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CHARLES L. WASHINGTON, Appellant	)	
	)	
and	)	Docket No. 03-1186
	)	Issued: March 4, 2004
DEPARTMENT OF THE NAVY, SEA	)	
SYSTEMS COMMAND, MARE ISLAND	)	
NAVAL SHIPYARD, Vallejo, CA, Employer	)	
	)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

On April 7, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 10, 2002. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case. The Board's jurisdiction is limited to review of the evidence that was before the Office at the time it issued its final decision. The Board may not consider new evidence on appeal.¹

The issues are: (1) whether an overpayment occurred in this case in the amount of \$7,923.38; (2) whether appellant is entitled to waiver of the overpayment; and (3) whether the Office properly directed recovery of the overpayment by reducing the amount of appellant's continuing compensation benefits.

¹ See 20 C.F.R. § 501.2(c); *Ricky S. Storms*, 52 ECAB 349 (2001).

FACTUAL HISTORY

On August 8, 1994 appellant, then a 48-year-old sandblaster, was injured in the performance of duty when he was climbing out of a tank and felt something pop in his back. He had a history of prior work-related back injuries on August 8, 1984 and April 18, 1990. The Office accepted his traumatic injury claim for lumbosacral strain. Appellant was initially off work from September 19 until November 1, 1984. He sustained a recurrence of disability on May 2, 1985 and has not returned to work since the employing establishment was unable to accommodate his work restrictions. Appellant has been receiving compensation on the periodic rolls since December 22, 1985.

On December 10, 2002 the Office issued a preliminary finding that an overpayment had been paid to appellant in the amount of \$7,923.38. The Office noted that the overpayment occurred because deductions were made incorrectly to his optional life insurance premiums from August 4, 1985 to April 22, 2000. Appellant was found to be without fault in the creation of the overpayment and appellant was advised that if he wished to receive a waiver of the overpayment he could take one of the following actions within 30 days: (1) request a telephone conference; (2) request a final decision based on the written evidence of record; or (3) request a recoupment hearing before the Branch of Hearings and Review. He was further advised to submit financial information and to complete a financial overpayment questionnaire if he sought waiver of the overpayment. Appellant did not request waiver of the debt nor did he provide any financial information for consideration by the Office on the issue of waiver. In a decision dated March 19, 2003, the Office determined that appellant was not entitled to waiver of the overpayment and ordered recovery of the debt by directing that the sum of \$125.00 be withheld from his continuing compensation benefits from April 19, 2003 through May 10, 2008.

LEGAL PRECEDENT -- ISSUE 1

An employee who is already enrolled in the basic life insurance program is entitled to continued coverage at no cost to the employee while he or she is receiving compensation.² An employee already enrolled in an optional life insurance program may retain such optional life insurance, while receiving compensation if he or she is eligible to continue regular insurance and has had optional life insurance for no less than the five years of service immediately preceding the disability or the full period or periods of service, during which optional life insurance was available, if less than five years. Premiums for optional life insurance are withheld from the employee's compensation payments. When an under withholding of life insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management (OPM) when the error is discovered. Such overpayment is subject to the waiver provision of the Federal Employees' Compensation Act as well as to other statutes and regulations relative to overpayments and collections of debt.³ For an employee to be found at fault in creating the overpayment, the

² Calvin W. Scott, 39 ECAB 1031 (1988).

³ See Ian Mansom Graham, 40 ECAB 1103 (1989); Calvin W. Scott, *supra* note 2.

evidence must establish that the employee knew or should have known that the Office was not deducting the premiums and that it should have been deducting the premiums from his compensation checks.⁴

ANALYSIS -- ISSUE 1

In the instant case, the record reveals that appellant was enrolled in an optional life insurance program prior to and while in receipt of compensation benefits. The Board finds that an overpayment occurred when the Office was given incorrect optional life insurance code information by OPM. When appellant was first placed on the periodic rolls, optional life insurance premiums were deducted beginning August 4, 1985, based on information on a Form CA-7 indicating that appellant had coverage for three multiples of his salary.⁵ However, on March 15, 1987 OPM advised that appellant's coverage was for only one multiple of his salary. The Office, therefore, began deducting less money from appellant's monthly compensation benefits. He was also issued a refund in the amount of \$388.02 for premiums over deducted based on the incorrect optional life insurance code. Subsequently, by letter dated June 19, 1999, OPM sent notification to the Office that it had incorrectly stated that appellant's optional life insurance coverage and that the correct coverage should be based on three multiples of appellant's salary as originally determined. In a memorandum dated December 3, 2002, the Office determined that for the period of August 4, 1985 to April 22, 2000, appellant was overpaid compensation when the Office deducted only \$4,039.99 to cover optional life insurance premiums when the Office should have deducted \$11,963.37 for those premiums. The Board finds that the Office properly determined that this underdeduction constituted an overpayment. By subtracting \$4,039.99 from \$11,963.37, the Office properly concluded that the amount of overpayment is \$7,923.38.

The Board also finds that appellant is without fault in the creation of the overpayment since he could not reasonably have been expected to be aware that the decrease in his optional life insurance premium and resultant increase in his monthly compensation was incorrect.

LEGAL PRECEDENT -- ISSUE 2

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of the Act and states as follows:

“Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual, which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”⁷

⁴ See *Ian Mansom Graham*, *supra* note 3.

⁵ The Board notes that there is no evidence that appellant did not elect this type of coverage.

⁶ *Carroll R. Davis*, 46 ECAB 361 (1994); see also *Robert Atchison*, 41 ECAB 83 (1989).

⁷ 5 U.S.C. § 8129(b).

Since the Office found that appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁸ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁰

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

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 the recovery of an overpayment would defeat the purpose of the Act or be against good conscience. This information will also be used to determine the repayment schedule, if necessary. Section 10.438 of the federal regulations provides that 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.¹²

ANALYSIS -- ISSUE 2

Based on section 10.438 the Board finds that the Office properly refused to waive recovery of the overpayment. In this case, appellant did not complete an overpayment questionnaire as requested by the Office, nor did he provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act. Appellant likewise has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous amount of compensation benefits

⁸ 20 C.F.R § 10.436 (1999).

⁹ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁰ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹¹ 20 C.F.R. § 10.437 (1999).

¹² 20 C.F.R. § 10.438 (1999); see *Linda Hilton*, 52 ECAB 476 (2001).

he received in this when the Office failed to withhold the correct amount for optional life insurance premiums. Because appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.¹³

LEGAL PRECEDENT -- ISSUE 3

The method by which the Office may recover overpayments is defined by regulation at section 10.441(a), which 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.”¹⁴

ANALYSIS -- ISSUE 3

The Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. Appellant, however, did not complete the overpayment questionnaire, nor did he provide any information to the Office as requested by the notice of preliminary finding of overpayment to indicate that his financial circumstances were such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship.

The Board has previously held that where a claimant failed to complete the overpayment recovery questionnaire, the Office’s decision to recover the overpayment by withholding 100 percent of appellant’s continuing compensation is proper.¹⁵ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations. When an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁶

¹³ Appellant argues on appeal that, since he was without fault in the creation of the overpayment, he should not be held accountable for repayment of the debt. The Board, however, notes that the fact that a claimant is without fault in creating an overpayment does not necessarily preclude the Office from revering all or part of the overpayment. See *Linda Hilton*, *supra* note 12. The inquiry is whether recovery is against equity and good conscience or would defeat the purposes of the Act. Appellant has failed to satisfy that criteria as previously discussed.

¹⁴ 20 C.F.R. § 10.441(a) (1999).

¹⁵ *Gail M. Roe*, 47 ECAB 268 (1995); see also *Nina D. Newborn*, 47 ECAB 132 (1995).

¹⁶ *Id.*

In this case, because appellant did not complete the overpayment recovery questionnaire as requested by the Office, the Board finds that the Office did not abuse its discretionary authority in determining that the overpayment of \$7,923.38 should be deducted from appellant's continuing compensation at the rate of \$125.00 per compensation period.

CONCLUSION

The Board finds that appellant is not entitled to waiver of the overpayment in the amount of \$7,923.38 and that the Office properly directed recovery of the debt by withholding \$125.00 each month from appellant's continuing compensation commencing April 19, 2003 until the debt is repaid on May 10, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 19, 2003 is affirmed.

Issued: March 4, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member