



## **FACTUAL HISTORY**

On August 25, 1986 appellant, then a 27-year-old contract representative, filed a traumatic injury claim alleging that on May 14, 1986 she experienced stress and a muscle spasm. She also alleged a recurrence of her long-term back problems as a result of undue pressure and stress brought on by harassment, discrimination and retaliation by her superiors.<sup>1</sup> The Office accepted appellant's claim for temporary aggravation of mixed personality disorder, permanent aggravation of delusional disorder, dysthymia, aggravated reflex esophalitis, muscular tension and aggravation of irritable bowel syndrome. By decision dated April 30, 1993, the Office found that the constructed position of audit clerk represented her wage-earning capacity effective May 2, 1993.<sup>2</sup>

By letter dated May 4, 1993, the Office notified appellant that it was placing her on the periodic rolls effective May 2, 1993. It advised her that she would be paid loss of wage-earning capacity compensation at the three-fourths rate, or 75 percent of the applicable pay rate, for her dependent son, who was born on November 17, 1980, beginning on May 2, 1993. The Office further advised appellant to provide notification in writing of any changes in the status of her dependents.

In a Form EN1032 dated January 30, 2002, appellant listed as dependents a son, a full-time college student, and a minor granddaughter as she was her legal guardian. The Form EN1032 explained that compensation was paid at 66 2/3 percent of the applicable pay rate if she had no dependent and at 75 percent if she had one or more dependents. It further provided, in pertinent part, that a dependent included "an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age" or "an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level."

On June 12, 2002 appellant and the registrar of Jackson State University in Jackson, Mississippi stated that appellant's son began attending the college on January 3, 2002. The school year was through July 30, 2002. Appellant's son was expected to complete his education on May 12, 2006.

In a Form EN1032 dated December 20, 2003, appellant again listed her son and granddaughter as dependents. She stated that her son was still a full-time college student. In EN1032 forms dated September 11, 2006, January 4 and December 31, 2007, appellant only claimed her granddaughter as a dependent.

By letter dated February 5, 2008, the Office advised appellant that her son was too old to be considered a dependent under the Federal Employees' Compensation Act. It also advised her that grandchildren were not covered under the Act. The Office adjusted appellant's

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<sup>1</sup> Prior to the instant claim, the Office accepted that appellant sustained employment-related low back strains on May 5, 1981 and August 28, 1984.

<sup>2</sup> By decisions dated August 18, 1994, May 3 and August 17, 1995, the Office denied modification of its April 30, 1993 wage-earning capacity determination.

compensation to the two-thirds rate as she no longer had any eligible dependents. It requested that she provide proof that her son was attending college until November 16, 2003, the maximum date of dependent eligibility if he was still in college so that it could compute the amount of the overpayment of compensation. Appellant was allotted 30 days to respond. She did not respond.

On May 7, 2008 the Office made a preliminary determination that appellant received an overpayment of \$11,168.94 from August 1, 2002 to February 16, 2008 because she received compensation at the augmented rate for dependents. An overpayment worksheet indicated that she was paid \$90,632.29 in compensation for the stated period at the three-quarters augmented rate when she should have been paid \$79,463.35 in compensation during this period at the two-thirds rate applicable for claimants without dependents. The Office found that appellant was at fault in creating the overpayment. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On June 1, 2008 appellant requested a prerecoupment hearing. In a June 1, 2008 OWCP-20 form, she stated that she did not have any of the incorrectly paid checks or payments in her possession. Appellant had claimed her granddaughter, who lived with her, as a dependent since her birth. She also provided health insurance for her granddaughter. Appellant was not aware that her granddaughter could not be claimed as a dependent. She stated that if it was determined that she was at fault in creating the overpayment she would repay it at a minimum rate as she experienced hardship in trying to meet her current monthly obligations. Appellant reported monthly income of \$1,272.85 in private pension benefits and \$904.22 in workers' compensation benefits, totaling \$2,177.07. She reported monthly expenses of \$950.00 for rent, \$450.00 for food, \$287.85 for utilities, \$100.00 for clothing, \$53.00 on credit cards and \$90.00 for car insurance, totaling \$1,930.85. With respect to assets, appellant indicated that she did not have stocks, bonds or real estate, and she reported \$175.00 in a checking account and \$123.00 in a savings account, totaling \$298.00.

By decision dated July 28, 2008, the Office finalized the preliminary finding of overpayment and fault. It directed recovery of the overpayment at a rate of \$100.00 per month from appellant's continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

The Act<sup>3</sup> 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 duty.<sup>4</sup> If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102(a).

compensation for total disability.<sup>5</sup> Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>6</sup> A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.<sup>7</sup> The term dependent, however, does not include a grandchild over whom the employee has legal custody.<sup>8</sup> 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 two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment in the amount of \$11,168.94. Appellant received wage-loss compensation based on the constructed position of audit clerk which represented her wage-earning capacity. The Office paid compensation at the three-fourths rate for dependents beginning on May 2, 1993. Appellant completed EN1032 forms on January 30, 2002 and December 20, 2003 which listed her son as a full-time college student and minor granddaughter, noting she was her legal guardian. In EN1032 forms dated September 11, 2006, January 4 and December 31, 2007, she only listed her granddaughter as a dependent. Appellant and the college registrar documented that appellant's son was enrolled in school through July 30, 2002. There is no evidence that he was enrolled on or after August 1, 2002. The Board finds that as appellant's son was no longer a full-time college student as of August 1, 2002, she was not entitled to receive compensation at the augmented three-fourths rate. Further, appellant was not entitled to receive augmented compensation because her granddaughter did not qualify as a dependent since she had only legal custody. The Office, however, continued to pay appellant compensation at the augmented three-fourths rate through February 16, 2008. It paid her \$90,632.29 in compensation from August 1, 2002 to February 16, 2008 instead of the proper amount of \$79,463.35 for claimants without dependents. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board finds that appellant received an overpayment of \$11,168.94, the difference between the amount of compensation that she actually received and the amount of compensation that she was entitled to as she received compensation at the augmented rate from August 1, 2002 to February 16, 2008.

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<sup>5</sup> *Id.* at § 8105(a).

<sup>6</sup> *Id.* at § 8110(b).

<sup>7</sup> *Id.* at § 8110(a).

<sup>8</sup> *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).

<sup>9</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act<sup>10</sup> provides that an overpayment of compensation shall be recovered by the Office 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.<sup>11</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>12</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>13</sup>

On the issue of fault, section 10.433 of the Office's regulations provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”<sup>14</sup>

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“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 individual's capacity to realize that he or she is being overpaid.”<sup>15</sup>

Augmented compensation is payable for a “dependent child” as provided by section 8110(c) of the Act.<sup>16</sup> The definition of the term “child” in section 8101(9) of the Act provides for three specific relationships in addition to the biological relationship between a parent and his or her natural child.<sup>17</sup> There are, however, other close relationships between an adult and a child, such as that between a legal guardian and a ward which are not included.<sup>18</sup>

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<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>12</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>13</sup> *Diana L. Booth*, *supra* note 9; *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>14</sup> 20 C.F.R. § 10.433(a).

<sup>15</sup> *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 9.

<sup>16</sup> 5 U.S.C. § 8110(3).

<sup>17</sup> *Id.* at § 8101(9).

<sup>18</sup> *Aretha Hudson*, 28 ECAB 169 (1977).

## **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>19</sup>

The Board finds that appellant was at fault in creating the overpayment from August 1, 2002 to February 16, 2008. By letter dated May 4, 1993, the Office advised her that she should notify it in writing of any changes in her dependents. Appellant completed a Form EN1032 on January 30, 2002 which provided her with the definition of a dependent and explained that she was not entitled to receive compensation at the augmented rate if she did not have dependents. As stated, she listed her son, a full-time college student, and granddaughter as dependents on this form and the December 20, 2003 EN1032 form, and only her granddaughter on the EN1032 forms dated September 11, 2006, January 4 and December 31, 2007. Further noted, it is not established that her son was a full-time college student after July 30, 2002. By receiving the May 4, 1993 letter and signing the EN1032 forms during the period January 30, 2002 through December 31, 2007, appellant had sufficient notice that she was not entitled to compensation at the augmented rate if she did not have an eligible dependent.<sup>20</sup> Therefore, the Board finds that appellant knew or should have known that the compensation she received after July 30, 2002 was incorrect as her son was no longer a full-time college student and her granddaughter was not a qualifying dependent. Although appellant contended that she thought she was entitled to augmented compensation on behalf of her granddaughter, there is no evidence of record establishing that she had legally adopted the child. The Board notes that even if an overpayment resulted from negligence by the Office, this does not excuse a claimant from accepting payment that the claimant knew or should have been expected to know was incorrect.<sup>21</sup> As appellant is at fault in the creation of the overpayment, she is not eligible for waiver of the recovery of the overpayment.

## **LEGAL PRECEDENT -- ISSUE 3**

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.<sup>22</sup> With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the

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<sup>19</sup> See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>20</sup> *Barbara J. Hill*, *supra* note 8.

<sup>21</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>22</sup> *Howard R. Nahikian*, 53 ECAB 406 (2002).

overpayment as soon as the error is discovered or his or her attention is called to same. If 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 any hardship.’<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

After determining that appellant was at fault in the creation of the overpayment, the Office found that she could repay the overpayment by withholding \$100.00 every 28 days from her continuing compensation. It considered the factors in section 10.441(a) in making this determination and found that \$100.00 recovery rate was justified. As appellant’s income exceeded expenses by \$246.22, the Board finds that the Office did not abuse its discretion in determining the rate of recovery of the overpayment in this case.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$11,168.94 for the period August 1, 2002 to February 16, 2008 because she received compensation at the augmented rate; that the Office properly found that she was at fault in creating the overpayment and, therefore, ineligible for waiver; and that the Office properly directed recovery of the overpayment at the rate of \$100.00 per month from her continuing compensation payments.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 28, 2008 decision of the Office of Worker’s Compensation Programs is affirmed.

Issued: August 11, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees’ Compensation Appeals Board

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

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<sup>23</sup> 20 C.F.R. § 10.441(a).