

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

M.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
City of Industry, CA, Employer**

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**Docket No. 09-1511
Issued: March 24, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2009 appellant filed a timely appeal from an April 16, 2009 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and that he was at fault for part of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,858.31 for the period July 22, 2006 through July 3, 2007 because the Office paid him compensation at an augmented rate even though he had no dependents; and (2) whether the Office properly determined that he was at fault in the creation of the overpayment from August 6, 2006 through July 3, 2007.

FACTUAL HISTORY

This case is before the Board for the second time. The relevant facts will again be set forth. On September 20, 2004 appellant, then a 58-year-old clerk, filed an occupational disease claim alleging that he sustained problems with his upper extremities and knees causally related to

factors of his federal employment. The Office accepted the claim, assigned file number xxxxxx176, for bilateral carpal tunnel syndrome, left medial epicondylitis and right trigger finger.

By decision dated August 30, 2006, the Office granted appellant a schedule award for a five percent permanent impairment of the right upper extremity and an additional four percent permanent impairment of the left upper extremity.¹ The schedule award provided that the Office would pay him compensation from May 14 to November 26, 2006 at a pay rate that included augmented compensation applicable to claimants with dependents. The Office advised appellant as follows:

“CHANGE IN STATUS OF DEPENDENTS -- If your award is paid as the augmented rate of $\frac{3}{4}$ because you have one or more dependents, you are required to provide written notification immediately of any change in status of your dependents, to the address on the first page of this letter. The notice must be signed by you and include your file number, the name of the dependents whose status changed, the effective date of the change, and the nature of the change in status. If you originally claimed only one dependent, and there is a change in status of your sole dependent, do not cash any checks you received after the change in status of that dependent. Return the checks promptly for adjustment by this Office.”

In a decision dated March 22, 2007, the Office denied appellant’s request for further review of the merits of this claim under 5 U.S.C. § 8128. Appellant appealed to the Board. On November 13, 2007 the Board set aside the August 30, 2006 decision granting him a schedule award and the March 22, 2007 nonmerit decision denying his request for reconsideration under 5 U.S.C. § 8128.² The Board remanded the case for the Office to recalculate the extent of appellant’s bilateral upper extremity impairment.

By decision dated December 19, 2007, the Office awarded appellant an additional five percent left upper extremity impairment.³ It further determined that he had an additional 5 percent permanent impairment of the right upper extremity, for a total right upper extremity impairment of 10 percent. The Office found that appellant was entitled to 31.2 weeks of compensation at an augmented pay rate from November 27, 2006 to July 3, 2007. It again advised him to immediately notify it in writing of any change in the status of dependents.

In an EN1032 form dated January 28, 2008, appellant related that he was married but that his wife had died on July 21, 2006.

¹ Appellant previously received a schedule award for a 22 percent permanent impairment of the left upper extremity under file number xxxxxx807.

² Docket No. 07-1248 (issued August 30, 2006).

³ The Office noted that his total left upper extremity impairment was 31 percent minus 22 percent previously awarded under another file number and the 4 percent previously awarded under the current file number.

By letter dated March 3, 2009, the Office notified appellant of its preliminary determination that he received an overpayment of \$3,858.31 for the period July 22, 2006 through July 3, 2007 because it paid him compensation at the augmented rate when he had no dependents. It calculated the overpayment by subtracting the amount that he should have received for the schedule award paid from July 22 to November 26, 2006, \$11,282.29, from the amount he actually received, \$12,694.86, to find an overpayment of \$1,412.57. For the period November 27, 2006 to July 3, 2007, the Office subtracted the amount appellant should have received, \$19,512.53, from the amount it paid him, \$21,958.27, to find an overpayment of \$2,445.74. It added \$1,412.57 and \$2,445.74 to find a total overpayment of \$3,858.31. The Office further advised appellant of its preliminary finding that he was without fault in creating the overpayment from July 22 to August 6, 2006 in the amount of \$165.64 but at fault for the overpayment for the period August 6, 2006 through July 3, 2007 because he should have known he was not entitled to augmented compensation during this period.

On March 19, 2009 appellant submitted a completed overpayment questionnaire. He claimed his 28-year-old daughter and two granddaughters as dependents. Appellant asserted that he supported his 28-year-old daughter and two grandchildren until February 2009. He provided his monthly income and monthly expenses. Appellant further noted that he told the employing establishment about the death of his spouse around July 22, 2006. He related that he received his first schedule award check on July 8, 2006, when his wife was alive. Appellant argued that repaying the debt would cause a financial hardship. He also asserted that he continued to provide assistance to his granddaughters as his daughter was incarcerated beginning January 27, 2009. Appellant submitted a 2007 tax return showing that he claimed his daughter and two grandchildren as dependents. He also submitted financial information supporting his request for waiver.

By decision dated April 16, 2009, the Office finalized its finding that appellant received an overpayment of compensation for the period July 22, 2006 to July 3, 2007. It noted that there was no evidence that appellant legally adopted his granddaughters. The Office further finalized its determination that he was without fault for the overpayment covering July 22 through August 5, 2006 in the amount of \$165.54 and at fault for the overpayment for the period August 6, 2006 through July 3, 2007 in the amount of \$3,692.77. It waived the overpayment of \$165.54 for which appellant was without fault. The Office indicated that it would request payment of the entire amount of the overpayment, \$3,692.77, within 30 days.

On appeal appellant argues that he timely notified the employing establishment of his wife's death and that the employing establishment informed him that it would advise the proper parties. He contends that he was not told that he needed to contact the Office directly and that he is not responsible for the lack of action by the employing establishment. Appellant additionally maintains that repayment would cause financial hardship.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained

⁴ 5 U.S.C. §§ 8101-8193.

while in the performance of duty.⁵ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁶ 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.⁷

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 or her support.⁸ 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.⁹ The term dependent also includes a student, which is defined as a child 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.¹⁰

If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation from July 22, 2006 through July 3, 2007. Appellant's wife died on July 21, 2006 but the Office continued to pay him compensation for a schedule award at an augmented rate until July 3, 2007. Accordingly, appellant received an overpayment of compensation.

On his overpayment recovery questionnaire, appellant claimed both his 28-year-old daughter and two grandchildren as dependents. A child is considered a dependent if he or she is under 18 years of age or over 18 but unmarried and incapable of self-support because of a physical or mental disability.¹² It also includes an unmarried full-time student under 23 years of age who has not completed four years of education beyond high school. Appellant's 28-year-old daughter is over the age of 23 and there is no evidence that she is unmarried and incapable of self-support because of a physical or mental disability. Thus his daughter does not qualify for dependent status.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8105(a).

⁷ *Id.* at § 8110(b).

⁸ *Id.* at § 8110(3).

⁹ *Id.* at § 8101(9).

¹⁰ *Id.* at § 8101(a).

¹¹ *Diana L. Booth*, 52 ECAB 370 (2001).

¹² 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405; *see also Leon J. Mormann*, 51 ECAB 680 (2000).

The Act includes stepchildren, adopted children and posthumous children but does not include grandchildren in the definition of dependents for purposes of augmented compensation.¹³ The Board has held that a grandchild is not among the categories of persons included in the term child for purposes of the Act. In *Barbara J. Hill*,¹⁴ the Board found that, while the claimant had legal custody of her grandchild, she was not entitled to augmented compensation based on her guardianship of the child. There is no evidence appellant adopted any of his two grandchildren; therefore, he was not entitled to augmented compensation.¹⁵

The Office paid appellant schedule award compensation of \$12,694.86 from July 22 to November 26, 2006 and \$21,958.27 from November 27, 2006 to July 3, 2007. Appellant should have received \$11,292.29 from July 22 to November 26, 2006 and \$19,512.53 from November 27, 2006 to July 3, 2007. He consequently received an overpayment of \$3,858.31, the difference between the compensation he was entitled to receive at the two-thirds rate and the compensation he received at the three-quarters rate.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹⁶ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulations¹⁷ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. In order for it to

¹³ 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).

¹⁴ 50 ECAB 358 (1999).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ 20 C.F.R. § 10.433.

establish that he was at fault in creating the overpayment of compensation, the Office must show that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹⁸ With respect to whether an individual is with fault, section 10.433(b) of the Office's regulations provide that whether or not the Office determines that an individual was with fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁹

The Board finds that appellant was at fault in creating the overpayment from August 6, 2006 through July 3, 2007. In its August 30, 2006 and December 19, 2007 schedule award decisions, the Office advised him to notify it immediately of any change in the status of claimed dependents. Appellant thus knew or should have known that the compensation he received after his wife's death was incorrect. He was responsible for taking all reasonable measure to ensure that payments received from the Office were proper.²⁰ Although appellant related that he informed the employing establishment of his wife's death, he did not notify the Office and continued to accept compensation payments at the augmented rate that he knew or should have known were incorrect. As he is not without fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover the overpayment.²¹

On appeal appellant contends that he notified the employing establishment of his wife's death. He maintains that he was not informed to separately notify the Office. As noted above, however, in its August 30, 2006 and December 19, 2007 decisions the Office specifically advised appellant that he must immediately inform it of change in dependent status.

Appellant further argues that repayment of the overpayment would cause financial hardship. As he is not without fault, however, the Office may not waive the overpayment.²²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,858.31 for the period July 22, 2006 through July 3, 2007 because the Office paid him compensation at an augmented rate even though he had no dependents. The Board further finds

¹⁸ *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁹ 20 C.F.R. § 10.433(b); *F.A.*, 60 ECAB ____ (Docket No. 08-1519, issued December 18, 2008); *see also Otha J. Brown*, 56 ECAB 228 (2004) (each recipient of compensation benefits is responsible for taking all reasonable measure to ensure that payments he or she receives from the Office are proper).

²⁰ *Id.*

²¹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007).

²² *Id.*

that the Office properly determined that he was at fault in the creation of the overpayment from August 6, 2006 through July 3, 2007.²³

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 16, 2009 is affirmed.

Issued: March 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²³ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board has no jurisdiction to review recovery of the overpayment. *Miguel A. Muniz*, 54 ECAB 217 (2002).