

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

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**M.T., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, Little Rock, AR, Employer** )

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**Docket No. 09-784**  
**Issued: October 21, 2009**

*Appearances:*  
*Appellant, pro se*  
*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 January 29, 2009 appellant filed a timely appeal from a merit decision dated January 5, 2009, of the Office of Workers' Compensation Programs, which found an overpayment of compensation in the amount of \$773.30. 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 appellant received an overpayment in the amount of \$773.30 for the period October 16, 2005 through August 30, 2008; and (2) whether the Office abused its discretion under section 8129(a) of the Federal Employees' Compensation Act in denying waiver of the recovery of the overpayment.

On appeal, appellant contends that the Office should grant a waiver of recovery of the overpayment because he was found to be without fault in its creation and because he suffered financially, physically and mentally due to the Office's mistakes.

## **FACTUAL HISTORY**

On May 27, 2005 appellant, then a 25-year-old transportation security screener, sustained an injury to his hip and groin area when he tripped over a floor mat in the performance of duty. His claim was accepted for right hip and pelvis strain, as well as synovitis/tenosynovitis of the right hip. Appellant was placed on the periodic rolls.

On November 24, 2008 the Office advised appellant that it had made a preliminary determination that an overpayment of \$773.30 had occurred, as health benefit premiums had been incorrectly deducted from his compensation payments under code 111 instead of code 104 from November 16, 2005 to August 30, 2008, due to a coding error. He was found to be without fault in the creation of the overpayment. The Office advised appellant of actions available to him if he believed that he should receive a waiver, including the ability to request a prerecoupment hearing and to submit a completed overpayment recovery questionnaire and financial evidence. The record does not contain information or evidence submitted by appellant in response to the preliminary determination of overpayment.

The record reflects that, for the period October 16, 2005 through August 30, 2008, the Office deducted health insurance from appellant's compensation payments under code 111, rather than under code 104, as authorized by appellant.<sup>1</sup> A fiscal audit dated October 17, 2008 reflects that the amount deducted from appellant's compensation payments for health insurance premiums from October 16, 2005 to August 30, 2008 was \$1,559.54. The audit worksheet also reflects that the amount that should have been deducted from compensation benefits for that period under the proper code was \$2,332.24, resulting in a difference of \$773.30.

In a January 5, 2009 decision, the Office finalized its determination that an overpayment of compensation in the amount of \$773.30 had occurred, due to the fact that health insurance premiums had not been incorrectly deducted from compensation payments from October 16, 2005 to August 30, 2008, due to a coding error. Although appellant was without fault in the creation of the overpayment, he did not submit any evidence or argument for a waiver. The Office informed appellant that he should forward a check to the Office in the entire amount of the overpayment.<sup>2</sup>

## **LEGAL PRECEDENT -- ISSUE 1**

The Act<sup>3</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>4</sup> When an overpayment has been made to an individual because of an error of fact or law,

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<sup>1</sup> The record contains a copy of a December 16, 2002 health benefit election form-reflecting appellant's election for health insurance coverage under code 104.

<sup>2</sup> Appellant submitted additional evidence after the Office's January 5, 2009 decision; however, the Board cannot consider such evidence for the first time on appeal. The Board's review of a case shall be limited to the evidence in the case record, which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102(a).

adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits program, provide guidelines for registration, enrollment and 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.”<sup>5</sup>

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 applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”<sup>6</sup>

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.<sup>7</sup> An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Office made deductions for health insurance benefits from appellant's compensation payments using an incorrect code. Appellant does not dispute the fact or amount of overpayment. The Board finds that the Office properly determined that he received an overpayment of compensation in the amount of \$773.30, for the period October 16, 2005 to August 30, 2008. The record reflects that the Office deducted the amount of \$1,559.54 from appellant's compensation benefits for health insurance premiums for the period October 16, 2005

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<sup>5</sup> 5 C.F.R. § 890.502(a)(1).

<sup>6</sup> *Id.* at § 890.502(c).

<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> See *James Lloyd Otte*, 48 ECAB 334 (1997); *Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

to August 30, 2008 based on code 111, rather than code 104, which was authorized by appellant. The evidence reflects that the actual cost of his health insurance during that period was \$2,332.24. The difference between the amount the Office should have deducted and the amount actually withheld represents an overpayment. The Board has recognized that when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment, because the Office must pay the full premium to OPM when the error is discovered.<sup>10</sup> The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$773.30.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act<sup>11</sup> provides that an overpayment must be recovered unless 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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.<sup>12</sup>

Section 10.436 of the implementing federal regulations<sup>13</sup> provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of the Act.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.<sup>14</sup>

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office, as 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.<sup>15</sup> This information would also be used to determine the repayment schedule, if necessary. Section

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<sup>10</sup> See *James Lloyd Otte*, *supra* note 9.

<sup>11</sup> 5 U.S.C. § 8129.

<sup>12</sup> *Wade Baker*, 54 ECAB 198 (2002).

<sup>13</sup> 20 C.F.R. § 10.436.

<sup>14</sup> *Id.* at § 10.437.

<sup>15</sup> *Id.* at § 10.438(a).

10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

In its November 24, 2008 preliminary overpayment determination, the Office informed appellant of actions available to him if he believed that he should receive a waiver. It advised him to submit a completed overpayment recovery questionnaire, as well as information and evidence regarding his income and expenses, within 30 days.

Appellant did not respond. He failed to submit a completed overpayment recovery questionnaire form prior to the issuance of the Office's final decision; nor did he submit financial information outlining his income and expenses. As a result, there was no evidence before the Office establishing that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.<sup>17</sup> As appellant failed to submit the requested information, as required by section 10.438 of its regulations, he was not entitled to a waiver.<sup>18</sup> The Board finds that the Office properly denied waiver of recovery of the overpayment of compensation.<sup>19</sup>

On appeal, appellant asserts that he should not be required to make repayment because the overpayment was not his fault. The fact that appellant was without fault does not preclude the Office from recovering all or part of the overpayment.<sup>20</sup> Because he failed to submit the requested financial information, appellant left the Office with no choice but to deny waiver.<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$773.30 for the period October 16, 2005 through August 30, 2008. The Board further finds that the Office properly denied waiver.

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<sup>16</sup> *Id.* at § 10.438(b).

<sup>17</sup> See 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>18</sup> See *T.S.*, 60 ECAB \_\_\_ (Docket No. 08-1604, issued March 13, 2009).

<sup>19</sup> The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in a lump sum. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. See *Judith A. Cariddo*, 55 ECAB 348 (2004). See also *Rose Carye*, 50 ECAB 482, 487 (1999); *Lewis George*, 45 ECAB 144 (1993).

<sup>20</sup> See *George A. Rodriguez*, 57 ECAB 224 (2005).

<sup>21</sup> See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2009  
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