

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

SYLVESTER FEW, Appellant

and

**DEPARTMENT OF THE NAVY, New Orleans,
LA, Employer**

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**Docket No. 03-2162
Issued: February 5, 2004**

Appearances:
Sylvester Few, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 26, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' overpayment decision dated July 31, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$798.16 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly found that the overpayment should be repaid by deducting \$50.00 every four weeks from continuing compensation.

FACTUAL HISTORY

The Office accepted that appellant sustained a left rotator cuff tear in the performance of duty on October 27, 1993 and subsequently authorized a left shoulder arthroscopy. In a letter dated May 16, 2003, the Office notified appellant of a preliminary determination that an overpayment of compensation totaling \$798.16 had occurred. The Office found that, during the

period January 27 to November 30, 2002, health benefit premiums were deducted from Texas Health Choice as opposed to HMO Blue Texas, appellant's selected health plan. Based on appellant's selected health benefit plan as of January 27, 2002, however, \$798.16 in additional premiums should have been deducted. The Office advised appellant that it found him to be without fault in creating the overpayment. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support of any request for waiver.¹

On June 6, 2003 appellant requested a telephone conference with the Office on the issues of fault and possible waiver of overpayment. The telephone conference took place on July 30, 2003 during which he stated that he had signed up for and used HMO Blue Texas during the period in question. The Office advised appellant that he was responsible for paying the cost of the health insurance and that fault was not an issue. He contended that he could not afford for the Office to take too much out of his continuing compensation. The Office advised that \$50.00 per month would be deducted until the overpayment was paid in full.

In a memorandum to the Director dated July 30, 2003, the Office advised that a telephone conference was held on July 30, 2003 and appellant raised the issue of fault. Appellant was advised that fault was not at issue. Appellant stated that he understood and agreed to a deduction of \$50.00 a month from his continuing compensation payments, until the overpayment was paid in full.

By decision dated July 31, 2003, the Office finalized its determination that a \$798.16 overpayment had occurred. The Office found that appellant was not entitled to waiver of the overpayment and that the overpayment would be collected by deducting \$50.00 every 4 weeks from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits (FEHB) program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”²

In addition 5 C.F.R. § 890.502(d) provides:

¹ The Board notes that a copy of the overpayment recovery questionnaire (Form OWCP-20) is not of record.

² 5 C.F.R. § 890.502(b)(1).

“An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees’ Health Benefits Fund.”³

Thus, under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁴ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁵ The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.⁶

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 the individual is entitled.⁷

ANALYSIS -- ISSUE 1

On December 26, 2001 appellant switched from Texas Health Choice, enrollment code UK2, to HMO Blue Texas, enrollment code YX2. The switch in health care providers was effective January 27, 2002. The Office, however, failed to deduct the premiums for health insurance under HMO Blue Texas from January 27 through November 30, 2002, which resulted in an overpayment of \$798.16.

The record indicates that appellant was responsible for the health insurance premium issued under HMO Blue Texas effective January 27, 2002. From January 27 through November 30, 2002, appellant paid premiums in the amount of \$1,408.80, but should have paid premiums of \$2,207.04. The difference from the amount owed, \$2,207.04, from the amount paid, \$1,408.80, results in an overpayment of \$798.16 for the period January 27 through November 30, 2002. The record shows that the Office correctly determined that premiums for health insurance were incorrectly deducted from January 27 through November 30, 2002 at a lower rate than appellant elected, resulting in an overpayment of \$798.16. Appellant has not contested the amount of the overpayment. Therefore, an overpayment of compensation in the amount of \$798.16 was created during the period January 27 through November 30, 2002 when

³ *Id.* at § 890.502(d).

⁴ *Id.* at § 890.502(b)(1).

⁵ *Id.* at § 890.502(d).

⁶ *See Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

⁷ *See* 5 U.S.C. § 8129(a).

the Office failed to deduct the correct premiums for health insurance from appellant's compensation benefits.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides that 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 the Act or would be against equity and good conscience.⁹

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.¹⁰ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.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 recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹²

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.¹³

⁸ *Id.*

⁹ *See* 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *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).

¹² *Id.* at § 10.438(a).

¹³ *Id.* at § 10.438(b).

ANALYSIS -- ISSUE 2

In this case, appellant engaged in a telephonic conference with the Office on July 30, 2003 during which appellant stated that he had signed up for and used HMO Blue Texas during the period in question. The Office found that appellant was without fault in the matter of the overpayment and properly advised appellant that he was responsible for paying the cost of the health insurance. The memorandum of record dated July 30, 2003, noted that appellant had stated that he understood that services were used and not fully paid. It further noted that appellant had agreed to the Office deducting \$50.00 each month from his compensation payments until the overpayment was paid in full.

The Board notes that appellant was advised by the Office that if he wanted to request waiver he needed to provide the necessary financial information by completing the overpayment recovery questionnaire issued on May 16, 2003. Appellant, however, failed to submit the overpayment recovery questionnaire or provide any financial information. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.¹⁴ Therefore, the Office acted properly in refusing to waive the recovery of the overpayment on this ground.

With respect to whether recovery would be against equity and good conscience, the Board notes that appellant 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 received in this case without deduction of appropriate health insurance premiums. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse. Additionally, appellant has not submitted any evidence to show that he is entitled to waiver of recovery of the overpayment on the grounds that recovery would be against equity and good conscience. The Office, therefore, did not abuse its discretion in denying appellant's request for waiver of recovery of the overpayment on this ground.

As previously noted, appellant failed to submit the financial information required by section 10.438 which was necessary to determine whether appellant detrimentally relied on the overpayments.¹⁵ As such, the Office acted properly in refusing to waive the recovery of the overpayment on this ground.

As 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.

¹⁴ *Id.* at § 10.438 (1999) (which provides that, if additional financial information is not submitted or a prerecoupment hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require); see *Robert B. Hutchins*, 52 ECAB 344 (2001); *John B. Moore*, 41 ECAB 804 (1990).

¹⁵ *Id.*

LEGAL PRECEDENT -- ISSUE 3

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“Whenever 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 the 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 hardship.”¹⁶

ANALYSIS -- ISSUE 3

In this case, the Office found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$50.00 per payment. The Office had advised appellant during its telephonic conference that the rate of recovery would be \$50.00 every four weeks from his continuing compensation until the overpayment was recovered and appellant had agreed with that amount. Appellant furthermore failed to present any financial information to enable the Office to determine appellant’s financial circumstances such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship.¹⁷ The Office’s procedure manual notes that, if a claimant is being paid compensation or is due accrued benefits from the Office and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.¹⁸ The Board, therefore, finds that the Office did not abuse its discretionary authority in determining that the overpayment sum of \$798.16 would be deducted from appellant’s due and accrued compensation benefits at the rate of \$50.00 every four weeks.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$798.16 during the period January 27 through November 30, 2002 as the Office failed to deduct the correct premiums for health insurance from his compensation benefits. The Board further finds that the Office properly denied waiver of the overpayment of compensation. Lastly, the Board finds that the Office did not abuse its

¹⁶ 20 C.F.R. § 10.441(a).

¹⁷ 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. *Gail M. Roe*, 47 ECAB 268 (1995); *see Nina D. Newborn*, 47 ECAB 132 (1995).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (September 1994).

discretionary authority in determining that the overpayment sum of \$798.16 could be deducted from appellant's due and accrued compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 31, 2003 is hereby affirmed.

Issued: February 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member