

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

W.T., Appellant

and

**DEPARTMENT OF THE ARMY, TRIPLER
ARMY MEDICAL CENTER, HI, Employer**

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**Docket No. 08-1375
Issued: November 3, 2008**

Appearances:
Appellant, pro se
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 April 8, 2008 appellant filed a timely appeal from the January 11, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative, which found her at fault in an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's overpayment decision.

ISSUES

The issues are: (1) whether appellant was at fault in creating a \$7,780.03 overpayment of compensation, thereby precluding waiver; and if so, (2) whether the Office properly set the repayment rate at \$500.00 a month from continuing compensation.

FACTUAL HISTORY

On September 6, 2005 appellant, then a 53-year-old supervisory management analyst, filed an occupational disease claim alleging that her emotional and physical condition was a result of workplace stressors that escalated into violence. The Office accepted her claim for generalized anxiety disorder.

On a May 8, 2006 claim for compensation, appellant listed a young dependent, a “GDaughter” who was living with her. The Office inquired whether this was a goddaughter or granddaughter and whether she was legally adopted. “Claimant said that she was her granddaughter and was legally adopted. She has the paperwork if we want it.” It paid compensation for temporary total disability at the augmented rate on the periodic rolls.

On May 31, 2007 the Office made a preliminary determination that appellant received a \$7,780.03 overpayment. It discovered that she had only legal custody of her granddaughter. The Office found that appellant was at fault in creating the overpayment because she falsely represented that she had legally adopted her granddaughter and was therefore entitled to compensation at the augmented rate for dependents.

Appellant contested the finding of fault and requested waiver. She completed an overpayment recovery questionnaire showing \$5,681.43 in monthly income and \$10,003.77 in monthly expenses. Appellant explained that the overpayment was not her fault: “I thought that since my Granddaughter ... was on my orders within my military and federal systems as my dependent as well as on my taxes and I have legal guardianship since she was born in Korea in January 2003, that I could continue to claim her as my dependent with OWCP. Being under tremendous stress and anxieties, I have previously provided tax forms and other documents.”

An Office hearing representative reviewed the written record. On January 11, 2008 she issued a decision finalizing the Office’s preliminary finding that appellant was at fault in creating a \$7,780.03 overpayment because she incorrectly advised the Office that she had legally adopted her granddaughter. The hearing representative reviewed the financial information appellant submitted and found that ordinary and necessary living expenses amounted to \$2,042.19 per month.¹ She found that appellant would have over \$2,000.00 in monthly income to repay the overpayment even if excessive expenses for telephone, auto maintenance and water were allowed.² Weighing appellant’s income, ordinary and necessary expenses and assets, the hearing representative determined that appellant should be able to repay the overpayment at the rate of \$500.00 from continuing compensation checks.

On appeal, appellant does not contest the fact or amount of the overpayment or even the Office’s finding of fault. She requests consideration of new information on her mortgage and new home insurance.³

¹ The evidence supported monthly expenses of \$1,600.00 for mortgage, \$500.00 for food, \$250.00 for clothing, \$250.00 for electricity, \$162.91 for auto insurance, \$60.00 for trash; \$170.00 for gasoline, and \$600.00 for car payment. Items found excessive included \$280.00 for phone, \$975.00 for auto maintenance and \$200.00 for water. Items found not ordinary and necessary included lawn care and cable television. Appellant did not submit evidence to support \$55.00 per month for dental or \$334.79 for medical expenses.

² The hearing representative noted that appellant submitted account activity showing transfers to and from two other accounts. One was a joint account she shared with her adult daughter. Appellant submitted no information on the other account.

³ The Board’s jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to consider the new evidence appellant submitted on appeal.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ A disabled employee with one or more dependents is entitled to have her basic compensation for disability augmented.⁵ The term “dependent,” however, does not include a grandchild over whom the employee has legal custody.⁶

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. 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 she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect (this provision applies only to the overpaid individual). The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁷ A claimant who is at fault in creating an overpayment is not entitled to waiver.⁸

ANALYSIS -- ISSUE 1

Appellant received an overpayment when the Office incorrectly paid compensation at the augmented rate for dependents. Her granddaughter did not qualify as a dependent because she had only legal custody. Appellant was therefore not entitled to augmented compensation.

Appellant was at fault in creating this overpayment because she made an incorrect statement as to a material fact which she knew or should have known to be incorrect. She informed the Office that her granddaughter was legally adopted. This was incorrect, and appellant knew or should have known it was incorrect. She later explained that she had only legal custody. As this information was material to the amount of compensation appellant was entitled to receive, the Board will affirm the Office’s finding of fault. Because appellant is at fault in creating the overpayment, she is not entitled to waiver.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8110(b).

⁶ *Barbara J. Hill*, 50 ECAB 358 (1999) (the employee contended that because she had legal custody of her granddaughter, she should be regarded as her dependent, thereby entitling her to compensation at the augmented rate).

⁷ 20 C.F.R. § 10.433(a) (1999).

⁸ 5 U.S.C. § 8129.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁹ The Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.¹⁰

ANALYSIS -- ISSUE 2

In appellant's January 11, 2008 decision, the Office hearing representative took into consideration appellant's income, ordinary and necessary expenses and assets. She also took into consideration that appellant's account activity showed transfers to and from other accounts, one of which remained a mystery. The hearing representative determined that appellant would have over \$2,000.00 in excess monthly income to repay the overpayment even if excessive expenses were allowed.¹¹ As she gave due regard to relevant factors so as to minimize any hardship, the Board finds that she did not abuse her discretion in setting the rate of recovery at \$500.00 from continuing compensation.¹²

CONCLUSION

The Board finds that appellant was at fault in creating a \$7,780.03 overpayment of compensation. It also finds that the Office properly set the repayment rate at \$500.00 a month from continuing compensation.

⁹ *Id.* at § 8129(a).

¹⁰ 20 C.F.R. § 10.441(a) (1999).

¹¹ Even if excessive, unnecessary and undocumented expenses were allowed, appellant would have well over \$1,000.00 in excess monthly income to repay the debt.

¹² *See Robert C. Schenck*, 38 ECAB 531 (1987).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2008
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