

FACTUAL HISTORY

This is the third appeal in this case.¹ By decision dated September 13, 2007, the Board affirmed a December 22, 2006 Office decision as to the fact of overpayment, but remanded the case for recalculation of the amount of the overpayment and consideration of waiver of recovery. By decision dated March 13, 1997, the Board affirmed a November 8, 1994 schedule award decision. The law and the facts of the previous Board decision are incorporated herein by reference.

On November 5, 2007 the Office issued a preliminary determination finding appellant to be without fault with regard to an overpayment of \$5,622.92 which occurred during the period June 21, 1998 to July 9, 2005. It failed to collect postretirement basic life insurance premiums from his continuing compensation benefits.

On November 10, 2007 appellant requested a telephone hearing with an Office hearing representative. At the March 10, 2008 hearing, appellant agreed to submit a financial disclosure form indicating his monthly income and expenses.

On April 11, 2008 the Office received a financial statement from appellant indicating that his monthly income was approximately \$4,061.10.² His monthly expenses totaled \$3,398.00 and included \$513.00 for a mortgage payment, \$400.00 for food, \$100.00 for clothing, \$450.00 for utilities, \$500.00 for miscellaneous household expenses, medical/dental care not covered by insurance, automobile and gas expenses or other transportation costs, personal necessities and cancer medicine, \$175.00 for car insurance, \$521.00 for a bank car payment, \$400.00 for two credit card accounts and \$300.00 for a cancer treatment center.³ Appellant had \$138.85 in cash, \$50.00 in a checking account and \$3.85 in a savings account.

By final decision dated May 22, 2008, the Office hearing representative determined that an overpayment of \$5,622.92 occurred because the Office failed to deduct postretirement life insurance premiums from June 21, 1998 through July 9, 2005. The hearing representative found that appellant was without fault in the creation of the overpayment because he had no notice or knowledge that the Office was not deducting life insurance premiums from his compensation

¹ Docket No. 07-793 (issued September 13, 2007); Docket No. 95-826 (issued March 13, 1997). On January 21, 1988 appellant, then a 31-year-old test equipment operator, sustained a traumatic injury when he sprained his back while moving a load of metal pallets. The Office accepted his claim for a low back strain and herniated nucleus pulposus at L5-S1.

² On May 1, 2008 the Office hearing representative telephoned appellant to clarify some matters regarding the financial evidence. Appellant advised that his monthly income had decreased and was currently \$3,761.10. He also reported that his monthly food bill had decreased from \$400.00 to \$350.00.

³ The Office hearing representative indicated that the amount paid to the cancer treatment center was \$200.00.

benefits. The hearing representative determined that appellant's claimed monthly income of approximately \$3,761.10 exceeded his claimed monthly expenses of \$3,384.00⁴ by more than \$50.00 (it exceeded by \$377.10). The hearing representative found that the circumstances in appellant's case did not warrant waiver of recovery of the overpayment. Because appellant's monthly income exceeded his expenses by more than the \$50.00 minimum, recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience.⁵ The hearing representative directed the Office to withhold \$200.00 each month from appellant's continuing compensation benefits until the overpayment was recovered.⁶

LEGAL PRECEDENT -- ISSUE 1

The Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁷ When an overpayment has been made to an individual because of error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the employee is entitled.⁸

Under the Federal Employees' Group Life Insurance Program (FEGLI), most federal employees' are eligible to participate in basic life insurance and one or more of the optional insurance plans.⁹ The coverage of basic life insurance is effective unless waived¹⁰ and the premiums for basic and optional life insurance coverage are withheld from the employees' pay.¹¹ At separation from federal employment, the FEGLI insurance will either terminate or continue under "compensational" status. If the compensational chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from the employees' compensation payments.¹² When an under withholding of life insurance

⁴ It is not clear how the hearing representative calculated \$3,384.00. Adding appellant's updated figures of \$513.00 for his mortgage payment, \$350.00 for food, \$500.00 for utilities, \$100.00 for clothing, \$500.00 for miscellaneous expenses, \$175.00 for car insurance, \$521.00 for a car payment, \$400.00 for credit card payments, and \$300.00 for a cancer treatment center total \$3,359.00. However, using the hearing representative's figure of \$3,384.00 in monthly expenses works in appellant's favor as it is a higher amount, leaving a smaller amount of income over expenses.

⁵ See *infra* notes 16 and 17.

⁶ Subsequent to the May 22, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁷ 5 U.S.C. §§ 8101-8193, 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8702(a).

¹⁰ *Id.* at § 8702(b).

¹¹ *Id.* at § 8707.

¹² 5 U.S.C. § 8706(b).

premiums occurs, the entire amount is deemed an overpayment of compensation because the Office must pay full premium to the Office of Personnel Management upon discovery of the error.¹³

ANALYSIS -- ISSUE 1

In a September 13, 2007 decision, the Board found that fact of overpayment was established in this case. However, the Office did not properly determine the amount of the overpayment because it improperly deducted an over collection of optional and basic life insurance premiums in the amount of \$2,618.56 from the \$5,622.92 overpayment caused by the failure of the Office to deduct postretirement basic life insurance premiums for the period June 21, 1998 to July 9, 2005, resulting in a finding that the amount of the overpayment was \$3,004.36. The Board noted that the Office's manner of calculation of the overpayment precluded the proper consideration of waiver of the overpayment.

In a May 22, 2008 decision, the Office properly calculated that the overpayment amount in this case is \$5,622.92 based on copies of payment printouts and worksheets which showed that no deductions were made from appellant's compensation benefits for postretirement insurance premiums for the period June 21, 1998 to July 9, 2005.

LEGAL PRECEDENT -- ISSUE 2

Under 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.¹⁴ Section 10.433 of the implementing regulations 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.¹⁵ Section 10.434 provides that, if the Office finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act] or

¹³ 5 U.S.C. § 8707(d); *Keith H. Mapes*, 56 ECAB 130, 133 (2004).

¹⁴ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁵ 20 C.F.R. § 10.433(a).

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹⁶

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary’s assets do not exceed a specified amount as determined by the Office. Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance in such payments gives up a valuable right or changes his or her position for the worse.¹⁷

The individual who received the overpayment is responsible for providing information concerning income, expenses and assets as specified by the Office.¹⁸ This information is needed to determine whether recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁹ This information will also be used to determine the repayment schedule, if necessary.²⁰

ANALYSIS -- ISSUE 2

The record establishes that appellant received an overpayment of \$5,622.92 which occurred because the Office failed to collect postretirement basic life insurance premiums from his continuing compensation benefits during the period June 21, 1998 to July 9, 2005. It determined that appellant was without fault in the creation of the overpayment because he had no notice or knowledge that the Office was not deducting life insurance premiums from his ongoing compensation benefits. Therefore, the issue is whether the Office properly denied waiver of recovery of the \$5,622.92 overpayment.

Although appellant was without fault in creating the \$5,622.92 overpayment that occurred from June 21, 1998 to July 9, 2005, he nonetheless bears responsibility for providing

¹⁶ *Id.* at § 10.434. 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 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. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any 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. *Id.* at § 10.437(b).

¹⁷ 20 C.F.R. § 10.437.

¹⁸ *Id.* at § 10.438(a).

¹⁹ *Id.*

²⁰ *Id.*

the financial information necessary to support his request for waiver.²¹ He submitted a completed overpayment recovery questionnaire and later corrected some of the information in a telephone call with the Office hearing representative. The hearing representative determined that appellant's claimed monthly income of approximately \$3,761.10 exceeded his claimed monthly expenses of \$3,384.00 by more than \$50.00 or \$377.10. The Board finds that the hearing representative properly found that the circumstances in appellant's case did not warrant waiver of recovery of the overpayment. Because appellant's monthly income exceeded his expenses by more than the \$50.00 minimum, the hearing representative properly found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.²²

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an employee who is entitled to further payments, the employee shall refund to the Office the amount of the overpayment as soon as the error is discovered or the employee's attention is called to the matter. 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 employee and any other relevant factors, so as to minimize any hardship.²³

ANALYSIS -- ISSUE 3

The Office noted that appellant's monthly income exceeded monthly expenses by \$377.10. It determined that he could repay the debt at the rate of \$200.00 a month without great hardship. The Board finds that the Office gave due regard to the relevant factors noted above and did not abuse its discretion in setting the rate of recovery. The Board will affirm the Office's May 22, 2008 decision on the issue of rate of recovery.²⁴

On appeal, appellant submitted additional financial information and stated that it would be a hardship for him to repay the overpayment because his monthly expenses had increased. However, the Board lacks jurisdiction to review evidence which was not before the Office at the time of its May 22, 2008 decision. The Board cannot consider this evidence for the first time on appeal.²⁵

CONCLUSION

The Board finds that that the Office determined that a \$5,622.92 overpayment occurred in appellant's case and properly denied waiver of recovery of the overpayment. The Board further

²¹ *Madelyn Y. Grant*, 57 ECAB 533, 537 (2006).

²² *See supra* notes 16 and 17.

²³ 20 C.F.R. § 10.441(a).

²⁴ The Board has jurisdiction to review the issue of recovery of an overpayment in those cases where the Office seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004).

²⁵ *See* 20 C.F.R. § 501.2(c).

finds that the Office did not abuse its discretion in directing the Office to recover the overpayment by withholding \$200.00 a month from appellant's continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 22, 2008 is affirmed.

Issued: February 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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