

FACTUAL HISTORY

On January 12, 1991 appellant, then a 28-year-old air traffic controller, injured his right hip and knee when he slipped and fell at work. The Office accepted appellant's claim for a contusion to right hip and aggravation of preexisting right hip condition with total hip replacement and paid appropriate benefits. Appellant stopped work on January 12, 1991 and returned to part-time duty effective April 25, 1991 and returned to full duty on May 31, 1992. He subsequently filed a claim for a recurrent disability beginning July 30, 1994, which the Office approved and paid temporary total disability compensation beginning August 1994. By decision dated August 12, 2004, the Office reduced appellant's compensation effective September 5, 2004, on the basis that the position of caseworker fairly and reasonably represented his wage-earning capacity.¹

In a fiscal payment worksheet dated September 1, 2004, the Office indicated that from August 21, 1994 to September 4, 2004 the amount for basic life insurance premiums, code 104, was not deducted from appellant's compensation. The Office determined that the cost of basic life insurance premiums for the period August 21, 1994 to April 24, 1999 was \$946.00; for the period April 25, 1999 to December 31, 2002 was \$701.40; and for the period January 1, 2003 to September 4, 2004 was \$308.69, for a total overpayment determination of \$1,956.81.

In a preliminary overpayment determination dated September 2, 2004, the Office advised appellant that he had received a \$1,956.81 overpayment because basic life insurance premiums were not deducted from his wage-loss compensation for the period August 21, 1994 to September 4, 2004. The Office also made a preliminary finding that appellant was without fault in creating the overpayment. The Office informed appellant that, if he wanted waiver of the overpayment, he 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 his claimed income and expenses within 30 days. The Office advised appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On September 28, 2004 appellant requested waiver of the overpayment and a hearing. In a letter dated September 28, 2004, appellant noted that he had deductions for life insurance for many years, but was unaware that greater deductions should have been made. He also submitted the overpayment questionnaire in which he listed his monthly expenses as: \$1,020.00 for mortgage (including property tax); \$600.00 for food; \$200.00 for clothing; \$350.00 for utilities; and \$300.00 for other expenses, (which included miscellaneous household expenses, medical and dental care not covered by insurance, automobile expenses or other transportation costs, personal necessities) for a total of \$2,470.00. He did not indicate any debt, besides his mortgage and indicated that he had interest income of \$20.00 per month, approximately \$61,000.00 in other funds, which included cash, checking and savings account balances and stocks. In an attachment to the overpayment questionnaire, appellant stated that his usual expenses were estimates and did not include any extras like emergencies, medical costs or retirement.

¹ Because more than one year has elapsed between the issuance of the Office's August 12, 2004 wage-earning capacity decision and August 25, 2005, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the August 12, 2004 merit decision. See 20 C.F.R. § 501.3(d)(2).

A hearing was held on April 27, 2004. At the hearing, appellant did not account for any additional expenses or debt and indicated that he received \$2,151.00 every 28 days from his disability compensation benefits along with earnings from his employment with Advanced Health Resources. Appellant indicated that he earned \$1,900.00 in wages in 2004 from employment, which began in April of that year. On January 1 through March 31, 2005 he noted earning \$2,400.00.

By decision dated July 20, 2005, the Office hearing representative found that appellant received a \$1,956.81 overpayment in compensation for the period August 21, 1994 through September 4, 2004, due to the lack of deduction for life insurance premiums. The hearing representative found that appellant was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted. The hearing representative found that collection would not be against equity and good conscience or cause a financial hardship and directed that the sum of \$200.00 be withheld from ongoing compensation benefits every 28 days until the overpayment was recovered.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Group Life Insurance Program (FEGLI),² most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options. The coverage for basic life insurance is effective unless waived and the premiums for basic and optional life coverage are withheld from the employee's pay. At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under compensation status. If the compensationner chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from his or her compensation payments. When an under withholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to Office of Personnel Management (OPM) upon discovery of the error.³

ANALYSIS -- ISSUE 1

The Office found that appellant received an overpayment of compensation as a result of an under withholding of premiums for basic life insurance coverage.

² The law governing life insurance for federal employees is found at 5 U.S.C. §§ 8701-8716.

³ 5 U.S.C. § 8707(d); *see Keith H. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004). An under withholding of premiums results in a two-tiered liability. The claimant owes the agency the under withheld funds and similarly the agency owes the insurance fund/OPM. If this occurs, the Office must make OPM whole and remit the entire amount of the under withholding, even if the debt is eventually waived. Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, Life Insurance, Chapter 5.401.11.b(2) (August 2004).

The Office noted that coverage was effective in this case, as coverage for basic life insurance is effective unless waived. Indeed, federal employees are automatically enrolled in basic life insurance unless they waive the coverage or are ineligible.⁴ The record does not contain any documentation from appellant suggesting that he waived his basic life insurance coverage. The Office determined that, when appellant was placed on the period rolls, no deduction was taken for his basic life insurance coverage. Appellant was placed on the periodic rolls in August 1994 and no deductions for basic life insurance coverage were made until September 5, 2004. The Office determined that appellant's deductions from August 21, 1994 to April 24, 1999 were \$946.72, from April 25, 1999 to December 31, 2002 were \$701.40 and from January 1, 2003 to September 4, 2004 were \$308.69. The Office added these three separate sums to determine that appellant received an overpayment in the amount of \$1,956.81. As these premiums were not deducted from his compensation payments, this resulted in an overpayment in the amount of \$1,956.81. Appellant has not contested this amount. As the record contains documents substantiating the life insurance overpayment and the explanation of how such overpayment was determined, the Board finds that the Office properly determined that appellant received an overpayment of compensation will affirm the Office's July 20, 2005 decision on the issue of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁵ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states:

"Adjustment or recovery [of an overpayment] 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

⁴ Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, Life Insurance, Chapter 5.401.8.a(1) (August 2004). In these cases, the Office should review the record and make a finding on whether coverage was effective during the period of the overpayment. Noting that the employing establishment determines the claimant's eligibility for life insurance, the Office might find for example, that the record showed coverage continuing under compensation status, as it did in this case and that the claimant completed no life insurance election (SF 2817), waiving or canceling basic life. *See id.*, Chapter 5.401.5.

⁵ *Frederick Arters*, 53 ECAB 397 (2002).

⁶ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

Since the Office found 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 determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁷

Section 10.438 provides that 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 recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.⁸ 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.⁹

ANALYSIS -- ISSUE 2

Appellant was found to be without fault in creating the overpayment. However, the fact that a claimant is without fault in creating the overpayment does not preclude the Office from recovering all or part of the overpayment. The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁰ The Office must exercise its discretion in determining whether waiver is warranted under either of the two standards discussed above.¹¹

For waiver under the first standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses¹² and that his 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.¹³

⁷ Before seeking to recover an overpayment or adjust benefits, the Office will advise the beneficiary in writing that: (a) the overpayment exists and the amount of the overpayment; (b) a preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment; (c) he or she has the right to inspect and copy government records relative to the overpayment; and (d) he or she has the right to present evidence which challenges the fact or amount of the overpayment and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived. *See* 20 C.F.R. § 10.431.

⁸ 20 C.F.R. § 10.438(a).

⁹ 20 C.F.R. § 10.438(b).

¹⁰ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹¹ *Linda Hilton*, 52 ECAB 476 (2001).

¹² An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.

¹³ *Jan K. Fitzgerald*, 51 ECAB 659 (2000); *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

In this case, appellant submitted information regarding his income, assets and expenses both on his September 20, 2004 overpayment recovery questionnaire and during his hearing testimony on April 27, 2004. Based on the financial information provided by appellant and appellant's testimony, the Office properly found that appellant's monthly income actually exceeded his monthly expenses by \$59.33.

Appellant indicated that he had interest income of \$20.00 per month and that he received disability compensation in the amount of \$2,151.00 per month. Appellant also indicated that he had received \$1,900.00 in wages in 2004 from employment, which began in April 2004 and had earned \$2,400.00 in wages during the period January 1 through March 31, 2005, which the Office hearing representative added together and divided by 12, the number of months, to arrive at an average monthly earnings received of \$358.33 from that employment. The amount of appellant's total monthly income is \$2,529.33. Appellant indicated that he had approximately \$59,000.00 in assets, which consisted of bank account balances of \$45,000.00 and stocks valued at \$14,000.00 and no debt besides his mortgage. Appellant also indicated that his ordinary monthly expenses consisted of \$1,020.00 for mortgage; \$600.00 for food; \$200.00 for clothing; \$350.00 for utilities; and \$300.00 for miscellaneous expenses, for a total monthly expense of \$2,470.00.

The Office properly subtracted appellant's total monthly income of \$2,529.33 from his total monthly expenses of \$2,470.00, to find that appellant had exceeded his monthly expenses by \$59.33. In this case, appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00 per month. Additionally, the Office properly found that, based on appellant's assets of approximately \$59,000.00, his resource base exceeded the amount allowable resource base under the Office's procedures. Appellant was given an opportunity to correct the information contained on his overpayment questionnaire and in his testimony and while he did supply additional information regarding his monthly income, he did not contest the Office's finding that he has a resource base in excess of \$3,000.00¹⁴ or that his monthly income exceeded his ordinary and necessary living expenses in excess of \$50.00. Thus, under the first standard, the Office properly denied appellant's request for waiver of the overpayment.

Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment, nor did appellant claim any lost right or detrimental reliance.¹⁵ At the time of the Office's decision, there was no evidence substantiating that recovery of the overpayment would be against equity and good conscience. Consequently, the Office properly denied waiver of the overpayment.

On appeal, appellant contends that he did not account for emergencies when determining his ordinary monthly expenses in the overpayment recovery questionnaire. He stated that, shortly after the hearing, he had to replace his van. The Board's jurisdiction, however, is limited to a review of that evidence which was before the Office at the time of its final decision. As evidence pertaining to this contention was not before the Office when it issued the July 20, 2004

¹⁴ The record reflects that appellant is unmarried with no dependents.

¹⁵ See *Christine P. Burgess*, 50 ECAB 444, 449 (1999).

decision, it cannot be considered by the Board.¹⁶ Furthermore, the Act, Office regulations and Office procedures, noted above, provide a framework for consideration of a claimant's overall financial situation and retention of an asset base, in determining eligibility for waiver. The Board finds that the Office did not err in considering appellant's eligibility for waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.¹⁷

Section 10.438 of the regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].¹⁸ Appellant's financial information used for determining waiver will also be used to determine any necessary repayment schedule.¹⁹

ANALYSIS -- ISSUE 3

With respect to the Office's decision to deduct \$200.00 every 28 days from appellant's continuing compensation, the Board finds that such a repayment schedule is in accordance with section 10.441(a). 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 to minimize any hardship."²⁰

In this case, appellant completed the overpayment questionnaire and testified as to his financial circumstances. There is no evidence that recovery of the overpayment from his continuing compensation would cause him undue financial hardship. Moreover, appellant testified that his only debt was his mortgage. Thus, based on the financial information provided by appellant, the Board finds that the Office properly imposed a repayment from continuing compensation at the rate of \$200.00 every 28 days pursuant to its recovery procedures.²¹

¹⁶ 20 C.F.R. § 501.2(c).

¹⁷ 20 C.F.R. § 10.441.

¹⁸ 20 C.F.R. § 10.438.

¹⁹ *Id.*

²⁰ 20 C.F.R. § 10.441(a).

²¹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Chapter 6.300.8 (May 2004).

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,956.81 because life insurance premiums were under withheld from appellant's compensation checks. The Board further finds that the Office acted within its discretion in denying waiver of recovery of the overpayment and properly determined that the overpayment should be recovered by deducting \$200.00 every 28 days from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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