

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN A. GORE and DEPARTMENT OF THE AIR FORCE,
HANSCOM AIR FORCE BASE, Bedford, MA

*Docket No. 97-2468; Submitted on the Record;
Issued January 14, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$13,153.86 because health benefits and optional life insurance premiums were not deducted for the period November 30, 1980 to December 30, 1989; (2) whether the Office properly denied waiver of the \$13,153.86 overpayment; (3) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,791.71 because health benefit premiums were not deducted for the period January 14, 1990 through October 16, 1993; and (4) whether the Office properly found that appellant was at fault in the creation of the \$1,791.71 overpayment.

On December 3, 1979 appellant, a program analyst, filed a claim alleging that she sustained right leg injuries in the performance of duty. The Office accepted appellant's claim for contusion left foot, contusion and abrasion right knee, and dislocated patella.

Appellant completed a claim for compensation on January 4, 1980 and indicated that she was enrolled in health benefits, code 202, on the date that her pay stopped and that she was also enrolled in optional insurance, basic C. In a letter dated April 23, 1980, appellant asked how her deductions for health benefits, life and optional life insurance were paid. By letter dated October 8, 1981, the Office informed appellant that she was eligible for compensation from January 18 through April 21, 1980 in the amount of \$4,774.35. On June 11, 1982 the Office issued appellant a check in the amount of \$3,465.02 covering the period September 2, 1980 through January 1, 1981. The Office did not deduct health benefits or optional life insurance benefits.

By letter dated February 21, 1989, the Office accepted additional conditions as related to appellant's accepted employment injury, including recurrent dislocation of the right patella; degenerative changes of the right knee; de Quervain's disease both wrists; and mild myositis of the left abdomen. The Office requested a leave analysis since January 1, 1981. The employing establishment responded and stated that appellant had used leave without pay since

November 27, 1980. A notice of change in health benefits enrollment was completed on March 16, 1989 indicating that appellant's enrollment in code 202 was transferred to the Office effective November 27, 1980. The Office issued a check on April 28, 1989 in the amount of \$184,525.14. The Office did not make any deductions for health benefits or optional life insurance. The Office entered appellant on the periodic rolls and issued a check in the amount of \$1,959.00 for the period April 9 to May 6, 1989 and did not include deductions for health or optional life insurance. In an undated letter, the Office indicated that there were no deductions for health benefits or optional insurance.

Appellant returned to work for four hours a day on June 28, 1993. On a worksheet dated July 28, 1993, the Office noted that appellant returned to work for four hours a day and stated that the Office would retain health benefits as requested by the employing establishment. By letter dated August 11, 1993, appellant stated that she returned to work on June 28, 1993 and that she had not received information regarding her health and life insurance from the employing establishment.

On August 12, 1993 the Office noted that health benefits, code 202, and optional, insurance plan A, were not deducted from benefits paid November 30, 1980 through December 30, 1989. The Office determined that appellant received an overpayment of optional insurance in the amount of \$235.00 and an overpayment in health benefits, code 202, in the amount of \$12,918.86 for a total overpayment of \$13,153.86.

The Office informed appellant on August 19, 1993 that it had made a preliminary determination of overpayment in the amount of \$13,153.86 as no health benefits and optional insurance deductions were made from November 30, 1980 to December 30, 1989. The Office noted that appellant was without fault in the creation of the overpayment and that waiver of the overpayment was under consideration. Appellant requested waiver of the overpayment and a telephonic conference on September 3, 1993. In a September 3, 1993 letter, appellant stated that she was not certain whether she had medical coverage while her claim was under adjudication. She stated that during this period she had numerous medical claims which she charged to her husband's insurance. Appellant stated that it would be unfair to have to pay for a service for which she received no value.

Appellant completed a overpayment recovery questionnaire on September 3, 1993. Appellant indicated that she had assets in the amount of \$120,000.00. In a letter dated October 20, 1994, the Office requested additional financial information from appellant. On December 12, 1994 appellant submitted documents regarding retirement accounts and investments. Appellant also detailed household expenses.

By decision dated May 19, 1997, the Office determined that appellant was not entitled to waiver of the overpayment in the amount of \$13,153.86. The Office reviewed appellant's financial documents and determined that collection of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act nor would it be against equity and good conscience.

The Board finds that appellant received an overpayment of compensation in the amount of \$13,153.86 because health benefits and optional life insurance premiums were not deducted for the period November 30, 1980 to December 30, 1989

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees Health Benefits (FEHB) Program, provide guidelines of the 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’s 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.”

In addition 5 C.F.R. § 890.502(c)(1) 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 the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.” (Emphasis added.)

The record indicates that no deductions were made for health benefits from appellant’s compensation benefits during the period November 30, 1980 through December 30, 1989. Furthermore, there is no evidence in the record that appellant canceled her health benefit enrollment or that the employing establishment terminated her health benefits enrollment when she entered the leave-without-pay status. The Board has previously recognized that when an underwithholding 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.¹ The amount of the overpayment due to lack of deduction for health benefits is \$12,918.86.

Appellant also received an overpayment of compensation due to the lack of deduction of optional insurance in the amount of \$235.00. Under the Federal Employees Group Life Insurance (FEGLI) program, most civilian employees of the federal government are eligible to participate in basic life insurance and one or more of the options.² The coverage for basic life is effective unless waived and premiums for basic and optional life coverages are withheld from the employee’s pay. When an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation to appellant because the Office must pay the full premium to OPM upon discovery of the error.³ As appellant has submitted no evidence

¹ *John E. Rowland*, 39 ECAB 1377, 1378 (1988).

² 5 U.S.C. § 870.

³ *Calvin W. Scott*, 39 ECAB 1031, 1036-37 (1988).

showing that she wanted to cancel optional life insurance, appellant is responsible for the optional insurance premiums not deducted from her compensation benefits.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault in the creation of the \$13,153.86 overpayment.

Section 8129(a) of the Act provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁴ The only exception to this requirement that an overpayment must be recovered is set forth 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.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must 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,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.322(a) of the implementing regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income; including compensation benefits, to meet current ordinary and necessary living expense; and (2) the individual’s assets do not exceed a 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. This base includes all of the individual’s assets not exempt from recoupment.

In the instant case, appellant provided financial information to the Office indicating that her assets exceeded a resource base of \$5,000.00 plus \$600.00 for each additional dependent. Therefore, recovery of the overpayment would not defeat the purposes of the Act.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that “Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant has not alleged, and the evidence does not demonstrate, that she relinquished a valuable right or changed her position for the worse in reliance on the

⁴ 5 U.S.C. § 8129(a).

⁵ 20 C.F.R. § 10.322(a).

failure to deduct health and option insurance benefits which formed the basis for the overpayment. As appellant has not shown that recovery would “defeat the purpose of the Act” or “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.⁶

The Board further finds that Office properly determined that appellant received an overpayment of compensation in the amount of \$1,791.71 because health benefit premiums were not deducted for the period January 14, 1990 through October 16, 1993.

In an August 16, 1993 memorandum to file, the Office noted that appellant had Aetna health benefits until that plan ceased. Appellant did not enroll in another plan. The Office stated that appellant was not entitled to coverage between January 13, 1990 and August 16, 1993. Appellant submitted leave and earnings statements indicating that no deductions were made for health or optional life insurance between the pay period ending July 10, 1993 and the pay period ending August 21, 1993.

Appellant completed a health benefits registration form on October 7, 1993 and indicated that she wished to transfer to enrollment code 104 effective January 14, 1990. The employing establishment noted that due to administrative error, appellant was not notified of enrollment opportunity for the 1990 open season. Appellant indicated that her family also had insurance coverage by a private company.

The Office did not deduct health benefits and optional life insurance benefits from compensation benefits paid from July 25 to October 16, 1993. The Office calculated that appellant received an overpayment in the amount of \$1,791.71 for health benefits code 104 from January 14, 1990 through October 16, 1993.

In a letter dated September 16, 1994,⁷ the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,791.74 as health benefits were not deducted from her compensation payments during the period January 14, 1990 through October 16, 1993. The Office found that appellant was not without fault in the creation of the overpayment. Appellant requested waiver of the \$1,791.74 overpayment on October 14, 1994 and completed a second overpayment questionnaire. By decision dated January 17, 1997, the Office finalized the overpayment decision. Appellant submitted a check in the amount of \$1,791.74 on February 10, 1997.

As noted previously, when underdeductions of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the

⁶ Appellant opted for early retirement with OPM benefits on October 3, 1994. With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act; *see Lewis George*, 45 ECAB 144, 154 (1993).

⁷ The Office also found that appellant had received an overpayment as she had received compensation for total disability while working part time. Appellant tendered a check in the amount of this overpayment. Appellant did not appeal this decision to the Board.

full premium to OPM when the error is discovered.⁸ Therefore, the Office properly found that an overpayment of compensation had occurred as appellant requested health benefits from January 14, 1990 and the Office did not make a payment for these benefits to OPM and as the record indicates that the employing establishment did not make such payment.⁹

The Board finds however that the Office improperly found that appellant was at fault in the creation of the \$1,791.71 overpayment and that it was therefore not subject to waiver.

Section 8129(a) of the Act¹⁰ provides that, where an overpayment of compensation has been made “because of an error or fact of 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.”¹¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations¹² provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. Section 10.320(c)¹³ of the Office’s regulations provides in relevant part:

⁸ *John E. Rowland, supra* note 1.

⁹ The Office transferred appellant’s health benefits to the OPM effective October 15, 1994.

¹⁰ 5 U.S.C. §§ 8101-8193, 8129(a).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.320(b).

¹³ 20 C.F.R. § 10.320(c).

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements.”

After consideration of all the particular circumstances in this case, the Board finds that the facts do not establish that appellant knew or should have been expected to know that she was accepting incorrect compensation amounts. OPM has taken the position that FEHB deductions from compensation payments must be paid retroactive to the date that the deductions ceased. This requires the Office to treat underdeductions of health benefit premiums as overpayments of compensation. There, however, is nothing in the record which should have alerted appellant that FEHB benefits should have been deducted from her compensation at the time she received the compensation. In fact the Office noted on August 16, 1993 that appellant was not entitled to coverage between January 13, 1990 and August 16, 1993. Appellant did not elect to receive health benefits until October 1993 and this election was made retroactive until January 1990. As appellant did not elect health benefits until after receiving the compensation benefits from January 14, 1990 to October 1993, she had no way of knowing at the time she received the payments that eventually the payments would be rendered retroactively incorrect. The case must, therefore, be remanded for the Office to consider appellant’s eligibility for waiver. After developing the issue of waiver as is necessary, the Office shall issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated May 19, 1997 is hereby affirmed. The Office's January 1, 1997 decision is hereby affirmed with regard to the fact of overpayment of compensation, is reversed with regard to the fault finding and is remanded to the Office for consideration of appellant's eligibility for waiver of the overpayment of compensation.

Dated, Washington, D.C.
January 14, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member