

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

J.V., Appellant

and

**SMALL BUSINESS ADMINISTRATION,
Washington, D.C., Employer**

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**Docket No. 09-1154
Issued: February 26, 2010**

Appearances:
Appellant, pro se
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 26, 2009 appellant filed a timely appeal from a December 22, 2008 decision of the Office of Workers' Compensation Programs, which found an overpayment in the amount of \$1,933.37. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,933.37; and (2) whether the Office properly determined that appellant was not entitled to waiver.

¹ The record contains Office decisions dated March 26, December 19 and 30, 2008 and January 9 and 12, 2009. Appellant did not appeal from these decisions.

FACTUAL HISTORY

On November 14, 2005 appellant, then a 40-year-old clerk, filed an occupational disease claim for a left arm condition sustained in the performance of duty. The Office accepted her claim for lateral epicondylitis of the right elbow; ulnar nerve entrapment at the right elbow; and medial epicondylitis. On October 31, 2008 it accepted ulnar nerve entrapment neuropathy in the left elbow.² Appellant received wage-loss compensation.

On February 27, 2006 appellant completed a Form CA-7 and indicated that she had a dependent son born on March 14, 1988. On May 24, 2006 the Office received a CA-7 form from appellant who listed as dependents her son and a granddaughter born October 7, 2004. On August 9, 2007 appellant completed a CA-7 form and indicated that she had two granddaughters as dependants. She claimed wage-loss compensation beginning July 8, 2007 for leave without pay. Appellant submitted additional CA-7 forms claiming compensation. The record establishes that she received wage-loss compensation at the three-fourths augmented rate from July 8, 2007 to September 13, 2008.

On September 24, 2008 the Office contacted appellant to clarify whether she should have received wage-loss compensation at the three-fourths augmented rate. It confirmed that her son did not attend college and that she had not adopted either of her granddaughters. Appellant related that she raised her granddaughters, who lived with her and claimed them as dependants on her taxes.

In a November 6, 2008 overpayment worksheet, the Office determined that appellant had received compensation at an augmented rate from July 8, 2007 to September 13, 2008 when she had no eligible dependents. As her son had turned 18 on March 14, 2006 and was not a student pursuing a full course of study, he was no longer an eligible dependent after that date. As of July 8, 2007, appellant claimed her grandchildren as dependents and she received compensation at an incorrect pay rate. The Office noted that she was paid \$19,904.99 at the augmented pay rate but should have received \$17,971.62 at the statutory 2/3rds pay rate. The difference represented an overpayment in the amount of \$1,933.37.

On November 6, 2008 the Office issued a preliminary determination that appellant was not at fault in the creation of an overpayment of compensation from July 8, 2007 through September 13, 2008 in the amount of \$1,933.37. It found that she was not aware that the Office had overpaid compensation, as she had correctly listed the dates of birth and names of her granddaughters. The amount of the overpayment represented the difference between the compensation paid to appellant at the augmented pay rate minus the compensation due at the basic rate. Appellant was advised of her right to challenge the amount of the overpayment or request a waiver within 30 days. If she sought waiver of the overpayment, she was directed to submit financial information by completing an overpayment recovery questionnaire within 30 days.

On December 10, 2008 appellant contacted the Office by telephone to discuss an extension of time and whether it would accept her response after the deadline. The issue of

² File No. xxxxxx593. The Office doubled the claims under master claim file number xxxxxx027.

dependency was explained to appellant concerning her grandchildren. The Office noted that she advised that she would complete the overpayment forms and submit them within a few days. No additional evidence was received within the allotted time.

In a December 22, 2008 decision, the Office finalized the overpayment. It noted that no financial documentation was submitted to support waiver of the overpayment. The Office determined that the overpayment should be recovered by requesting that appellant forward a check in the amount of \$1,933.37 within 30 days. If appellant was unable to refund the entire overpayment immediately, she was advised to contact the Office so that appropriate arrangements for recovery could be made.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act 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 her duty.³ 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.⁴

The basic rate of compensation is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more eligible dependents, she is entitled to have her basic compensation augmented at the rate of 8 1/3 percent or a total of 75 percent.⁵ A disabled employee is entitled to compensation equal to two-thirds of her monthly pay, if disability is total or two-thirds of the difference between her monthly pay and her monthly wage-earning capacity, if disability is partial.⁶ A disabled employee with one or more dependents is entitled to have the basic compensation rate for disability augmented to three-fourths of her monthly pay.⁷

Section 8101(9) defines the term "child" to include stepchildren, adopted children and posthumous children. Section 8110 provides augmented compensation benefits for dependents. It does not include a grandchild as a dependent. The Act defines child as one who is under 18 years of age or over that age and incapable of self-support.⁸ 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.⁹

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *See Stephen R. Cofrancesco*, 57 ECAB 662 (2006); *Jacqueline S. Harris*, 56 ECAB 252 (2005).

⁶ 5 U.S.C. §§ 8105(a), 8106(a).

⁷ *Id.* at § 8110(b).

⁸ *Id.* at § 8101(9).

⁹ *Id.* at § 8101(a).

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.¹⁰

ANALYSIS -- ISSUE 1

The Office paid appellant compensation at the augmented three-fourths rate from July 8, 2007 to September 13, 2008. During this period, she claimed her granddaughters as her dependents. As noted, however, the Act defines the term “child” to include an adopted child. Appellant did not establish that she had adopted her grandchildren. Section 8110 does not include a grandchild as a dependent for purposes of augmented compensation.¹¹ For this reason, appellant did not have any eligible dependents during the period of the overpayment.¹² Because she did not have any eligible dependents while in receipt of augmented compensation, she received compensation to which she was not entitled and constitutes an overpayment.

The Office paid compensation of \$19,904.99 from July 8, 2007 to September 13, 2008 at the augmented rate for dependents. Appellant should have received compensation at the statutory 2/3rds basic rate in the amount of \$17,971.62. The Board finds that the Office properly determined that she received an overpayment of \$1,933.37 from July 8, 2007 to September 13, 2008.

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. 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 the Act or would be against equity and good conscience.¹³

Office regulations, at 20 C.F.R. § 10.438, state that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.

¹⁰ *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).

¹¹ *Jacqueline S. Harris*, 56 ECAB 252 (2005). *See* 5 U.S.C. § 8110.

¹² As appellant’s son reached the age of 18 as of March 14, 2006 and did not pursue a course of full-time study after his 18th birthday and there is no evidence that he was disabled, he no longer qualified as an eligible dependent. *See Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹³ 5 U.S.C. § 8129.

This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

The Office found appellant to be without fault in creating the \$1,933.37 overpayment as she had listed her grandchildren as dependents. Appellant bears responsibility for providing the financial information necessary to support a request for waiver. The Office requested that she provide financial information and submit an overpayment recovery questionnaire within 30 days of the preliminary overpayment notification. Appellant did not submit the requested documentation within the 30-day time period. The Office applied its regulatory authority to determine that her failure to submit the requested information resulted in the denial of waiver. Under the implementing federal regulations, the Board finds that the Office properly denied waiver of the overpayment pursuant to 20 C.F.R. § 10.438(b).

On appeal, appellant contended that the overpayment should be waived as it constituted a financial hardship and submitted additional evidence. As noted, she failed to provide the requested information to the Office pursuant to its regulations. The Board does not have jurisdiction to consider evidence for the first time on appeal.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,933.37 and that she was not entitled to waiver.

¹⁴ 20 C.F.R. § 10.438. *See Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁵ *Id.* at § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 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