United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 07-133**
	)	**Issued: October 5, 2007**
DEPARTMENT OF COMMERCE, Washington, DC, Employer	)	

Appearances:
Stephen Shires, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 13, 2006 with respect to an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of $37,132.53 was created during the period January 26, 1984 to April 16, 2005; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment should be repaid by deducting $400.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

The Office accepted that on May 19, 1958 appellant sustained the following injuries while in the performance of duty: fractured lumbar veterbra; left leg thrombophlebitis; and

lumbar radiculopathy. Appellant did not return to work and received compensation for wage-loss and medical benefits.

By letter dated August 15, 2005, the Office advised appellant of a preliminary determination that an overpayment of compensation totaling $37,132.53 had been created. The Office explained that, during the period January 26, 1984 to April 16, 2005, it had deducted from compensation payments a health benefit premium based on self-coverage only. Since appellant had selected family coverage, the appropriate premium for family coverage should have been deducted. The Office included a worksheet with annual premiums for self and family coverage for the relevant time period, indicating that the Office should have deducted an additional $37,132.53 in premiums from January 26, 1984 to April 16, 2005. With respect to fault, the Office made a preliminary determination that appellant was at fault in creating the overpayment.

In response to a request for financial information, appellant completed an overpayment recovery questionnaire (Form OWCP-20) dated September 9, 2005. He reported a monthly income of $4,733.32, with monthly expenses of $4,337.89. With respect to assets, appellant reported the value of stocks and bonds at $103,935.72.

Appellant requested a hearing before an Office hearing representative, which was held on May 30, 2006. At the hearing appellant argued that he was not at fault in creating the overpayment. In addition, appellant argued that, if he had known the wrong premium amount was being deducted, he would have chosen self-coverage because his spouse had other health insurance coverage.

In a letter dated June 6, 2006, appellant again argued that had he known a higher premium should have been deducted, he would not have chosen family coverage. He argued that he had given up a valuable right in not being able to select self-coverage and recovery of the overpayment would be against equity and good conscience.

By decision dated September 13, 2006, the Office hearing representative finalized a finding that an overpayment of $37,132.53 was created from January 26, 1984 to April 16, 2005. The hearing representative determined that appellant was not at fault in creating the overpayment. On the issue of waiver, the hearing representative denied waiver on the grounds that, based on financial information provided, recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. The hearing representative further determined that the overpayment should be recovered by deducting $400.00 every 28 days from continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits (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."

In addition, 5 C.F.R. § 890.502(d) provides: "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 title 5, United States Code, to OPM for deposit in the Employees Health Benefits Fund." When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.[1]

ANALYSIS -- ISSUE 1

The record indicated that the Office withheld premiums for health benefit insurance based on "self" coverage under the chosen plan. Appellant does not contest that he had selected "self and family" coverage under the plan. Because the Office deducted less than the proper amount for the coverage selected, an overpayment of compensation was created. An Office memorandum provided calculations showing that the under withheld amount for the period January 26, 1984 to April 16, 2005 was $37,132.53. Based on the evidence of record, the Board finds that the Office properly found that an overpayment of compensation in the amount of $37,132.53 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[2] provides: "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."[3] Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses," and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.[4] An

[1] *See John Skarbek*, 53 ECAB 630 (2002).

[2] 5 U.S.C. § 8101 *et seq.*

[3] 5 U.S.C. § 8129(b).

[4] Office procedures provide that the assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

individual's liquid assets "include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits."[5] Nonliquid assets "include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies.…"[6]

20 C.F.R. § 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.[7]

ANALYSIS -- ISSUE 2

The hearing representative found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of the Act or would be against equity and good conscience. As to whether recovery would "defeat the purpose of the Act" in this case, the Board notes that appellant reported liquid assets in excess of $100,000.00. Since these assets exceed the resource base of $8,000.00 for an individual with a spouse, under 20 C.F.R. § 10.436 recovery of the overpayment would not defeat the purpose of the Act.

Appellant argues that, with respect to the "against equity and good conscience" standard, he relinquished a valuable right in reliance on the incorrect premium withholding. He appears to argue that the valuable right he gave up was the right to select the "self" coverage. The Board is not persuaded by this argument. Appellant always had a right to change his coverage to "self" coverage during the overpayment period. He never relinquished a valuable right in reliance on incorrect withholding of health insurance premiums. If, as appellant indicated, his spouse had other health benefit insurance, he always had the right to select "self" coverage with the expectation of further reducing the amount withheld from compensation payments. The Board finds that appellant has not established that recovery of the overpayment would be against equity and good conscience.

The Board therefore finds that the record did not establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Pursuant to 5 U.S.C. § 8129(b), the Office properly denied waiver of the overpayment.

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[5] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004).

[6] *Id.*

[7] 20 C.F.R. § 10.437(b)(1) (1999).

LEGAL PRECEDENT -- ISSUE 3

The Office's regulation provides:

> "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 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."[8]

ANALYSIS -- ISSUE 3

The hearing representative found that appellant could repay the overpayment of $37,132.53 by deducting $400.00 from continuing compensation payments every 28 days. The record indicated that compensation payments in 2005 were approximately $1,880.00, and appellant reported a monthly household income of $4,733.32, with expenses of $4,337.89. Appellant also reported $103,935.72 as the current value of stocks and bonds. As noted above, the Office must take into account the financial circumstances of the individual and other relevant factors. In view of the financial information reported by appellant on the OWCP-20 form, there is no evidence of any financial hardship in setting the rate of recovery at $400.00 from each compensation payment. The Board finds that the Office followed its regulations in the method of recovering the overpayment in this case.

CONCLUSION

The evidence established that an overpayment of $37,132.53 was created from January 26, 1984 to April 16, 2005. The Office properly denied waiver of the overpayment and set the rate of recovery at $400.00 from appellant's continuing compensation payments.

[8] 20 C.F.R. § 10. 441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2006 is affirmed.

Issued: October 5, 2007
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