

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

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M.G., Appellant )

and )

**DEPARTMENT OF THE ARMY, ARMY )  
MATERIAL DEVELOPMENT & READINESS )  
COMMAND, Redstone, AL, )**

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**Docket No. 07-2317**

**Issued: April 11, 2008**

*Appearances:*

*David C. Gable, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 31, 2007 finding a \$12,070.51 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues on appeal are: (1) whether the Office properly determined that appellant received a \$12,070.51 overpayment of compensation from October 13, 2002 to February 17, 2007; (2) whether the Office properly determined that she was at fault in the creation of the overpayment; and (3) whether the Office properly directed recovery of the overpayment by withholding \$300.00 from her continuing compensation payments.

## **FACTUAL HISTORY**

On August 29, 1977 appellant, then a 53-year-old clerk stenographer, sustained injury when she tripped and fell while in the performance of duty. The Office accepted a lumbosacral sprain and displacement of the lumbar intervertebral disc without myelopathy. Appellant stopped work on August 29, 1977 and did not return. She was placed on the periodic rolls on October 24, 1978 and received compensation for total disability. Appellant's compensation was at the three-fourths augmented pay rate for compensation purposes, as she had a dependent spouse.

On November 1, 1978 the Office notified appellant of the conditions under which she would receive compensation every four weeks. The Office noted that in order to avoid an overpayment of compensation, she was to contact the Office with any change in address or any change in the status of her dependents.

In CA-1032 forms dated February 26, 1979 to August 3, 2002, appellant advised that she was married and noted her husband as a dependent. The CA-1032 forms advised that a claimant who has no eligible dependents is paid at the statutory two-thirds basic pay rate and a claimant who has one or more eligible dependents is paid compensation at the three-fourths augmented pay rate. The form also noted the circumstances under which a claimant could claim compensation for a dependent.

In correspondence dated July 30, 2003 and August 3, 2004, the Office requested that appellant complete the attached CA-1032 forms which covered the 15 months prior to the date she signed the form. Part C of the form requested information on eligible dependents and noted the different compensation rates based on eligible dependents. The Office advised appellant to completely answer all questions and return the statement within 30 days of the date of the letter. She did not respond.

In an EN1032 dated September 25, 2005, appellant advised that she was not married and had no dependents. Her son, acting as her representative, noted on the EN1032 that he held power of attorney on behalf of appellant. He noted on the EN1032 that appellant was 78 years old and had back pain, anxiety, depression, and dementia and underwent hip replacement surgery in January 2005. Appellant's representative noted that appellant had not worked in 25 years and her family had cared for her for the prior 10 years. He requested an explanation as to why the EN1032 form had to be filled out yearly. In an EN1032 dated February 22, 2006, the representative noted that appellant was not married but widowed.

By letter dated February 20, 2007, the Office advised appellant that her compensation was reduced to the two-thirds statutory pay rate as she did not have an eligible dependent. By letter dated February 20, 2007, the Office requested that she submit a completed CA-1032 for the period August 1, 2002 to July 31, 2003 within 30 days. The Office began paying appellant compensation at the basic rate beginning February 18, 2007.

In undated correspondence, appellant's representative indicated that he was never informed that appellant's compensation was based on the number of eligible dependents listed on

the CA-1032 form. Appellant's representative submitted a certified copy of a general power of attorney dated May 10, 1999, in which appellant appointed him attorney-in-fact and a signed authorization from appellant to represent her before the Office.

In an EN1032 dated March 26, 2007, signed by appellant and her representative, it was noted that appellant did not have any eligible dependents. Also submitted was a death certificate for Carl Gable, appellant's spouse, dated October 12, 2002.

On May 16, 2007 the Office noted that appellant had been erroneously paid at the three-fourths percent augmented pay rate from October 13, 2002 to February 17, 2007 instead of the statutory two-thirds pay rate. The Office found that there was an overpayment of compensation for the period commencing on October 13, 2002, after the death of appellant's husband, to February 17, 2007. The Office calculated that appellant's gross compensation payable at the three-fourths rate was \$103,662.22 and at the gross compensation pay rate of two-thirds was \$91,591.71, a \$12,070.51 overpayment.

On May 16, 2007 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$12,070.51. The Office noted that the overpayment occurred because her husband died on October 12, 2002 and she was without dependents since October 13, 2002; however, she received augmented compensation at the three-fourths rate instead of the statutory two-thirds rate from October 13, 2002 to February 17, 2007.<sup>1</sup> The Office found that appellant was at fault as she failed to provide information she knew or reasonably should have known to be material to the receipt of compensation benefits. The Office noted that appellant had the right to submit evidence or arguments which would affect the preliminary findings.

On June 10, 2007 appellant's representative submitted a Form OWCP-20 overpayment recovery questionnaire. Appellant's monthly expenses were \$2,500.00 and monthly income of \$3,290.00. Her representative further noted a checking account balance of \$1,500.00 and savings account balance of \$750.00. He asserted that appellant was not at fault in creating the overpayment as the Office never informed him that his father was considered a dependent. Appellant's representative noted that his father had a separate civil service retirement pension and never mentioned that he was a dependent on appellant's disability payments. He further noted that the cost of caring for appellant was increasing and, without her current disability payments, she would experience a financial hardship. Appellant's representative requested a telephone conference.

In a conference call dated June 26, 2007, appellant's representative asserted that he was unaware that his father was considered a dependent for purposes of appellant's compensation benefits. He sent a copy of his father's death certificate to the Office in December 2002 and had completed CA-1032 forms for the period August 3, 2002 to September 25, 2005 and was unsure why there was a three-year lapse in the Office records. Appellant's representative agreed that the

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<sup>1</sup> The preliminary overpayment cover letter dated May 16, 2007, noted an overpayment period of October 13, 2002 to January 17, 2007; however, this appears to be a typographical error. The overpayment calculation contained in the accompanying Office memorandum and supported by the attached supplemental roll payment worksheets provide that the correct overpayment period is October 13, 2002 to February 17, 2007.

overpayment occurred and that the amount was correct. He indicated that appellant would experience a financial hardship if she was required to repay the debt.

By decision dated July 31, 2007, the Office found that appellant received a \$12,070.51 overpayment of compensation from October 13, 2002 to February 17, 2007<sup>2</sup> for which she was at fault in creating. In an accompanying memorandum, the Office determined that appellant was at fault as she failed to provide information she knew or reasonably should have known to be material and continued to receive augmented compensation at the augmented three-fourths rate after her husband died on October 12, 2002 and she had no qualifying dependent. The Office noted that appellant's representative submitted a completed overpayment questionnaire form. The Office advised that the overpayment would be collected by withholding \$300.00 from continuing compensation payments every four weeks, beginning September 2, 2007.

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

The basic rate of compensation under the Federal Employees' Compensation Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation augmented at the rate of 75 percent of monthly pay.<sup>3</sup> A husband is considered the employee's dependent if he is a member of the same household; or if he is receiving regular contributions from the employee for his support; or if the employee has been ordered by a court to contribute to his support.<sup>4</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 2/3 compensation rate and the augmented compensation received at the 3/4 rate constitutes an overpayment of compensation.<sup>5</sup>

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

With respect to fact of overpayment, appellant's representative does not contest that an overpayment of compensation was created. He noted that his father died on October 12, 2002. The Office properly found that appellant did not have an eligible dependent after October 12, 2002, her husband's date of death. Appellant did not have any dependents as of October 13, 2002 and was not entitled to compensation at the augmented three-fourths rate from October 13, 2002 to February 17, 2007. Therefore, an overpayment of compensation was created.

The Board finds that, as of October 13, 2002, appellant no longer had a dependent. However, the Office erroneously continued to pay her at the augmented three-fourth rate from

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<sup>2</sup> The final overpayment cover letter dated July 31, 2007, noted an overpayment period of October 13, 2002 to January 17, 2007; however, this appears to be a typographical error. The overpayment calculation contained in the Office memorandum and supported by the attached supplemental roll payment worksheets provide that the correct overpayment period is October 13, 2002 to February 17, 2007.

<sup>3</sup> 5 U.S.C. §§ 8105(a), 8110(b).

<sup>4</sup> 5 U.S.C. § 8110(a)(2).

<sup>5</sup> *Ralph P. Beachum*, 55 ECAB 442 (2004).

October 13, 2002 to February 17, 2007. As a result, appellant received an overpayment in the amount of \$12,070.51.

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

Section 8129(b) of the Act provides as follows:

“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.”<sup>6</sup>

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>7</sup>

Section 10.433(a) of the Office’s implementing regulations provides:

On the issue of fault, 20 C.F.R. § 10.433(a) provides 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) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>8</sup>

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

“(b) 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>9</sup>

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

The Office applied the second standard in determining that appellant was at fault in creating the overpayment. Appellant knew or should have known that this information was material. When her husband died on October 12, 2002, she should have known that there was no

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<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>8</sup> *Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>9</sup> 5 U.S.C. § 10.433(b).

entitlement to compensation at the augmented rate of 75 percent when there were no eligible dependents after October 12, 2002. Appellant received payments commencing on October 13, 2002 with no reduction in compensation and she continued to receive compensation payments every 28 days showing no reduction.<sup>10</sup>

As noted, the record establishes that from 1979 to 2002 appellant regularly completed the Form EN1032, which states that a claimant must immediately inform the Office of any change in the status of claimed dependents, such as a spouse dying. The CA-1032 and EN1032 forms provided information to appellant regarding dependents and augmented compensation. She was advised as to the requirements for claiming a spouse as a dependent and that a claimant with no dependents is paid at 66 2/3 percent of the applicable pay rate, not 75 percent. The record reflects that, on August 3, 2002, appellant signed and returned a Form EN1032 which included the following acknowledgement: "I understand that I must immediately report to OWCP any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third[-]party settlement, and any change in income from federally-assisted disability or benefits programs." Additionally, the Board notes that a review of the record indicates that appellant failed to file CA-1032 forms that were requested on July 30, 2003 and August 3, 2004. In a CA-1032 form signed on September 25, 2005 by appellant and appellant's representative, it was noted that she did not have an eligible dependent. Appellant's representative noted his mother's age and health problems. He advised the Office that he and his family had cared for appellant for the previous 10 years and that he held power of attorney for his mother. Appellant's representative asked "Please help me understand why these forms must be filled out every year. Go after the abusers and leave this poor old woman alone." It is clear from appellant's representative's statement also signed by appellant that he and appellant were aware that the CA-1032 forms must be filled out yearly. Furthermore, neither the representative nor appellant, who continued to sign certain forms sent to the Office offered any explanation as to why the CA-1032 forms dated July 30, 2003 and August 3, 2004 were not returned to the Office as requested. Each of these forms advised appellant of the need to update information on dependents. The failure to properly file forms dated July 30, 2003 and August 3, 2004, is evidence supporting that appellant was not forthcoming with providing information that was material. Consequently, the evidence establishes that appellant failed to furnish information which she knew or should have known to be material and the Office has met its burden of proof in establishing that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery.

Appellant's representative contends that he was never informed by the Office or his family that his father was considered a dependent for purposes of appellant's compensation payments. However, the CA-1032 and EN1032 forms sent to appellant clearly advised her of the circumstances in which a dependent could be claimed for purposes of augmented compensation. Furthermore, as neither appellant nor the representative made the Office aware of the representative's power of attorney status until September 2005 and provided no representative

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<sup>10</sup> The record reveals that appellant's son held power of attorney for her since 1999; however, neither appellant nor her son advised the Office of his status until September 2005. The record contains no evidence that appellant was incapable of completing and understanding forms regarding her receipt of compensation. See *Frederick C. Smith*, 48 ECAB 132 (1996); *George A. Hirsch*, 47 ECAB 520 (1996).

authorization until 2007, the Office would have no reason to advise the representative of any rules regarding dependency until it received written notice of his appointment.<sup>11</sup>

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

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 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>12</sup>

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

The record supports that, in requiring repayment of the overpayment by deducting \$300.00 every 28 days from appellant’s continuing compensation payments, the Office took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.321, and found that this method of recovery would minimize any resulting hardship on appellant. The overpayment questionnaire indicates that appellant has monthly income of \$3,290.00 and total monthly expenses of \$2,500.00. The Office considered the amount of appellant’s assets and the extent her monthly income exceeded her monthly expenses. Therefore, the Office properly required repayment of the overpayment by deducting \$300.00 from appellant’s continuing compensation payments every 28 days.

### **CONCLUSION**

The Board has determined that the Office properly determined that appellant received a \$12,070.51 overpayment of compensation from October 13, 2002 to February 17, 2007 and that she was not “without fault” in the creation of the overpayment. The Office properly directed recovery of the overpayment by withholding \$300.00 from continuing compensation payments.

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<sup>11</sup> While a claimant may appoint one individual to represent her interests, the appointment must be in writing. Only a properly appointed representative may make a request or give directions to the Office regarding the claims process. See 20 C.F.R. § 10.700. See also *Shirley Rhynes*, 55 ECAB 703 (2004).

<sup>12</sup> 20 C.F.R. § 10.441(a). See *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993); *Roger Seay*, 39 ECAB 441 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 31, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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