U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL R. GRAHAM and DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Rockville, MD

Docket No. 01-1523; Submitted on the Record;
Issued May 7, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of $4,584.64 was created; and (2) whether the Office properly found appellant to be at fault in creating the overpayment.

In this case, on November 16, 1990 appellant, then a 33-year-old editorial assistant, filed a claim for traumatic injury alleging that on November 13, 1990 she slipped and fell in the performance of duty, injuring her lower back. On February 12, 1991 the Office accepted appellant's claim for lumbar strain and aggravation of lumbar disc disease and began paying all appropriate compensation benefits.[1] The record reflects that as of April 7, 1991 she was enrolled in the Federal Employee Health Benefit (FEHB) Program, Code Number E31.

By letter dated October 27, 2000, Kaiser Permanente, appellant's health care provider, informed her that a routine audit had revealed that, although she was enrolled under a family plan, her agency was only deducting a single premium. The letter advised appellant that, if she elected family coverage, she should contact her agency and have them correct her enrollment status. By letter dated November 14, 2000, she forwarded a copy of the Kaiser letter to the Office and asked them to correct her enrollment status. By letter of response dated November 21, 2000, the Office informed appellant that, effective November 5, 2000, her health plan enrollment had been changed to family coverage, retroactive to January 8, 1995, as requested. The Office asked her to complete a standard Form 2809 electing family coverage and further informed appellant that she would be contacted under separate letter as to any possible overpayment that may exist in her case. On December 18, 2000 she completed the SF 2809 form, electing family coverage and returned it to the Office.

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[1] After her injury, appellant returned to work half days beginning February 1991, but stopped work completely on February 27, 1991.

In a letter dated January 22, 2001, the Office advised appellant that a preliminary determination had been made that an overpayment of $4,584.64 was created. The Office stated that she had requested retroactive coverage from January 8, 1995 to November 4, 2000 and that the amount owed was the difference between the amount paid for single health benefits coverage and the cost of family coverage. With respect to fault, the Office made a preliminary finding that appellant was at fault, as she did not advise the Office of her family insurance coverage until she elected such coverage on December 18, 2000. The Office advised appellant of her right to a prerecoupment hearing and asked her to complete an overpayment recovery questionnaire.

On February 9, 2001 appellant requested a waiver of the overpayment and provided a completed overpayment recovery questionnaire, together with financial documentation. She further requested that a decision be made on the basis of the written evidence. Appellant stated that she had filled out the proper paperwork electing family coverage and had no idea that the proper premiums were not being deducted until Kaiser informed her of such in their October 27, 2000 letter, after which she immediately informed the Office. She further asserted that as both of her daughters and her husband received their insurance cards and as all bills for their medical care were paid, she was not aware that there was a problem. Finally, appellant asserted that, as she had direct deposit, she did not see the amount of her monthly checks and did not receive any statements from the Office as to what deductions had been made.

By decision dated February 21, 2001, the Office finalized the overpayment amount and the finding of fault.

The Board finds that an overpayment of $4,584.64 was created in this case as correct health benefit premiums were not deducted for the period January 8, 1995 to November 4, 2000.

The regulations of the Office of Personnel Management (OPM), which administers the 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 Stated Code, to OPM for deposit in the Employees Health Benefits Fund." (Emphasis added.)

The record indicates that deductions for self only health benefits were made from appellant's compensation benefits during the period January 8, 1995 to November 4, 2000, during which appellant was enrolled in family coverage. 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.[2] The amount of the overpayment due to lack of full deduction for health benefits is $4,584.64. Appellant does not dispute the occurrence of the overpayment or the amount, but rather asserts that she is not at fault in the creation of the overpayment.

On the issue of fault, the Board finds that the Office did not properly determine that appellant was at fault in creating the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act[3] 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."[4] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[5]

On the issue of fault, 20 C.F.R. § 10.433 provides that a claimant who has done any of the following will be found at fault in creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.[6] In this case, the Office apparently based its finding of fault on the grounds that appellant did not properly request a change in health benefits coverage from self-only to self and family until December 2000, when she completed the SF 2809, when she knew or should have known this information to be material. The Office noted that every year the Office sent out FEHB Plans to recipients of compensation and that each year recipients are advised that from November 8 through December 13 they have the opportunity to change plans or options or change from self-only to self and family. The Office further noted that, while recipients are asked to notify the Office if they wish to make any changes to their plan, appellant did not notify the Office of any change in health benefits until her letter dated November 14, 2000, in which she requested that her enrollment be changed to reflect family coverage. The record does not, however, contain sufficient evidence to support this conclusion. There is no evidence of record that appellant did in fact know that the health benefits deductions made from her compensation were incorrect or that she failed to properly notify the Office of her health benefits enrollment status. In addition, appellant asserted that she did in fact notify the Office of her request to change from self-only, to self and family coverage. In support of her assertion, appellant submitted a copy of her FEHB Registration Form, signed and dated November 25,

[2] *John E. Rowland*, 39 ECAB 1377, 1378 (1988).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8129(b).

[5] *Gregg B. Manston*, 45 ECAB 344 (1994).

[6] *Danny L. Paul*, 46 ECAB 282 (1994).

1994, in which she elected to change her coverage from E31, self-only, to E32, self and family. Appellant also asserted that she never before asked to change her health benefit enrollment option, as she thought it was correct. Both her daughters and her husband had received insurance cards and there had never been any problem regarding bill payment. In addition, the record reflects that appellant consistently and promptly updated the Office as to the status of her dependents, informing the Office when her daughters moved away from or back to, home and when she remarried. With respect to the "should have" known standard, the Office stated: "[y]ou reasonably should have been aware that your insurance carrier, Kaiser, was going to 'disenroll your dependents' from the plan as they did not have the proper paperwork to continue your family coverage. Kaiser stated in their letter dated October 27, 2000, '[i]f your agency does not send us appropriate documentation verifying your dependents enrollment, we will disenroll your dependents from this Plan….' Thus, given the plan's lack of evidence to support your family coverage election and this Office allowing you retroactive change from single to self and family to keep your coverage it is found that you reasonably were aware that you were in receipt of family coverage while being charged for single coverage…." The Board notes that the letter from Kaiser dated October 27, 2000 only establishes that appellant was aware, as of that date, that the proper health benefit premiums were not being deducted from her compensation benefits. In addition, upon receipt of this letter, appellant immediately contacted the Office and asked that her status be corrected. In the absence of probative evidence establishing that appellant knew or should have known that her health benefit premium deductions were incorrect for the period January 8, 1995 to November 4, 2000, the Board finds that the Office has not properly established that appellant was at fault in creating the overpayment in this case.

The decision of the Office of Workers' Compensation Programs dated February 21, 2001 is affirmed with respect to fact of and amount of the overpayment and set aside with respect to fault. The case is remanded for consideration of waiver of the overpayment.

Dated, Washington, DC
May 7, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member