

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

M.B., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, TX, Employer**

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**Docket No. 09-471
Issued: October 1, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 8, 2008 appellant filed a timely appeal from a November 28, 2008 merit decision of the Office of Workers' Compensation Programs finding that she had received an overpayment of compensation and that she was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$4,900.72 for the period September 27, 2006 through September 27, 2008; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver; and (3) whether the Office abused its discretion in setting the rate of recovery.¹

¹ The Board notes that on August 21, 2008 the Office denied appellant's request for an increased schedule award. As appellant did not request review of this decision, the Board will not address the merits of the August 21, 2008 schedule award decision.

FACTUAL HISTORY

This is the fourth appeal before the Board. By decision dated June 22, 1995, the Board affirmed the denial of appellant's request for reconsideration of a schedule award as untimely and failing to show clear evidence of error.² By decision dated December 9, 1997, the Board affirmed the Office's denial of appellant's request for attendant services.³ In a December 4, 2006 decision, the Board set aside a November 16, 2005 merit decision of the Office denying authorization for the purchase of a van and remanded the case for further development.⁴ The law and the facts of the case as set forth in the Board's prior decisions are hereby incorporated by reference.

On February 3, 1987 appellant, then a 43-year-old procurement clerk, filed a claim for compensation alleging that on January 30, 1987 she injured her left ankle while in the performance of duty. The Office accepted her claim for various conditions, including a left ankle sprain; cellulitis of the left toe, unspecified; left wrist sprain; aplastic anemias; traumatic arthropathy of the left ankle and foot; left knee and leg sprain; and fracture of the medial malleolus of the left ankle. Appellant was placed on the periodic rolls and was paid wage-loss compensation at the three-fourths augmented rate for one or more dependents.

In accordance with Office procedures, appellant submitted periodic reports in order to confirm her entitlement to continued compensation. On July 16, 2007 she completed and signed an affidavit of earnings and employment (Form CA-1032). This form advised appellant that a claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate, while a claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. The form further provided, in pertinent part, as follows:

“You may claim compensation for a dependent if you have one or more of the following: (a) a husband or wife who lives with you; (b) an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond high school level; [and] (e) a parent who totally depends upon you for support.”

In completing the form, appellant stated that she was no longer entitled to receive augmented compensation for her daughter, who dropped out of school on September 26, 2007.⁵ However, she listed her grandchildren, born March 23, 2001 and October 16, 2003, as eligible dependents. On July 8, 2008 appellant again completed and signed an affidavit of earnings and employment

² Docket No. 94-398 (issued June 22, 1995).

³ Docket No. 97-486 (issued December 9, 1997).

⁴ Docket No. 06-701 (issued December 4, 2006).

⁵ The record reflects that appellant's daughter was born on September 27, 1983.

(Form CA-1032), reflecting her claim that she was entitled to compensation on account of her dependent grandchildren.

In a letter dated October 22, 2008, the Office informed appellant that she had been improperly claiming compensation for her grandson as a dependent and that, in order to prove his eligibility as a dependent, she must provide evidence of court-ordered legal guardianship. Appellant was advised that, as her daughter was no longer eligible as a dependant as of her 23rd birthday, on September 27, 2006, her compensation rate would be reduced to the single rate of 66 2/3 effective October 25, 2008.

An October 22, 2008 ACPS Manual Fiscal Payment Worksheet reflected that appellant received net compensation at the augmented rate in the amount of \$40,943.05 for the period September 27, 2006 to September 27, 2008. The report further indicated that she should have received compensation in the amount of \$36,042.33 at the single rate for the comparable period, resulting in an overpayment of \$4,900.72.

By notice dated October 24, 2008, the Office advised appellant of its preliminary determination that she had received an overpayment of in the amount of \$4,900.72 for the period September 27, 2006 to September 27, 2008 because she was paid compensation at an augmented rate, although she did not have any eligible dependents. It also made a preliminary finding that she was at fault in the creation of the overpayment as she was aware or reasonably should have been aware that she did not have any eligible dependents after her daughter's 23rd birthday. Appellant was afforded the opportunity to request a prerecoupment hearing, a telephone conference or a decision based on review of the written record on the issue of fault and possible waiver. She was advised to submit an overpayment recovery questionnaire and supporting financial information within 30 days.

On October 30, 2008 appellant submitted a letter indicating that she had been the guardian for her grandchildren since February 29, 2004, prior to the incarceration of their mother. She also stated that her daughter was a dependent until September 27, 2007, while she attended college.

Appellant submitted powers of attorney delegating parental authority, dated February 29, 2004. The documents, which were notarized in the state of Texas, granted appellant legal guardianship of her grandchildren.

By decision dated November 28, 2008, the Office finalized the preliminary determination of overpayment, finding that appellant was overpaid \$4,900.72 for the period September 27, 2006 to September 27, 2008, due to her receipt of compensation during that period at the augmented rate when she did not have any eligible dependents. It found appellant at fault in creation of the overpayment as she knew or reasonably should have known that she no longer had eligible dependents. The Office further indicated that it would withhold \$100.00 per month from appellant's continuing compensation payments to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁶ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁷ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his or her monthly pay, which is known as basic compensation for total disability.⁸ Under section 8110 of the Act, entitled "Augmented Compensation for Dependents," an employee is entitled to compensation at the augmented rate of 75 percent of his or her weekly pay if he or she has one or more dependents within the scope of the Act.⁹

Under section 8110 of the Act, the term "dependent" includes an unmarried child "while living with the employee or receiving regular contributions from the employee towards his support."¹⁰ The Act defines "child" as "one who is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children and posthumous children, but does not include married children."¹¹ The term "dependent" also includes a student, defined as a child under the age of 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.¹²

If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation she was entitled to receive at the 66 2/3 percent compensation rate and the augment compensation received at the 75 percent rate constitutes an overpayment of compensation.¹³

When an overpayment has been made to an individual 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.¹⁴

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8102(a).

⁸ *Id.* at § 8105(a). *See also Duane C. Rawlings*, 55 ECAB 366 (2004).

⁹ 5 U.S.C. § 8110.

¹⁰ *Id.* at § 8110(3).

¹¹ *Id.* at § 8101(9).

¹² *Id.* at § 8101(a).

¹³ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though he had no dependents, he received an overpayment of compensation). *See also Diana L. Booth*, 52 ECAB 370 (2001).

¹⁴ 5 U.S.C. § 8129(a).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,900.72 for the period September 27, 2006 through September 27, 2008.

During the period in question, appellant received wage-loss compensation for total disability at an augmented rate, based upon her representation that she had at least one eligible dependent. However, the record does not establish that appellant had any eligible dependents after September 27, 2006.

Appellant continued to claim her daughter as an eligible dependent until September 27, 2007, when she allegedly dropped out of school. However, the record reflects that her daughter attained the age of 23 years on September 27, 2006. As of that date, appellant's daughter was no longer considered a student under the Act and, therefore, was no longer eligible as a dependent.¹⁵

Appellant also reported to the Office in affidavits dated July 16, 2007 and July 8, 2008 that her infant grandchildren were eligible dependents, by virtue of her legal guardianship of the children since February 2004. The record establishes that she obtained legal guardianship of the minor children in February 2004. However, the issue is whether appellant's grandchildren are considered "children" under section 8110 of the Act.

As noted above, the Act defines "child" as "one who is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children and posthumous children, but does not include married children."¹⁶ Congress provided for only three specific relationships, in addition to the biological relation between a parent and her natural child, which would constitute a "parent/child" relationship. It did not include "grandchildren" in the definition of dependents for purposes of augmented compensation.¹⁷ Section 8110 of the Act defines the class of persons who qualify as "dependents" and thereby come within the scope of the Act for purposes of augmented compensation and provides that only a member of the class of children specifically defined as a "child" of the injured employee will entitle the latter to augmented compensation.¹⁸

The Board has consistently held that a "grandchild" is not a "child" for purposes of the Act. In *Barbara J. Hill*,¹⁹ the Board found that, while the claimant had legal custody of her

¹⁵ See *supra* note 11.

¹⁶ *Id.* at § 8101(9).

¹⁷ See *Louis L. Jackson*, 39 ECAB 423 (1988) (where the Board noted that while Congress allowed grandchildren as a class of persons eligible for death benefits under section 8133, it did not include a grandchild in the definition of dependents for purposes of augmented compensation under section 8110).

¹⁸ See *Barbara J. Hill*, 50 ECAB 358 (1999). See also *id.* In both *Hill* and *Jackson*, the Board noted the principle of statutory construction known as *expressio unis est exclusio alterius*, whereby the expression of specific persons or things in a statute implies an intent to exclude all others.

¹⁹ *Id.*

grandchild, she was not entitled to augmented compensation based on her guardianship of the child. Referring to *Louis L. Jackson Sr.*,²⁰ the Board noted that there were other close relationships between an adult and a child that were not included in the definition of “child,” including that between a legal guardian and a ward.²¹ In this case, the children at issue did not belong to any of the three categories designated by the Act. They were not stepchildren or posthumous children. There is no evidence of record that they were adopted. Accordingly, the Board finds that the minor grandchildren are not considered “children” as defined by the Act.

For the reasons stated above, the Board finds that the Office properly found that appellant was not eligible for augmented compensation during the period in question. The record reflects that appellant received net compensation at the augmented rate in the amount of \$40,943.05 for the period September 27, 2006 to September 27, 2008, but that she should have received compensation in the amount of \$36,042.33 at the single rate for the comparable period. The difference between the two amounts constitutes an overpayment of compensation in the amount of \$4,900.72. Therefore, the Board finds that the Office correctly determined the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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.²² 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 this subchapter or would be against equity and good conscience.”²³ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²⁴

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 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

²⁰ *Supra* note 17.

²¹ *Barbara Hill, supra* note 18.

²² 5 U.S.C. § 8129(a).

²³ *Id.* at § 8129(b).

²⁴ *William F. Salmonson*, 54 ECAB 152 (2002) (the Board held that no waiver of compensation is possible if the claimant is at fault in the creation of the overpayment of compensation).

(3) Accepted a payment which he or she knew or should have known to be incorrect.”²⁵

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individuals’ capacity to realize that he or she is being overpaid.²⁶ In applying the tests to determine fault, the Office applies a “reasonable person” test.²⁷

ANALYSIS -- ISSUE 2

Appellant received augmented compensation for two decades. She routinely completed affidavits of earnings and employment (EN1032 forms), which advised her that a claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate, while a claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. The forms further provided a clear and unambiguous definition of “dependent,” which did not include a grandchild or a student over the age of 23 years.

On appeal, appellant contends that she was not at fault in the creation of the overpayment because she believed that her grandchildren were eligible dependents. The Board finds, however, that she knew or reasonably should have known that they were not “dependents” as defined by the Act. Appellant was reminded of the definition of “dependent” and the circumstances under which she was entitled to receive augmented compensation each time she completed and signed financial disclosure statements requested by the Office every 15 months. Given the specificity of the Form EN1032, she should have known that she was not entitled to claim either her daughter or her grandchildren as dependents during the period in question.²⁸ As the Form EN1032 made clear, appellant’s daughter lost her status as a dependent on September 27, 2006, her 23rd birthday. Moreover, the form provided no information from which she could conclude that her grandchildren were dependents for compensation purposes. Appellant repeatedly accepted payments which she knew or should have known to be incorrect.

The Board notes that appellant received guardianship of her grandchildren on February 29, 2004. There is no evidence of record that she made an effort prior to the Office’s preliminary determination of overpayment to clarify whether her grandchildren were “dependents” under the Act.

²⁵ 20 C.F.R. § 10.433(a) (2003).

²⁶ *Rosemary A. Kayes*, 54 ECAB 373 (2003).

²⁷ *William E. McCarty*, 54 ECAB 525 (2003).

²⁸ The Board has held that the Form CA-1032 is sufficient notice as to who is a qualifying dependent under the Act for the purpose of receiving augmented compensation. See *Elsie G. Dibartolomeo*, Docket No. 02-15 (issued September 13, 2002); *Ruth B. Watkins*, Docket No. 98-1048 (issued August 2, 2000); *Pamela P. Humphrey*, Docket No. 96-1720 (issued December 11, 1998); *James Hopkins*, Docket No. 93-2254 (issued September 7, 1995).

The Board finds that appellant knew or reasonably should have known that she was receiving payments to which she was not entitled. Therefore, she was at fault in the creation of the overpayment and is not entitled to waiver.

On appeal, appellant also requests waiver, as other governmental or administrative agencies recognized her grandchildren as her “children” and provided benefits accordingly. The findings of other administrative agencies are not dispositive regarding entitlement to benefits under the Act.²⁹ Moreover, no waiver of payment is possible if the claimant is not “without fault” in the creation of the overpayment.³⁰

LEGAL PRECEDENT -- ISSUE 3

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.³¹ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction, and the recovery of an overpayment remains within the discretion of the Office. The Board’s jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.³²

ANALYSIS -- ISSUE 3

Appellant did not submit a completed overpayment recovery questionnaire or other financial information requested by the Office prior to the final November 28, 2008 overpayment decision, which established a repayment schedule. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.³³ When an individual fails to provide requested information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.³⁴ As appellant did not submit any financial information to the Office as requested, the Board finds that there is no evidence in the record to show that a recovery rate of \$100.00 every 28 days was unreasonable or that the Office improperly withheld the amount of \$100.00 from her continuing compensation payments.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$4,900.72 for the period September 27, 2006 through September 27, 2008. The Board also finds that the

²⁹ See *Daniel Deparini*, 44 ECAB 657 (1993).

³⁰ See *William F. Salmonson*, *supra* note 24.

³¹ 5 U.S.C. § 8129(a).

³² *Terry A. Keister*, 56 ECAB 559 (2005); see also *Albert Pineiro*, 51 ECAB 310 (2000).

³³ See 20 C.F.R. § 10.438 (2009).

³⁴ *Frederick Arters*, 53 ECAB 397 (2002). Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (June 2009).

Office properly determined that appellant was at fault in creating the overpayment and thus not entitled to waiver. The Board further finds that the Office did not abuse its discretion in setting the rate of recovery at \$100.00 every compensation period.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment and determination of fault.

Issued: October 1, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board