

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND K. LIPPOLD and DEPARTMENT OF THE NAVY,
NAVAL ORDINANCE STATION, Indian Head, MD

*Docket No. 99-394; Submitted on the Record;
Issued September 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$514.06 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of recovery of \$514.06; and (4) whether the Office properly determined that \$100.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for a disc herniation at L4-5, a herniated nuclear pulposis at L4-5 and a lumbar laminectomy and discectomy.

In a preliminary determination dated July 31, 1998, the Office found that appellant received an overpayment in the amount of \$514.06 because deductions for postretirement and basic life insurance premiums were not taken for the period from December 7, 1997 through July 18, 1998. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

By decision dated September 16, 1998, the Office finalized the overpayment determination. The Office found that appellant was not entitled to waiver of recovery of the overpayment as he had failed to respond to the overpayment notification or submit any financial information in support of the request for waiver. The Office stated that \$100.00 would be deducted from appellant's compensation each month until the overpayment was paid.

The Board finds that appellant received an overpayment in the amount of \$514.06.

The record shows that appellant chose to go on retirement disability on December 17, 1997 and opted to receive life insurance benefits on November 10, 1987.

In a calculation sheet dated July 31, 1998, the Office explained how it obtained the figure of \$514.06. It noted that appellant's weekly postretirement and basic life insurance premiums should have been deducted from December 7, 1997 through July 18, 1998, that appellant's post-retirement biweekly premium was \$26.52 and the basic life insurance biweekly premium was \$5.61. The Office therefore divided the number of days in the relevant time period, 224, by 14 days per pay period times \$26.52 to obtain a total postretirement deduction of \$424.31 and divided 224 by 14 days per pay period times \$5.61 to obtain a total basic life insurance deduction of \$89.75. The Office added the figures of \$89.75 and \$424.31 to determine the total premium figure of \$514.06 which was not deducted.

Under the Federal Employees Group Life Insurance (FEGLI) program, most civilian employees of the federal government are eligible to participate in basic life insurance with one or more options.¹ The coverage for basic life is effective unless waived and premiums for basic and optional life coverage are withheld from the employee's pay. Under the FEGLI program, insurance remains in effect until canceled and premiums due are to be deducted from the injured employees' compensation payments. The injured employee remains responsible for all insurance premiums. In this case, the record reveals, however, that premiums for appellant's basic life insurance and post-retirement insurance were not deducted from his compensation payments. Thus, an overpayment was created in the amount of \$514.06 by the underdeduction of premiums for the insurance appellant elected.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Act² provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.³ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.⁴

The implementing regulation⁵ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

¹ See *James Lloyd Otte*, 48 ECAB 334, 337 (1997).

² 5 U.S.C. § 8129(b).

³ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.320(b).

The record establishes that appellant was unaware that the Office was not deducting postretirement and basic life insurance premiums during the relevant time period and therefore the Office properly determined that appellant was without fault in the creation of the overpayment.

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

In the July 31, 1995 preliminary determination, the Office advised appellant that he should submit the appropriate financial information to establish whether he was eligible for a waiver. Appellant did not submit any financial information.

Section 8129(a) of the Act⁶ provides that, where an overpayment of compensation has been made “because of an error of fact or law” adjustments 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): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the office to waive the overpayment.⁸ 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 sections 10.322-.323 of the implementing federal regulations.

Section 10.322⁹ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet his current ordinary and necessary living expenses and the individual’s 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. For waiver under the “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.¹⁰

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ *James Lloyd Otte*, *supra* note 1 at 337; *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁹ 20 C.F.R. § 10.322.

¹⁰ *James Lloyd Otte*, *supra* note 1; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

In the present case, the Office determined that an overpayment in the amount of \$514.06 occurred from December 7, 1997 through July 18, 1998 due to the underdeducting of appellant's basic life insurance and post-retirement premiums from his compensation payments. Although appellant was provided with an opportunity, he did not submit any financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.¹¹ Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

The Board further finds that the Office properly withheld \$100.00 from continuing compensation payments to recover the overpayment.

Section 10.321(a) provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustments shall be made by decreasing subsequent payments of compensation, "having due regard to 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 resulting hardship upon such individual."

In the present case, appellant submitted no financial evidence to show that the monthly withdrawal of \$100.00 to recover the overpayment was unreasonable. In the absence of appellant's submitting additional evidence from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits, the Office may base its determination of the monthly rate of recovery on the information that is available.¹² Although the Office did not state on what it based its calculation of a monthly recovery rate of \$100.00 a month, computer printout sheets from the Employment Standards Administration show that appellant was receiving net monthly compensation payments of approximately \$1,700.00. Therefore, the Office's deduction of \$100.00 per month from appellant's continuing compensation payments to recover the overpayment is proper.

¹¹ *Richard S. Gumper*, 43 EAB 811, 817 (1992).

¹² *See Fred A. Cooper*, 44 ECAB 498, 506 (1993).

The decision of the Office of Workers' Compensation Programs dated September 16, 1998 is hereby affirmed.

Dated, Washington, D.C.
September 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member