

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES B. HUTTON and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Tulsa, Okla.

*Docket No. 95-2658; Submitted on the Record;  
Issued May 8, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of a \$15,264.90 overpayment of compensation and therefore, was not entitled to waiver of the overpayment.

On May 1, 1975 appellant, then a 38-year-old air traffic control specialist, filed a claim alleging that he developed stress as a result of his air traffic controller duties. On March 23, 1976 the Office accepted appellant's claim for aggravation of anxiety depression, state based on working conditions.<sup>1</sup> The record indicates that appellant filled out periodic statements in support of his compensation benefits from April 1983 through April 1989, in which he claimed his wife as a dependent and was therefore, compensated at the augmented rate of 3/4 or 75 percent of his monthly income.<sup>2</sup> The form contained essentially the following information:

"You may claim additional compensation for a dependent if you have one or more of the following: (a) a spouse who is a member of your household; (b) an unmarried child, including an adopted or step-child, who is living with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who is incapable of self-support by reason 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 schooling beyond the high school level; (e) a parent who is wholly dependent on you for support."

In periodic statements dated April 15, 1991 and June 6, 1994, appellant claimed his granddaughter as a dependent.

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<sup>1</sup> Appellant was medically disqualified from his position on April 23, 1975.

<sup>2</sup> Appellant's last periodic statement listing his wife as a dependent was received by the Office on April 28, 1989.

In a report of telephone call or Office call, CA-110, dated July 18, 1994, the Office noted that it had advised appellant that his granddaughter did not qualify as a dependent for the purposes of calculating his compensation benefits.

On July 18 and December 29, 1994 the Office requested appellant to submit a copy of his divorce decree. The Office received the divorce decree on January 26, 1995.

The Office adjusted appellant's compensation rate to reflect payment calculated at 2/3 or 66 2/3 percent of appellant's monthly pay rate based on his having no dependents after his divorce from his wife effective October 30, 1989.

On February 13, 1995 the Office determined that appellant was overpaid \$15,264.90 from October 31, 1989 to July 23, 1994, because he had been compensated at the augmented 3/4 rate of his monthly pay, although he had no dependents after October 30, 1989 and, therefore, should have been paid at the statutory rate of 2/3 of his monthly pay.

On February 14, 1995 the Office notified appellant that it had made a preliminary determination that he had been overpaid in the amount of \$15,264.90 from October 31, 1989 to July 24, 1994, because he received compensation at the augmented rate of 75 percent of his monthly pay but was only entitled to the statutory rate of two-thirds of his monthly pay "as you had no dependents."

Appellant does not contest, nor does the record refute, that an overpayment in the amount of \$15,264.90 was created. The issue presented is whether the Office, in its March 20, 1995 decision, properly determined that appellant was at fault in the creation of the overpayment.

In response to the Office inquiries, appellant submitted a report, which the Office received on March 7, 1995. Appellant claimed that he was raising his granddaughter and was now listing her on his periodic form as a dependent. He also stated that he would have adopted her but for the expenses involved. In response to the Office's inquiry as to whether he wished to appeal its decision, in which it found that appellant was at fault in creating the overpayment, or its denial of a waiver to repay the overpayment, or to reevaluate the issue of fault, appellant failed to indicate by checkmark or other annotation that he wished to appeal any of these issues. He noted that he was not certain what he was supposed to be doing but hoped that he would be dealt with fairly.

In a decision dated March 20, 1995, the Office found that appellant was overpaid \$15,264.90, that he was at fault in the creation of the overpayment, because he knew or had reason to know that the amount he received was incorrect, and that \$150.00 would be withheld from his compensation each pay period until the debt was paid.

Section 8129(b) of the Federal Employees' Compensation Act<sup>3</sup> provides: "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 the

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

Act or would be against equity and good conscience.”<sup>4</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations provides in relevant 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 (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”<sup>5</sup>

In the present case, the Board finds that appellant filled out periodic forms from 1983 through 1989, in support of his continuing compensation, in which he listed his wife as a dependent. Each form advised appellant regarding the definition of a dependent, which included a spouse who is a member of appellant’s household; an unmarried child, including an adopted or step-child, who is living with appellant and is under 18 years of age; an unmarried child who is 18 or over, but who is incapable of self-support by reason of mental or physical disability; an unmarried child under 23 years of age who is a full-time student and has not completed four years of schooling beyond the high school level; or a parent who is wholly dependent on appellant for support. In a similar form received by the Office on April 15, 1991 appellant listed only his granddaughter as a dependent. Appellant, however, did not advise the Office of his October 30, 1989 divorce from his wife until 1994.

The Board finds that each periodic form that appellant filled out provided adequate notice regarding what constituted a dependent for the purposes of computing his rate of compensation.

The Board notes that under the definition of dependent, granddaughter is not listed as a dependent and that therefore, appellant knew or should have known that his granddaughter is not a dependent, for which he would otherwise be able to claim an augmented rate of 3/4 or 75 percent of his monthly pay as compensation.<sup>6</sup> Section 8110 of the Act defines the classes of persons who qualify as “dependents” and thereby come within the scope of the Act for purposes of augmented compensation.<sup>7</sup> Appellant failed to timely advise the Office of his divorce from his wife. Further, appellant was properly advised of the definition of dependents and should have known a grandchild is not a dependent listed for purposes of receiving augmented compensation.

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<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.320(b).

<sup>6</sup> See *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988).

<sup>7</sup> See 5 U.S.C. § 8110(3).

The Board accordingly finds that appellant accepted payments that he knew or should have known were incorrect. Under 20 C.F.R. § 10.320(b)(3), he is at fault in the creation of the overpayment and no waiver of the overpayment is permitted in this case.

The decision of the Office of Workers' Compensation Programs dated March 20, 1995 is affirmed.

Dated, Washington, D.C.  
May 8, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member