¹ *D.F.*, 58 ECAB ___ (Docket No. 07-248, issued June 11, 2007).

² *Helyn E. Girmann*, 11 ECAB 557, 559 (1960).

coverage with any or all of these employers. This list would include any retirement plan or benefits paid in lieu of employment such as Social Security, Office of Personnel Management, workers' compensation, etc;

“(2) A statement indicating whether he ever discussed with appellant whether or not he was eligible for health benefit coverage with any of his employers or for retirement or benefit providers. [Appellant and her husband] should also submit a statement explaining why she elected to maintain health benefit coverage for him even though they were no longer living together;

“(3) Financial information for the period December 27, 2002 to September 2, 2006, including the amount of income and monthly expenses, include medical expenses.”

By letters dated July 9 and 16, 2007, appellant responded to the Office's questionnaire. In her July 9, 2007 letter, she stated that her husband was in very poor physical and mental condition. Appellant indicated that he was currently hospitalized in the intensive care unit with a staph infection and was stricken with paralysis on the left side and involuntary movements on his right side. In addition, appellant's husband still experienced periods of bleeding in his brain in addition to running a high fever. Appellant related that he was barely coherent and had great difficulty communicating in any form. She indicated that her husband had received health benefit payments from her health plan, Health America, which was still paying his health benefits and Medicare payments despite the fact that the Office terminated her compensation as of September 30, 2006. Appellant advised that her husband was staying at Lancashire Nursing and Rehabilitation Center.

In her July 16, 2007 letter, appellant stated that prior to his hospitalization her husband had periodically worked at a job driving forklifts. This job provided minimal benefits, to which he was no longer entitled. Appellant advised that her husband currently received Social Security benefits and retirement pay from a job he held previously. She stated that her husband received no other health insurance benefits other than those from her own plan. Appellant stated that she had tried to discontinue these payments but was told that this was not practicable until she divorced her husband. She clarified that her husband was still covered under her health insurance policy and that her policy paid his medical bills.

The Office scheduled a telephone conference in order to clarify appellant's husband's actual earnings and expenses for the period December 27, 2002 to September 2, 2006 and determine whether he qualified a dependent under the Act. Prior to the telephone conference, a memorandum of conference was issued which indicated that appellant's husband was not employed for the period December 27, 2002 through September 2, 2006, though he did have health benefit coverage under Medicare beginning in 2002 when he reached 65 years of age. Following the teleconference, the claims examiner prepared a memorandum of conference.

Summarizing appellant's husband's medical history as provided during the conference the claims examiner reported as follows:

“[Appellant's husband] is currently 71 years old. In 1999 when he was 63 years old he was diagnosed with cancer and disabled from work. His health improved to the point where he returned to work in a part-time capacity in 2001. [Appellant's husband] also has a medical history of brain tumors (including hemorrhages), heart attacks beginning in 2002 and diabetes. He stopped work again in 2002 due to a heart attack and has never returned to work in any capacity since that date. It is therefore established that [her husband] was not employed for the period December 27, 2002 to September 2, 2006. In December 2006 he sustained a fall due to a brain tumor. [Appellant's husband] currently has serious medical conditions from which he is not expected to recover or be able to return home in the future.”

The Office requested additional evidence from appellant, including medical evidence from her husband's physician to support the work status/disability for the period December 27, 2002 through September 2, 2006; evidence regarding his current ability to communicate with the Office; evidence confirming her husband's income for the period December 27, 2002 through September 2, 2006; an explanation from appellant as to why her husband maintained health benefit coverage on her plan when he had concurrent health benefit coverage under Medicare;³ the specific benefits her husband derived from this additional health benefit coverage; and additional information on any financial transactions which may have occurred between appellant and her husband during the period December 27, 2002 through September 2, 2006.⁴

In a letter dated August 10, 2007, appellant indicated that some of the records required to fully respond to the information requested by the Office were “packed up by the Office of Aging.” She indicated that she was unable to obtain the medical evidence requested for the period December 27, 2002 through September 2, 2006. Appellant related that her husband had become almost totally uncommunicative and stated that his monthly \$1,354.00 Social Security check went directly to the nursing home. She submitted copies of utility bills, bank statements, Medicare forms, Social Security forms, checkbook balances and property tax forms for the period December 27, 2002 to September 2, 2006 to support her assertions regarding her husband's current financial status.

³ The Office stated that appellant's husband was covered by her previous private health insurance provider, Health America, prior to their separation and continued to be covered until August 2, 2007, though no deductions had been paid by him or appellant since the Office terminated her compensation on September 2, 2006. Her husband has been covered by Medicare since 2002 when he was 65. The Office therefore noted that he had health benefit coverage under Medicare for the period December 27, 2002 to September 2, 2006.

⁴ The Office stated that appellant's husband was employed by Grinnell Fire Protection Services for approximately 18 years. He receives a small pension from Grinnell in the amount of \$411.00, but no health benefit coverage from this pension plan. Appellant's husband receives \$1,354.00 per month in Social Security benefits, \$150.00 per month from an Individual Retirement Account (IRA), for total monthly income of \$1,915.00. His monthly expenses consist of a \$764.00 mortgage, taxes of \$277.67, \$200.00 for food, \$100.00 for clothing and \$555.00 in utilities for a monthly total of \$1,896.67. Appellant's husband also had \$25,000.00 in an escrow account from the sale of a home, approximately \$2,769.00 cash on hand and \$7,782.24 in a checking account.

By decision dated August 30, 2007, the Office found that appellant was not entitled to augmented compensation for the period December 27, 2002 through September 2, 2006. It stated that the evidence of record was not sufficient to establish that her husband qualified as a dependent. It noted that, while the record supported that appellant's husband had private health benefit coverage under Health America for the period December 27, 2002 through September 2, 2006, for which deductions were made from appellant's compensation payments, the record also indicated that her husband had regular income from Social Security, a pension from retirement from Grinnell Fire Services, an IRA and health benefit coverage under Medicare. The Office therefore determined that the evidence of record did not support that appellant's husband derived an actual benefit from the additional health benefit coverage by Health America or that he was financially dependent on appellant for support December 27, 2002 through September 2, 2006 in order to maintain his standard of living and qualify him as a dependent under the Act.

LEGAL PRECEDENT

The basic rate of compensation under the Act⁵ is 66 and 2/3 percent of the injured employee's monthly pay.⁶ When the employee has one or more dependents as defined by the Act, she is entitled to have her compensation augmented at eight and one-third percent.⁷

Under the Act, a husband may be a dependent if: "(A) he is a member of the same household as the employee; or (B) he is receiving regular contributions from the employee for his support; or (C) the employee has been ordered by a court to contribute to his support."⁸

ANALYSIS

The record is clear that appellant's husband was not a member of the same household and that she was not ordered by a court to contribute to his support. Therefore, the issue is whether appellant was providing regular contributions to her husband's support, thus qualifying him as a dependent. The Board finds that the Office erred in finding that appellant's estranged husband did not qualify as a dependent under the Act. The Board stated in its prior decision that her husband would be a dependent of appellant if it could be established that she was providing regular contributions to his support and that he "looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living."⁹ While the Office did obtain the requisite information regarding appellant's husband's financial status, there are insufficient grounds to support the Office's finding that he did not rely on the health coverage she had been providing him. He is confined to a bed in a nursing home and has been rendered virtually uncommunicative by various medical conditions. Based upon appellant's testimony, the record indicates that her husband has multiple chronic life

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8105(a).

⁷ 5 U.S.C. § 8105(b).

⁸ 5 U.S.C. § 8110(a)(2).

⁹ *Girmann*, *supra* note 2.

threatening medical conditions, which have incapacitated him since 2002. Appellant has also stated that her husband does not carry his own health insurance and that her health insurance coverage has paid his medical bills. The record indicates that appellant's husband receives monthly Medicare payments, as he has since 2002 when he turned 65, a \$411.00 monthly pension from Grinnell, \$1,354.0 per month in Social Security benefits -- which, according to appellant's unrefuted assertion, currently goes directly to the nursing home -- plus \$150.00 per month from an IRA, for a total monthly income of \$1,915.00. The Office found that his monthly expenses amounted to \$1,896.67, leaving him with a monthly surplus of \$19.00. In its August 2, 2007 memorandum, it found that appellant's husband was so thoroughly disabled that he was incapable of submitting information regarding his own financial situation. Based on this record, adduced by the Office on remand, her husband was dependent upon all of the benefits he had been receiving, including the health insurance premiums from appellant under the plan that covered appellant and her family from December 27, 2002 through September 2, 2006. Appellant was therefore "providing regular contributions to his support" and her husband "looked to and relied, in whole or in part, upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living." Accordingly, the Board reverses the Office's finding that appellant's estranged husband was not a dependent under the Act and that she was not entitled to augmented compensation.

CONCLUSION

Under the circumstances described above, the Board reverses the Office's finding that appellant's estranged husband qualifies as a dependent under the Act. The Board finds that appellant was entitled to receive augmented compensation at the 75 percent rate.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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