

The issues are: (1) whether the Office properly determined that appellant received an overpayment of \$28,319.90 from July 18, 1984 to April 16, 2005; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly directed recovery by deducting \$600.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

On September 28, 1983 appellant, then a 41-year-old carpenter, sustained traumatic injury when a sheet of plywood struck him above the groin. He stopped work on September 29, 1983 and returned to work on October 11, 1983. The Office accepted the claim for contusions of the abdomen and bladder, bilateral femoral hernia, inguinal hernias, ilio-inguinal nerve entrapment and gastritis. Appellant stopped work on November 28, 1983. He returned to full-duty work on January 3, 1984 and worked until July 18, 1984. Appellant has not returned to work.

By letters dated March 17 and 21, 2005, the Office advised appellant that its records did not show that any deductions for health insurance benefits had been made. It requested that he submit any documents showing whether he was covered and any deductions made.

In a March 28, 2005 letter, appellant stated that he always had health benefits. He had been threatened with termination of his health care benefits because premium payments had not been made. Appellant submitted pay stubs which indicated that health benefits were deducted from his compensation in the 1970s.

By letter dated May 13, 2005, the Office advised appellant that the amount of his recent compensation check had been reduced to reflect the deduction for health benefits.

In a June 14, 2006 memorandum to the file, an Office claims examiner noted that an overpayment of compensation was created in appellant's case as health benefits insurance had not been deducted from his compensation for the period July 18, 1984 through April 16, 2005. The claims examiner indicated that health benefits deductions began on April 17, 2005. The Office calculated that health benefits premiums for the period July 18, 1984 to April 16, 2005 totaled \$28,319.90.

In a preliminary overpayment determination dated July 27, 2006, the Office advised appellant that he had received a \$28,319.90 overpayment because health insurance premiums were not deducted for the period July 18, 1984 to April 16, 2005. It determined that he was without fault in creating the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire and submit financial documents within 30 days.

On August 23, 2006 appellant requested a telephonic hearing before an Office hearing representative. He stated that recovery of the overpayment would cause financial hardship for his family due to his work-related medical problems. Appellant reiterated that he always had medical insurance for himself and his family. He contended that the overpayment was the Office's fault. In an overpayment recovery questionnaire dated August 3, 2006, appellant stated that he did not have any of the incorrectly paid checks or payments in his possession as they were direct deposited into his bank account. He was unaware that no deductions had been made to his health insurance company. Appellant reported monthly income of \$6,918.00, which

represented his and his wife's income of \$4,390.00 and his benefits of \$2,528.00 from the Department of Veterans Affairs (VA). He claimed his wife, daughter and granddaughter as his dependents. Appellant reported monthly expenses which included \$1,897.59 for rent or mortgage. He estimated \$450.00 for food, \$400.00 for clothing, \$855.00 for utilities, \$600.00 for other miscellaneous expenses, \$456.78 for a car payment, \$25.72 for cable, \$227.91 for life and mortgage insurance and \$400.00 for credit card payments, totaling \$5,213.00.¹ Appellant reported having a second home valued at \$198,000.00 with a monthly mortgage of \$1,637.59. He stated that he had \$1,093.00 in a checking account.

During a December 20, 2006 telephonic hearing, appellant clarified his monthly income and expenses. He testified that he received compensation of \$2,098.00 from the Office and that his wife received approximately \$2,000.00 per month in benefits. Appellant testified that his 33-year-old daughter did not contribute any money to his household and that his granddaughter was 12 years old. He clarified the expenses related to his mortgage and second home. Appellant testified that his monthly mortgage for his primary residence was \$1,637.59 and not \$1,897.59 as previously reported. He stated that the house was worth \$198,000.00 and the mobile home was worth \$70,000.00. Appellant reported \$400.00 cash on hand. The Office hearing representative requested that appellant submit financial documents such as, copies of bills and bank statements in support of his financial statement within 30 days to determine whether waiver of the overpayment would be granted. The hearing representative advised that failure to submit the requested information would result in the denial of waiver. Appellant did not respond within the time allotted.

By decision dated March 12, 2007, the Office hearing representative finalized the determination that appellant received an overpayment in the amount of \$28,319.90 and that he was without fault in the creation of the overpayment. She denied waiver of the recovery of the overpayment, finding that he failed to submit the requested financial evidence to support the information provided in his overpayment recovery questionnaire and during his testimony in the telephonic hearing.² The hearing representative found that appellant was entitled to compensation based on an augmented pay rate as his wife was a dependent. She found that his daughter and granddaughter were not dependents. The hearing representative directed recovery of the overpayment in the amount of \$600.00 from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The regulations of the Office of Personnel Management, which administers the Federal Employees' Health Benefits Program, provide guidelines for registration, enrollment and

¹ The Board notes that appellant's monthly expenses actually totaled \$5,263.00.

² The hearing representative noted that appellant's monthly income including, his wife's income, totaled \$6,918.00 and his monthly expenses totaled \$4,952.22 including, the correct mortgage payment of \$1,636.59. The Board notes that it appears that appellant's monthly expenses totaled \$5,053.00.

continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

“[A]n employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs an indebtedness due the United States in the amount of the proper employee or annuitant withholding required for each pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues.”³

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

“An agency that withholds less than the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected contributions 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.”⁴

ANALYSIS -- ISSUE 1

In this case, deductions for health insurance premiums were not made from appellant’s compensation payments for the period July 18, 1984 to April 16, 2005. The Office determined that health benefits of \$28,319.90 should have been deducted from his compensation during the above period. Appellant indicated that he always had health insurance while working at the employing establishment. As no health benefit deductions were made from his compensation during this time period and there is no evidence that he cancelled his health benefits enrollment, the Board finds that an overpayment was created in the amount of \$28,319.90 due to the nonwithholding of health insurance premiums. Appellant does not dispute that he received the overpayment in question nor the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees’ Compensation 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 an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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.”⁵

³ See 5 C.F.R. § 890.502(a)(1); see *John Skarbek*, 53 ECAB 630 (2002).

⁴ *Id.* at § 890.502(c).

⁵ 5 U.S.C. § 8129.

Office regulations, at 20 C.F.R. § 10.438, state:

“(a) 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.”

“(b) 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.”⁶

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$28,319.90 overpayment that arose from July 18, 1984 through April 16, 2005, he bears responsibility for providing the financial information necessary to support his request for waiver. His overpayment recovery questionnaire dated August 3, 2006 and testimony at the December 20, 2006 telephonic hearing revealed monthly income of \$6,918.00, expenses of \$5,053.00 and \$400.00 cash on hand. Although the Office asked appellant to submit supporting financial documents including, copies of bills supporting the expenses listed, he did not respond within the allotted 30-day time period. It explained that this information was necessary to consider the question of waiver and to determine a reasonable method for collection. The Office properly explained that failure to submit the requested information would result in the denial of waiver. Because appellant failed to submit sufficient evidence, as requested by the Office, showing that recovery of the overpayment 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 the recovery of the overpayment pursuant to 20 C.F.R. § 10.438(b).

LEGAL PRECEDENT -- ISSUE 3

The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. Section 10.441(a) of the regulations 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 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 any hardship.”⁷

⁶ 20 C.F.R. § 10.438.

⁷ *Id.* at § 10.441(a).

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. As noted, he completed an overpayment recovery questionnaire but, failed to submit additional supportive financial documents requested by the Office prior to the issuance of the March 12, 2007 overpayment decision. When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.⁸ On appeal, appellant contends that he timely submitted the requested financial information. The record forwarded to the Board contains financial documentation received after the issuance of the March 12, 2007 decision. However, the Board may not consider such evidence for the first time on appeal. The Board's review of a case is limited to that evidence of record which was before the Office at the time of its final decision. It may not be reviewed for the first time on appeal.⁹ The Board finds that the Office did not abuse its discretion in following its regulations and deducting \$600.00 every 28 days.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$28,319.90 from July 18, 1984 to April 16, 2005. The Board further finds that the Office properly denied waiver of the recovery of the overpayment. The Board finds that the Office properly required repayment of the overpayment by deducting \$600.00 from appellant's continuing compensation payments.

⁸ *Ralph P. Beachum, Sr.*, 55 ECAB 442, 448 (2004); *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).

⁹ 20 C.F.R. § 501.2(c). Appellant may submit the new evidence to the Office with a written request for. 5 U.S.C. § 8128; 20 C.F.R. §10.606.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2008
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