

were dependents under the Act as other governmental and administrative entities had recognized them as dependents.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated September 23, 2003,¹ the Board affirmed as modified a February 28, 2003 decision of the Office terminating appellant's wage-loss and medical compensation benefits on the grounds that any disability related to accepted lumbar, shoulder, elbow and knee injuries had ceased on or before that date. The Board modified the decision by changing the effective date of the termination from February 23 to 28, 2003 and returned the case to the Office for payment of any compensation due and owing for the period February 23 to 28, 2003.² The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference. The evidence relevant to the overpayment issue will be set forth *infra*.

The Office accepted that, on November 28, 2000, appellant, then a 66-year-old customer service representative, sustained low back, left shoulder and left elbow strains and bilateral knee contusions. After stopping work on November 29, 2000, she received wage-loss compensation at the three-fourths augmented rate on the daily and periodic rolls. The Office placed appellant's case on the periodic rolls effective February 25, 2001.

Appellant filed claims for compensation (Form CA-7) dated January 5 and 25, February 12, March 26 and 28; April 25, May 14, June 24, August 7 and October 5, 2001.³ The forms contained the following definitions of dependents: "Your wife or husband is a dependent if he or she is living with you. A child is a dependent if he or she either lives with you or receives support payments from you, and he or she: (1) is under 18; or (2) is between 18 and 23 and is a full-time student; or (3) is incapable of self-support due to physical or mental disability." In these forms, appellant listed the following individuals as dependents living in her household: Tonisia Davis, born October 6, 1984; Antoine Butler, born September 2, 1985; Brandon Butler, born June 22, 1993; and Wayne Davis, born April 10, 1997. Appellant did not specify the nature of her relationship with these individuals.

In a September 13, 2001 letter, the Office advised appellant that she would be paid compensation at the 75 percent rate or three-fourths rate for one or more dependents.

Appellant completed and signed an affidavit of earnings and employment (Form CA-1032) on September 11, 2002. This form advised appellant, in pertinent part, that she could claim augmented compensation if she had an eligible dependent, including "an unmarried child, including an adopted child or stepchild, who lives with you and is under 18 years of age...." On the form appellant listed Antoine Butler, born September 21, 1985, as a dependent. She noted Antoine's relationship to her as "GSON." (Emphasis in the original).

¹ Docket No. 03-1100 (issued September 23, 2003).

² On January 21, 2004 the Board issued an order denying appellant's November 18, 2003 petition for reconsideration, finding that she failed to establish any error or fact or law warranting further consideration.

³ Each Form CA-7 appellant submitted was the version revised in November 1998.

In a March 28, 2003 letter, the Office requested that appellant explain her relationship to the children listed on the Forms CA-7. In response, she submitted an April 1, 1985 grant of child custody for Tonisia Davis in which appellant was described as the mother-in-law of Tonisia's natural mother. Appellant also submitted a June 30, 1994 special power of attorney granting her the authority to "provide for the care, maintenance, well-being, education and health" of her daughter's children Antoinne, Brandon and Wayne Butler.

In a May 2, 2003 letter, the Office advised appellant that an overpayment of compensation had occurred as she was not "entitled to receive augmented compensation based upon [her] grandchildren." In a June 30, 2003 memorandum and accompanying payment log, the Office noted that appellant's date-of-injury pay rate was \$31,833.00 per year. From February 25, 2001 to February 22, 2003, she was paid a total of \$47,849.93 in compensation at the three-fourths rate but was entitled to have received only \$45,168.53 based on the two-thirds rate. This resulted in an overpayment of \$2,681.48.

By notice dated October 16, 2003, the Office advised appellant of its preliminary determination that an overpayment of \$2,681.48 was created for the period February 25, 2001 to February 22, 2003 because she "claimed and [wa]s paid compensation at an augmented rate" although she did not have any dependents under the Act's definition. The Office also made a preliminary finding that appellant was at fault in creation of the overpayment as she "should reasonably have known that [her] listed dependents were not [her] own children or spouse and therefore not eligible for compensation payment at the augmented rate." The Office afforded appellant the opportunity to request a prerecoupment hearing, a telephone conference on the issue of fault and possible waiver and to submit financial information.

In a November 7, 2003 letter, appellant asserted that she provided her four grandchildren with "food, clothing, education, medical and dental care, recreation, transportation and similar necessities." While appellant did not contest the accuracy of the Office's calculations or the amount of the overpayment, she asserted that recovery of the overpaid amount would cause severe financial hardship. She submitted pay stubs dated from April 17 to September 18, 2003 and correspondence regarding recovery of \$786.69 in past due health benefits but did not provide any other financial information.

By decision dated February 26, 2004, the Office finalized the overpayment of compensation, finding that appellant was overpaid \$2,681.48 for the period February 25, 2001 to February 22, 2003 as she received compensation at the augmented rate but did not have any eligible dependents. The Office found appellant at fault in creation of the overpayment as she "reasonably knew the children listed were not [hers] and [she] had not legally adopted them." The Office directed recovery of the overpayment by submission of a lump-sum check in the amount of \$2,681.48.

LEGAL PRECEDENT -- ISSUE 1

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

from personal injury sustained while in the performance of duty.⁴ 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 or her monthly pay, which is known as basic compensation for total disability.⁵ Under section 8110 of the Act, entitled Augmented Compensation for Dependents, an employee is entitled to compensation at the augmented rate of 75 percent of his or her weekly pay if he or she has one or more dependents within the scope of the Act.⁶ 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.”⁷ 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.”⁸

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.⁹

ANALYSIS -- ISSUE 1

Appellant’s November 28, 2000 employment injuries left her incapable of earning the wage she received at the time of injury.¹⁰ She received compensation under the Act, including during the period from February 25, 2001 to February 22, 2003, on the basis that her disability was total. During this period, appellant filed 10 claims for augmented compensation (Form CA-7) dated from January 5 to October 5, 2001. In these forms, appellant listed the following individuals as dependents living in her household: Tonisia Davis, born October 6, 1984; Antoinne Butler, born September 2, 1985; Brandon Butler, born June 22, 1993; Wayne Davis, born April 10, 1997. In an affidavit of earnings and employment (Form CA-1032) signed on September 11, 2002, appellant listed Antoinne Butler as a dependent, identifying him as her “GSON.” (Emphasis in the original). Also, appellant submitted a June 30, 1994 special power of attorney granting her legal authority over her daughter’s children Antoinne, Brandon and Wayne Butler and an April 1, 1985 grant of child custody for Ms. Davis. Appellant was described as the mother-in-law of Ms. Davis’ natural mother. Thus, the record demonstrates that the four individuals appellant listed on the forms were her grandchildren.

⁴ 5 U.S.C. § 8102(a).

⁵ 5 U.S.C. § 8105(a). *See also Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁶ 5 U.S.C. § 8110.

⁷ 5 U.S.C. § 8110(3).

⁸ 5 U.S.C. § 8101(9).

⁹ *Ralph P. Beachum, Sr.*, 55 ECAB ____ (Docket No. 03-2142, issued April 1, 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).

¹⁰ *See* 20 C.F.R. § 10.5(f) (“disability” defined).

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*,¹¹ 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.¹² 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 Act¹³ and appears only in section 8133 of the Act¹⁴ which provides for those classes of persons as specifically defined who are eligible for death benefits.¹⁵ 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 8110.¹⁶ Also, as set forth above, the Act’s definition of a “child” includes adopted children.¹⁷ There is no evidence of record that appellant adopted any of her four grandchildren.

Therefore, the Office properly found that appellant was not eligible for augmented compensation based on her legal custody or guardianship of her grandchildren. There is no evidence of record that appellant had any dependents under the Act for the period February 25, 2001 to February 22, 2003. Thus, the \$2,681.48 difference between the basic or two-thirds compensation rate appellant should have received and the augmented or three-fourths compensation rate she did receive, constitutes an overpayment of compensation. The Board finds that the Office’s June 30, 2003 calculations of the amount of the overpayment appear to be correct. The Board 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

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.¹⁸ The only exception to this requirement is a

¹¹ *Barbara J. Hill*, 50 ECAB 358 (1999). See also *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988).

¹² *Barbara J. Hill*, *supra* note 11.

¹³ 5 U.S.C. § 8110(10).

¹⁴ 5 U.S.C. § 8133.

¹⁵ *Barbara J. Hill*, *supra* note 11.

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 8101(9).

¹⁸ 5 U.S.C. § 8129(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 this subchapter or would be against equity and good conscience.”¹⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²⁰

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations states, in pertinent 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) Accepted a payment which he or she knew or should have known to be incorrect.”²¹

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 individuals’ capacity to realize that he or she is being overpaid.²² In applying the tests to determine fault, the Office applies a “reasonable person” test.²³

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard under section 10.433, finding appellant at fault in creation of the overpayment as she knew or should have known she was not entitled to receive augmented compensation if she had no eligible dependents for the period February 25, 2001 to February 22, 2003.

The Board finds that appellant knew or should have known that the listed minors were not her natural or adopted children and could not qualify as dependents under the Act. On the Form CA-7 claims she filled out beginning on January 5, 2001, the instructions specify that a claimant’s “wife or husband is a dependent if he or she is living with” the claimant. The

¹⁹ 5 U.S.C. § 8129(b).

²⁰ *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002) (the Board held that no waiver of compensation is possible if the claimant is at fault in the creation of the overpayment of compensation).

²¹ 20 C.F.R. § 10.433(a) (2003).

²² *Rosemary A. Kayes*, 54 ECAB ____ (Docket No. 02-1397, issued January 23, 2003).

²³ *William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003).

paragraph continues: “[A] child is a dependent if he, or she lives with you ... and he or she ... is under 18....” Appellant’s detailed correspondence to the Office and the careful manner in which she completed her compensation forms evince her high level of understanding, sufficient for her to have realized that the term “child” meant the claimant’s child, just as “wife” or “husband” referred to the claimant’s spouse. Thus, the Board finds that the instructions on the Form CA-7 provided appellant sufficient notice of the requirements for a dependent child as of January 5, 2001, the date she first filed a Form CA-7 claim.

Also, the criteria for dependents are set forth in the Form CA-1032 that she signed on September 11, 2002. In pertinent part, this form advised appellant that she could claim augmented compensation if she had “an unmarried child, including an adopted child or stepchild, who live[d] with [her] and [was] under 18 years of age....” The Board finds that this definition is clear and unambiguous and does not mention grandchildren. Thus, the Form CA-1032 provided appellant sufficient notice that her grandchildren did not qualify as dependents as they were not her children and she had not legally adopted them.²⁴

On appeal, appellant asserts that she believed she was entitled to augmented compensation under the Act as other governmental or administrative agencies recognized her four grandchildren as her “children.” However, the findings of other administrative agencies are not dispositive regarding entitlement to benefits under the Act.²⁵ The Board finds that appellant was at fault in the creation of the overpayment as she knew or should have known that her grandchildren were not her dependents under the Act. As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board has no jurisdiction to review the recovery of the overpayment.²⁶

CONCLUSION

The Board finds that the Office properly found that appellant was not entitled to receive augmented compensation for the period February 25, 2001 to February 22, 2003 as she had no dependents during that period. The Board further finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,681.48 as she received augmented compensation during the period February 25, 2001 to February 22, 2003, when she had no dependents. The Board further finds that the Office properly determined that appellant was at fault in creation of the overpayment and that therefore it was not subject to waiver.

²⁴ The Board has held that the Form CA-1032 is sufficient notice as to who is a qualifying dependent under the Act for the purpose of receiving augmented compensation. *See Elsie G. Dibartolomeo* (Docket No. 02-15, issued September 13, 2002); *Ruth B. Watkins*, (Docket No. 98-1048; issued August 2, 2000); *Pamela P. Humphrey* (Docket No. 96-1720, issued December 11, 1998); *James Hopkins* (Docket No. 93-2254, issued September 7, 1995).

²⁵ *See Daniel Deparini*, 44 ECAB 657 (1993).

²⁶ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2004 is affirmed.

Issued: November 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member