

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Haven, CT, Employer**

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**Docket No. 09-1007
Issued: February 17, 2010**

Appearances:
Kevin J. Curseaden, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2009 appellant, through counsel, filed a timely appeal from a January 8, 2009 merit decision of the Office of Workers' Compensation Programs affirming an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,400.64 for the period July 17, 2005 through September 29, 2007; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly directed repayment at \$150.00 a month from continuing compensation.

FACTUAL HISTORY

This is the second appeal in this case. By decision dated April 8, 1998, the Board set aside the Office's decisions dated December 2, 1994 and August 30, 1995 denying her

recurrence of disability commencing April 29, 1994. The case was remanded for further development.¹ The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.²

The record reflects that appellant claimed her husband as a dependent. Because she had at least one eligible dependent, the Office paid her wage-loss compensation at the augmented rate of 75 percent. On July 21, 1999 appellant and her husband gained legal custody and/or guardianship of their grandson, born October 9, 1995.³ In addition to her husband, she claimed her grandson as a dependent for purposes of obtaining augmented wage-loss compensation.

In a signed Form EN1032 dated October 5, 2005, appellant reported that she was a widow as of July 16, 2005 and continued to claim her grandson as a dependent. On several subsequent EN1032 forms, she noted that she was a widow and claimed her grandson as a dependent.

In an October 11, 2007 letter, the Office informed appellant that she had been improperly claiming compensation for her grandson as a dependent. It informed her of the requirements for claiming compensation for a dependent child. The Office found there was no evidence to document that appellant had adopted her grandson. Therefore, she was not entitled to compensation at the augmented rate.

A December 31, 2007 overpayment calculation worksheet reflected that appellant received net compensation at the augmented rate in the amount of \$73,231.33 from July 15, 2005 through September 29, 2007. Appellant should have received compensation in the amount of \$65,114.55 at the basic statutory rate, resulting in an overpayment of \$8,116.78.

By notice dated February 13, 2008, the Office advised appellant of its preliminary determination that she received an overpayment in the amount of \$8,116.78 for the period July 15, 2005 through September 29, 2007 because she received compensation at the augmented rate, without any eligible dependents. It also made a preliminary finding that she was at fault in the creation of the overpayment as she knew or reasonably should have known that she did not have any eligible dependents after her husband's death.

Appellant contested the finding of fault and requested a preresoupment hearing before an Office hearing representative. She completed an overpayment recovery questionnaire showing \$5,950.38 in gross monthly income⁴ and \$4,859.80 in monthly expenses. Appellant advised that she supported her grandson and her daughter, who were currently living with her. She reported owning a timeshare in Aruba and listed other funds in the amount of \$37,000.00. Appellant

¹ Docket No. 96-527 (issued April 8, 1998).

² On August 14, 1987 appellant, then a 48-year-old clerk, filed a traumatic injury claim alleging that she injured her right shoulder on August 13, 1987 when she was lifting and weighing bulk packages. The Office accepted the claim for a cervical strain, which was expanded to include cervical radiculopathy. By letter dated August 31, 2000, it placed appellant on the periodic rolls for total disability.

³ The temporary guardianship was set to terminate on July 21, 2000.

⁴ Appellant noted her net monthly income was 5,522.68.

explained that the overpayment was not her fault as she believed her grandson qualified as a dependent since she was his court appointed guardian. She also submitted information that her adult daughter was living with her as of July 21, 2008 and dependent upon her for support.

An oral hearing was held on July 14, 2008 before an Office hearing representative at which appellant was represented by counsel. Following the hearing, appellant submitted financial information and a revised overpayment questionnaire form. She noted that her adult daughter was currently living with her.

On January 8, 2009 an Office hearing representative affirmed the overpayment. However, she found appellant was not at fault in the creation of the overpayment and modified the period and amount of the overpayment. The hearing representative found the Office did not correctly calculate the overpayment as appellant was entitled to augmented compensation until July 17, 2005, the day after her husband died. She found that appellant received \$72,969.04 in augmented compensation for period July 17, 2005 through September 29, 2007 when she was only entitled to receive \$64,568.40, which resulted in an overpayment of \$8,400.64. The hearing representative reviewed the financial information appellant submitted and found monthly income of \$5,714.93 with monthly ordinary and necessary living expenses of \$4,859.80. She found appellant was not entitled to waiver as her monthly income exceeded her monthly expenses and she claimed \$37,000.00 in savings. Weighing appellant's income, ordinary and necessary expenses and assets, the hearing representative determined that appellant could repay the overpayment at the rate of \$150.00 every month.

On appeal, appellant contests the finding that she was not entitled to claim her grandson as a dependent and to the denial of waiver. She also claims that her adult daughter now lives with her and is dependent upon her.⁵

LEGAL PRECEDENT -- ISSUE 1

Compensation for disability or schedule impairments is paid at the statutory rate of 66 2/3 percent if the employee has no eligible dependents. Compensation is paid at the augmented rate of 75 percent if the employee has at least one eligible dependent.⁶ Eligible dependents include a wife or husband, an unmarried child under 18 years of age, an unmarried child over 18 who is

⁵ The Board notes that appellant submitted additional evidence with her appeal. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁶ 5 U.S.C. §§ 8105(a), 8106(a), 8107(a), 8110(b); 20 C.F.R. §§ 10.401(b), 10.403(b) and 10.404(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10 (February 2002).

incapable of self-support, a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent.⁷

ANALYSIS -- ISSUE 1

Appellant informed the Office that her husband died on July 15, 2005. There is no indication from the record that appellant subsequently remarried. In order for her to receive wage-loss compensation at the augmented rate of 75 percent she must have had at least one other eligible dependent on or after July 17, 2005. In challenging the overpayment, appellant noted that she is the legal guardian for her grandson.

Under certain circumstances, compensation will be augmented for an injured employee's unmarried child. However, child and grandchild are not synonymous, and the latter is not specifically recognized as an eligible dependent for purposes of augmented compensation.⁸ Although appellant obtained legal custody of her minor grandson, there is no evidence that she legally adopted him. Absent such evidence, compensation was payable at the basic statutory rate of 66 2/3 percent.

A grandchild is not enumerated as a dependent child for purposes of receiving augmented compensation. Furthermore, guardianship or legal custody by itself does not establish dependency. Accordingly, the Board finds that appellant's grandson is not an eligible dependent under the Act.

Appellant's marital status changed as of the death of her husband on July 16, 2005. Subsequently, she did not have any eligible dependents. Therefore, appellant was not entitled to receive augmented wage-loss compensation from July 17, 2005 through September 29, 2007. Appellant has not challenged the Office's hearing representative's calculation of the overpayment in the amount of \$8,400.64. The Board affirms the Office's determination with respect to the fact and the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless 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.⁹ Section 10.433 of the implementing regulations provide that the Office may

⁷ 5 U.S.C. § 8110(a); 20 C.F.R. § 10.405(a). A spouse is considered a dependent if he or she is a member of the same household as the employee. However, cohabitation is not required in all instances. Dependent status will be conferred where the husband or wife is receiving regular contributions from the employee for support or the employee has been ordered by a court to contribute to the spouse's support. 5 U.S.C. § 8110(a)(1) and (a)(2).

⁸ *Jacqueline S. Harris*, 56 ECAB 252, 255 (2005). The definition of a child includes stepchildren, adopted children, and posthumous children, but does not include married children. 5 U.S.C. § 8101(9). See also *Katie E. Hall*, 50 ECAB 177 (1998); *Barbara J. Hill*, 50 ECAB 358 (1998). The Federal Employees' Compensation Act separately defines grandchild for purposes of identifying eligible beneficiaries to certain death benefits under 5 U.S.C. § 8109 and 8133. *Id.* at § 8101(10).

⁹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ Section 10.434 provides that, if the Office finds the recipient of an overpayment was not at fault, repayment will be required unless: “(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act], or (b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹¹

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary’s assets do not exceed a specified amount as determined by the Office. Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance in such payments gives up a valuable right or changes his or her position for the worse.¹²

ANALYSIS -- ISSUE 2

The Office hearing representative found that appellant was not at fault in creating the overpayment. Therefore, the issue is whether the Office properly denied waiver of recovery of the \$8,400.64 overpayment.

The Board finds that the Office properly found that the circumstances in appellant’s case do not warrant waiver of the overpayment. The evidence establishes monthly income of \$5,714.93 and expenses of \$4,859.80. Appellant’s monthly income exceeded her expenses by more than the \$50.00 minimum (*i.e.*, \$855.13). Further there are sufficient other listed assets from which the debt could be paid. The Office properly found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.¹³

On appeal, appellant’s counsel contended that it would be a hardship for her to repay the overpayment and the guidelines do not consider the cost of living in Milford, Connecticut. Appellant also contends that the guidelines contained in 20 C.F.R. § 10.436 are unrealistic given that she is her grandson’s sole source of financial support. She contends that the calculations set

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at 10.437.

forth at 20 C.F.R. § 10.438 fail to take into account maintenance for her house and automobile and unexpected and incidental emergency costs, particularly those that arise with her teenager grandson. Contrary to appellant's contention, the overpayment questionnaire form does provide for the inclusion of house maintenance and automobile expenses under "Other expenses" which included automobile expenses, other transportation expenses and miscellaneous household costs. It also provides a section identifying persons supported by claimant including their relationship to the claimant which is considered in determining whether waiver is warranted. Appellant provided no evidence showing how the regulations or the overpayment questionnaire fail to consider the cost of living was in Milford, Connecticut. Lastly, the evidence indicates appellant's compensation payments and other income will continue and that given her financial circumstances and, thus, the denial of her request for waiver would not result in undue hardship.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, 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 hardship.¹⁴

ANALYSIS -- ISSUE 3

In the January 8, 2009 decision, the Office hearing representative took into consideration appellant's income, ordinary and necessary expenses and assets. She also took into consideration appellant's \$37,000.00 in savings. The record supports that in requiring repayment of the overpayment by monthly payments of \$150.00 the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,440.64 and that waiver of recovery of the overpayment of compensation was not warranted. Lastly, the Board finds that the Office did not abuse its discretion in setting the monthly rate of recovery at \$150.00 from continuing compensation payments.

¹⁴ 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2009 is affirmed.

Issued: February 17, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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