

FACTUAL HISTORY

On December 15, 1999 appellant, then a 41-year-old limited-duty mail carrier, filed a notice of traumatic injury alleging that on October 29, 1999 she injured her neck and shoulder muscles when she jerked on the emergency brake in her postal vehicle.¹ The Office accepted the claim for a left rotator cuff tear, for which surgery was authorized and performed. Appellant stopped work on November 1, 1999 and returned to intermittent light duty and stopped again on December 27, 1999. On June 7, 2000 the Office accepted that appellant had a recurrence of disability and paid appropriate compensation for the period March 3 to 31, 2000. She continued to receive wage-loss benefits as a result of the employment injury until September 23, 2000, when she returned to work in a part-time limited-duty position. Appellant stopped work entirely on November 27, 2001 due to an objective worsening in her condition and temporary total disability was reinstated.

In an April 10, 2002 memorandum, a senior claims examiner indicated that, when appellant was placed back on the periodic rolls for total disability, there were no deductions made for health or life insurance premiums. A fiscal payment worksheet of record later detailed that employee health benefits had not been deducted from appellant's wage-loss compensation from January 26 to March 22, 2003 and that a premium of \$139.96. According to an April 2, 2003 compensation verification report, appellant received \$2,079.00 of gross compensation every four weeks, from which employee health benefits, optional and basic life insurance should be deducted.

In a preliminary overpayment determination dated September 10, 2003, the Office advised appellant that she had received a \$139.96 overpayment because health insurance premiums were not deducted for the period January 26 through March 22, 2003. The Office made a preliminary finding that appellant was without fault in creating the overpayment. The Office informed appellant that, if she believed she should receive a waiver of the overpayment, she should complete a financial recovery questionnaire form and submit documents such as income tax returns, bank statements, bills, canceled checks, pay slips and other records to support her claimed income and expenses.

On September 25, 2003 appellant requested waiver of the overpayment and submitted financial documentation in support of her request.

By decision dated October 10, 2003, the Office found that appellant received an overpayment of compensation in the amount of \$139.96 that occurred because health benefit premiums were not deducted from January 26 to March 22, 2003. The Office found that she was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted because her monthly income exceeded her monthly expenses by over

¹ The record reflects that appellant had previous occupational disease claims accepted by the Office for conditions including bilateral carpal tunnel syndrome with a date of injury of June 26, 1991, right wrist tenosynovitis with a date of injury of October 10, 1991, aggravation of tenosynovitis and de Quervain's syndrome of the left wrist with a date of injury of December 16, 1997 and aggravation of cervical stenosis and degenerative disc disease with a date of injury of May 6, 1998. All the previous claims including the October 29, 1999 claim were combined under one master case file number for efficient case management.

\$2,000.00. The Office found that the sum of \$139.96 would be withheld from her continuing compensation effective November 1, 2003.

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. Under applicable regulation, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.² An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.³

ANALYSIS -- ISSUE 1

In this case, deductions for health insurance premiums were not taken from appellant's compensation payments the period January 26 to March 22, 2003. Although she no longer worked for the employing establishment, she carried health benefits which she had previously elected while receiving compensation for wage loss due to the employment-related injury.⁴ The Office calculated that two payments for health benefits of \$69.68 should have been deducted from appellant's compensation during the above period totaling \$139.36. As no health benefit deductions were made from her compensation during that time period and there is no evidence that appellant cancelled her health benefits enrollment, the Board finds that an overpayment was created in the amount of \$139.96 due to the under withholding of health insurance premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides that, when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulation prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵ Section 8129(b) provides the only exception to this mandatory adjustment:

"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."⁶

² See 5 C.F.R. § 890.502(b)(1).

³ See 5 C.F.R. § 890.502(d).

⁴ See *supra* note 2.

⁵ 5 U.S.C. § 8129(a).

⁶ *Id.* at § 8129(b).

Section 10.436 of Title 20 of the Code of Federal Regulations⁷ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [Federal] FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) The individual's assets do not exceed the 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.”⁸

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. Because she is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

Following appellant's request for a waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act or would be against equity and good conscience. The information provided by appellant in the questionnaire revealed that she had monthly expenses which included, \$820.00 for rent or mortgage, \$250.00 for food, \$100.00 for clothing, \$300.00 for telephone, electricity and gas and \$300.00 for other expenses, totaling \$1,770.00. The questionnaire further noted that appellant earned \$2,002.00 in monthly compensation and had \$200.00 in her checking account and \$20.00 in cash on hand. The Office determined based on the overpayment questionnaire submitted in

⁷ 20 C.F.R. § 10.436.

⁸ Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (September 1994).

⁹ *Id.*

support of waiver, that appellant and her dependents had \$1,992.32 in net compensation income plus an additional \$2,002.00 appellant reported for a combined monthly income of \$3,994.32. The Office thereafter determined that her household had a surplus of over \$2,000.00 each month and in its decision dated October 10, 2003, the Office found that it was, therefore, unable to waive the \$139.96 overpayment.

On appeal appellant challenges the Office finding that she had \$2,002.00 in additional income and asserts that she has no such income, but only that which is paid by the Office each month. A compensation verification worksheet of record dated April 2, 2003, indicates that she received \$2,079.00 in compensation every four weeks. The Board notes that on the questionnaire appellant listed \$2,002.00 as her total monthly income, but did not indicate its source. It is possible that the amount listed on the questionnaire represents an approximation of her net compensation. Although the Office found that she had a surplus of over \$2,000.00 per month based on a combined monthly income of \$3,994.32, there is insufficient evidence of record, which establishes the monthly income set forth by the claims examiner. The Board finds, however, that even if appellant's monthly income is reduced to \$1,992.32, her ordinary and necessary monthly expenses still only total \$1,770.00. Her income, therefore, still exceeds her expenses by more than \$50.00 per month. Appellant, therefore, can not be deemed to need substantially all her current income to meet current ordinary and necessary living expenses. The evidence of record does not establish that financial hardship would result which would defeat the purpose of the Act if recovery is made of the \$139.96 overpayment. There is also no argument or evidence to support that recovery of the overpayment would be against equity and good conscience. Appellant is, therefore, not entitled to waiver of the overpayment in this case. The Office's denial of waiver did not constitute an abuse of discretion.¹⁰

LEGAL PRECEDENT -- ISSUE 2

The method of recovery of the overpayment is provided by regulation at 20 C.F.R. § 10.441(a) which provides as follows:

“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 payment, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”

ANALYSIS -- ISSUE 3

With respect to the Office's decision to deduct \$139.96 from one continuing compensation payment, the Board finds that such a repayment schedule is in accordance with 20 C.F.R. § 10.441(a). This section authorizes the Office to recover an overpayment by decreasing later payments of compensation. In exercising its authority under section 10.441(a), the Office must take 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

¹⁰ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984).

to minimize any hardship.” Given the financial information available, as appellant had over \$200.00 of monthly discretionary income available, the Board finds that the Office reasonably imposed repayment of the entire sum from one continuing compensation payment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$139.96 because health benefit premiums were not deducted from her monthly compensation from January 26 to March 22, 2003. The Office did not abuse its discretion in denying waiver of the overpayment and in collecting the entire sum due from one continuing compensation payment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated October 10, 2003 is affirmed, as modified.

Issued: June 10, 2004
Washington D.C.

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member