

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

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**PERCY L. STOVALL, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
New Orleans, LA, Employer**

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**Docket No. 05-459  
Issued: September 8, 2005**

*Appearances:*  
*Percy L. Stovall, 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  
DAVID S. GERSON, Judge

**JURISDICTION**

On November 15, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 20, 2004, finding that an overpayment of compensation was created for which he was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issues in this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that an overpayment of \$9,852.87 was created; (2) whether the Office properly found that appellant was at fault in creating the overpayment and, therefore, not entitled to waiver; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$183.00 every 28 days from appellant's continuing compensation. On appeal, appellant contends that he requested a telephone conference and submitted the overpayment recovery questionnaire.

## **FACTUAL HISTORY**

On March 15, 1993 appellant, then a 58-year-old mail processor, filed a claim for a traumatic injury arising from a slip and fall down a stairwell during a fire drill. The Office accepted his claim for a left shoulder strain and a right knee strain. Appellant stopped work on March 16, 1993 and did not return.<sup>1</sup> The Office subsequently accepted the conditions of aggravation of a preexisting right knee and left shoulder arthritic degenerative disease.

In letters dated June 29 and November 18, 1993, the Office informed appellant that he would receive regular payments of disability compensation on the periodic rolls at the rate equal to 66 2/3 percent of his monthly pay. In a letter dated March 11, 1994, the Office informed appellant of his obligations to inform the Office of various changes, including a change in the status of any dependants claimed to establish entitlement to additional compensation and periodically requested that he submit a Form EN1032, which covered the 15 proceeding months, to confirm that he had not returned to work and that appellant continued to have no dependents for augmented compensation purposes. Appellant continually reported his dependency status as married but living separately. In a form letter EN1032 which he signed on October 18, 2001 appellant claimed a dependency status for Shawnmica Holden, born August 27, 1992, whom he listed as a stepchild. On October 25, 2001 the Office changed his benefits to reflect entitlement to compensation at the augmented rate of three fourths of his weekly pay effective October 7, 2001.

In a form letter EN1032, signed August 20, 2002, appellant noted Shawnmica as his granddaughter. In a form letter EN1032 signed August 10, 2004, he listed as dependents his daughter, Leona Holden, date of birth May 27, 1969 and his grandchildren, Shawn Holden, date of birth November 22, 1997 and Shawnmica Holden, date of birth, August 27, 1992. In a handwritten note attached to the EN1032 form, which the Office received August 26, 2004, appellant's daughter advised that he lived with her at 1923 Washington Avenue and supported her and her family.

In a letter dated September 9, 2004, the Office informed appellant that he had no eligible dependent to qualify for the augmented three fourths compensation rate. The Office noted that his daughter could not be considered a dependent as she was over the age of 23 and not a full-time college student. The Office also noted that, although appellant was legally married, his wife could not be considered a dependent as she no longer resided with him. The Office stated that grandchildren were not considered dependents unless there was evidence of legal adoption, they were under the age of 18 (or 23 and full-time college students) and he was their sole means of support. The Office stated that appellant's compensation status was changed to reflect the correct two thirds compensation rate effective September 5, 2004 and noted how the compensation rate was calculated.

On September 10, 2004 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$9,852.87 for the period October 7, 2001 to September 4, 2004, as appellant received compensation at the augmented rate for periods of time

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<sup>1</sup> Appellant returned for a brief period at the end of March to the beginning of April, 1993.

in which he did not have a qualified dependent. The Office further found that he was at fault in the creation of the overpayment as his pay increased \$251.00 each 28-day pay period and he never inquired as to why his compensation check increased when his dependency status had not changed. The Office informed him that he should complete the enclosed overpayment recovery questionnaire and submit financial documents in support of a request for waiver within 30 days. Additionally, the Office informed appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On October 15, 2004 the Office received appellant's request for a telephone conference with the Office on the issues of fault and possible waiver of overpayment.<sup>2</sup> No other evidence, such as a completed overpayment recovery questionnaire or supporting financial documents, was received.

By decision dated October 20, 2004, the Office finalized its determination that appellant received a \$9,852.87 overpayment as he received compensation at the augmented three fourths dependency rate when he had and reported, no eligible dependents. The Office determined that appellant was at fault as he had been reporting no eligible dependents since at least 1998 and, when he began receiving the augmented three fourths dependency rate on October 7, 2001, he never inquired as to why his compensation had increased \$251.00 each 28-day cycle with no change in his status. The Office indicated that it would withhold \$183.00 from his continuing compensation each 28-day cycle as repayment of the overpayment.

On appeal, appellant argues that he responded to the Office and submitted financial evidence. The Board notes that the financial evidence was received by the Office on November 4, 2004. The Board's jurisdiction, however, is limited to a review of that evidence which was before the Office at the time of its final decision. As this evidence was received after the Office issued the October 20, 2004 decision, it cannot be considered by the Board.<sup>3</sup> The Board further notes that appellant had requested a telephone conference before the Office, but that such request was untimely filed. His request was received by the Office on October 15, 2004 which was past the 30 days allotted from the date of the Office's preliminary determination of September 10, 2004.<sup>4</sup>

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

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting

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<sup>2</sup> Appellant signed such request November 6, 2004. The date of November 6, 2004 is subsequent to the Office's date of receipt of October 15, 2004.

<sup>3</sup> 20 C.F.R. § 501.2(c).

<sup>4</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(b)(1) (May 2004) (if a claimant is being paid compensation on the periodic rolls or an annuity from Office of Personnel Management (OPM) or is due accrued benefits from either the Office or OPM and does not respond to the preliminary overpayment finding, a final decision should be issued without conducting a conference and the debt should be recovered from such benefits as quickly as possible).

from personal injury sustained while in the performance of his duty.<sup>5</sup> If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, the basic compensation rate for total disability.<sup>6</sup> Under section 8110 of the Act, entitled Augmented Compensation for Dependents, an employee is entitled to compensation at the augmented rate of three fourths of his or her weekly pay if he or she has one or more dependents.<sup>7</sup> In pertinent part, section 8110 provides that the term “dependent” includes an unmarried child “while living with the employee or receiving regular contributions from the employee towards his support.”<sup>8</sup> 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.”<sup>9</sup>

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 fourths rate constitutes an overpayment of compensation.<sup>10</sup>

### ANALYSIS -- ISSUE 1

Appellant’s March 15, 1993 employment injuries left him incapable of earning the wages he received at the time of injury and, thus, the Office paid him compensation for temporary total disability.<sup>11</sup> He received compensation based on the two thirds compensation rate as appellant’s wife did not qualify as a dependent. The record does not establish that appellant either lived with him or that she was receiving regular contributions from appellant for her support or that the court had ordered him to pay her support. During the period October 7, 2001 through September 4, 2004, however, appellant received augmented compensation based on the three fourths compensation rate. During this period, in an affidavit of earnings and employment (Form EN1032) dated October 18, 2001, August 20, 2002 and August 10, 2004, appellant listed the

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8105(a). *See also Duane C. Rawlings*, 55 ECAB \_\_\_\_ (Docket No. 02-2172, issued March 8, 2004).

<sup>7</sup> 5 U.S.C. § 8110.

<sup>8</sup> 5 U.S.C. § 8110(3).

<sup>9</sup> 5 U.S.C. § 8101(9). Under 5 U.S.C. § 8110(a)(1) a wife is a dependent if she is a member of the same household as the employee, she is receiving regular contributions from the employee for his support; or the employee has been ordered by a court to contribute to his support.

<sup>10</sup> *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

<sup>11</sup> *See* 20 C.F.R. § 10.5(f) (“disability” defined).

following individuals as dependents living in his household: his daughter, Leona Holden, date of birth May 27, 1969 and his grandchildren, Shawn Holden, date of birth November 22, 1997 and Shawnmica Holden, date of birth August 27, 1992.<sup>12</sup>

A child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.<sup>13</sup> Appellant's daughter, Leona Holden was born May 27, 1969. During the period October 7, 2001 to September 4, 2004, his daughter was over the age of 18 and was not under the age of 23 and pursuing a full-time course of study. Moreover, there is no evidence that she was unmarried and incapable of self-support because of a physical or mental disability. Thus, appellant's daughter did not qualify for dependency status.

The Board has previously held that a "grandchild" is not among the categories of persons included in the term "child" for purposes of the Act. In the case of *Barbara J. Hill*,<sup>14</sup> the Board noted that the definition of the term "child" in section 8101(9) of the Act provides for three specific relationships in addition to the biological relation between a parent and his or her natural child. The Board stated that there are other close relationships between an adult and a child, such as that between a legal guardian and a ward, which are not included.<sup>15</sup> Section 8101(9) provides that, only a member of the class of children specifically defined as a "child" of the injured employee will entitle the latter to augmented compensation for dependents. Further, the Board noted that the term "grandchild" is separately defined under section 8101(10) of the Act<sup>16</sup> and appears only in section 8133 of the Act,<sup>17</sup> which provides for those classes of persons as specifically defined who are eligible for death benefits.<sup>18</sup> While Congress allowed grandchildren as a class of persons eligible for death benefits under section 8133, Congress did not include a grandchild in the definition of dependents for purposes of augmented compensation under section 8110.<sup>19</sup> Also, as set forth above, the Act's definition of a "child" includes adopted children.<sup>20</sup> There is no evidence of record that appellant adopted any of his two grandchildren. Therefore, he is not entitled to augmented compensation based on the fact that his grandchildren lived with him and he helped to support them.

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<sup>12</sup> Appellant listed only Shawnmica Holden as a dependent in his October 18, 2001 and August 20, 2002 EN1032 forms.

<sup>13</sup> 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405. See *Leon J. Mormann*, 51 ECAB 680 (2000).

<sup>14</sup> *Barbara J. Hill*, 50 ECAB 358 (1999). See also *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988).

<sup>15</sup> *Id.*

<sup>16</sup> 5 U.S.C. § 8110(10).

<sup>17</sup> 5 U.S.C. § 8133.

<sup>18</sup> *Barbara J. Hill*, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> 5 U.S.C. § 8101(9).

Thus, there is no evidence of record that appellant had any dependents under the Act for the period October 7, 2001 through September 4, 2004 when he was paid the augmented compensation rate. The \$9,852.87 difference between the basis or two thirds compensation rate appellant should have received (\$69,118.33) and the augmented or three fourths compensation rate he did receive (\$78,971.20) for the period in question, constitutes an overpayment of compensation. The Board finds that the Office's calculations of the amount of the overpayment appear to be correct. The Board further notes that appellant did not contest the amount of the overpayment. Therefore, the Board finds that the Office correctly determined the fact and amount of overpaid compensation in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

Pursuant to 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.<sup>21</sup>

Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>22</sup> The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.<sup>23</sup> The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (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 (this provision applies only to the overpaid individual).<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, the Office found that appellant was at fault in that he accepted payments he should have known were incorrect for the period October 7, 2001 through September 4, 2004 when he was paid the augmented compensation rate. The Office stated that in October 2001, his net compensation pay increased from \$1,822.28 to \$2,073.28 each periodic

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<sup>21</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>22</sup> 20 C.F.R. § 10.433(a).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

roll cycle and that there was no indication in the file that appellant inquired as to why his check had increased to \$251.00 when his dependency status had not changed.

The Board finds that appellant accepted extra payments of \$251.00 which he knew or should have known were incorrect for the period October 7, 2001 through September 4, 2004 as he knew that Shawnmica Holden was not his stepchild, even though he reported her as such in the October 18, 2001 EN1032, which he signed on October 18, 2001 specifically advised that he may claim compensation for an unmarried child, including an adopted child or stepchild, who lives with him and was under 18 years of age. The evidence of record reflects and appellant later listed in his August 20, 2002 and August 10, 2004 EN1032 forms that Shawnmica Holden was in fact, his granddaughter. Thus, appellant knew or should have known that he was not entitled to the \$251.00 increase in his compensation payments as his dependency status had not changed.<sup>25</sup> Accordingly, the Board finds that appellant was at fault in the creation of the overpayment as he knew or should have known that his granddaughter was not his dependent under the Act.

### **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 any hardship.<sup>26</sup>

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

With respect to the Office's decision to deduct \$183.00 every 28 days from appellant's continuing compensation, the Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must take 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>27</sup> Appellant did not respond to the Office's request for relevant financial information within the time allotted.<sup>28</sup> Office regulations provide that the overpaid individual is responsible for providing information about income and expenses that will be used in determining a repayment schedule.<sup>29</sup> The Board finds that the Office properly exercised its discretion when it imposed a

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<sup>25</sup> See also *Luis D. Alamo*, 35 ECAB 1045 (1984) (an increase in the amount of the compensation payments can place the claimant on notice that the payments are incorrect).

<sup>26</sup> 20 C.F.R. § 10.441.

<sup>27</sup> 20 C.F.R. § 10.441(a).

<sup>28</sup> As previously noted, appellant's financial information was received after the Office issued its October 20, 2004 decision. Thus, the Board has no jurisdiction to review such evidence. 20 C.F.R. § 501.2(c).

<sup>29</sup> 20 C.F.R. § 10.438(a).

repayment from continuing compensation at the rate of \$183.00 every 28 days pursuant to its recovery procedures.<sup>30</sup>

**CONCLUSION**

The Board finds that the Office properly found that appellant was not entitled to receive augmented compensation for the period October 7, 2001 through September 4, 2004 as he had no dependents during that period. The Board further finds that the Office properly determined that he received an overpayment of compensation in the amount of \$9,852.87 as appellant received augmented compensation during the period October 7, 2001 to September 4, 2004, when he had no dependents. The Board further finds that the Office properly determined that he was at fault in creation of the overpayment and that, therefore, it was not subject to waiver. The Board also finds that the Office did not abuse its discretion in requiring repayment by deducting \$183.00 every 28 days from appellant's continuing compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 20, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2005  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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<sup>30</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Chapter 6.300.8 (May 2004).