

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFRED PRONOVOST and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 03-1170; Submitted on the Record;
Issued December 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$386.80 was created; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, denied waiver.

This case was previously on appeal before the Board.¹ In a June 25, 1987 decision, the Board affirmed a March 11, 1986 decision, finding that the Office properly determined appellant's loss of wage-earning capacity based upon his ability to perform the duties of a service clerk. The law and the facts as set forth in the previous Board decision are incorporated herein by reference.² Appellant continued to receive benefits and by letter dated July 2, 2002, Mark Gardner, National-Secretary Treasurer of the National Postal Mail Handlers Union (NPHMU), requested termination of appellant's enrollment in the Mail Handlers Benefit Plan (MHBP) for health insurance because he had failed to pay union dues, which was required to maintain enrollment. Mr. Gardner requested that appellant's MHBP enrollment be terminated at the end of the pay period in which the notice was received. The letter advised that on June 14, 2002 a termination letter was mailed to appellant advising him that his health plan enrollment would be terminated if payment of union membership dues was not received within 15 days of the letter. By letter dated September 6, 2002, Mr. Gardner advised the Office that appellant had paid his delinquent dues on September 6, 2002 and was restored to active membership status. He requested that the Office provide continued coverage in the MHBP and allow appellant to reenroll if his membership had been cancelled.

In a letter dated December 5, 2002, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of

¹ Docket No. 86-1557.

² The Office had accepted that appellant had sustained an employment-related lumbosacral strain and herniated disc at L5.

\$396.80, because appellant did not pay his union dues and his health benefits had been terminated. The Office stated that it had been notified by the NPMHU that appellant's health benefits were cancelled effective August 11, 2002 and, therefore, the Office did not make deductions for health benefits for the period August 11 to October 5, 2002. The Office indicated that upon notification appellant had paid his union dues and his health benefits were restored retroactively to August 11, 2002. The record indicates that premiums for the period totaled \$396.80. The Office further advised appellant that he was at fault in the creation of the overpayment because he was aware that his entitlement to health benefits was based upon being a union member and paying dues. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods, including a request for a telephone conference, a request for a written review of the record or a request for a precoupment hearing. If appellant wished a waiver of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire.

Appellant did not respond. By decision dated March 28, 2003, the Office finalized the overpayment decision, finding that appellant was at fault in the creation of the overpayment and he was not entitled to waiver.

The Board finds that the Office properly determined that an overpayment of \$396.80 occurred due to failure to deduct health insurance premiums from August 11 to October 5, 2002.

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits (FEHB) 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's share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs 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(d) 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."

The record in this case indicates that no deductions were made for health benefits from appellant's compensation benefits during the period August 11 to October 5, 2002. The Office determined that his MHBP premiums for that period totaled \$396.80, which the Office provided to OPM after appellant paid his dues and his health benefits were reinstated retroactively. He received an overpayment in compensation in that amount. The Office determined that the overpayment resulted from appellant's failure to pay his required membership dues, as a result of which his entitlement to health benefits in the MHBP ceased health benefits premiums were not

deducted by the Office during the above period. The union subsequently advised the Office that, appellant paid his dues and his health benefits should be reinstated to prevent a gap in health care coverage.

The Board has previously 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.³ The amount of the overpayment due to lack of deduction for health benefits in the instant case, is \$396.80. The Board, therefore, finds that the Office properly determined that an overpayment in the amount of \$396.80 was created.

Section 8129(a) of the Federal Employees' Compensation Act⁴ provides that where an overpayment of compensation has been made "because of error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁵ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."⁶ Thus, the Office may not waive the overpayment of compensation in this case, unless appellant was without fault.

In determining whether an individual is at fault, section 10.433 of the Code of Federal Regulations 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 he or she knew or should have known to be incorrect: or
- (2) Failed to furnish information he or she knew to be material; or
- (3) Accepted a payment which he or she knew or should have been expected to know was incorrect."⁷

In the instant case, the Office relied upon the third criteria, noting that appellant was aware that his entitlement to health benefits was based upon being a union member and paying union dues, which he had done for years. The Office found appellant to be at fault. The Board agrees. The record reflects that appellant failed to pay his union dues in a timely manner and that proper deductions for his health benefits were not made during the period August 11, 2002, following the reinstatement of benefits on October 5, 2002. The record reflects that appellant's

³ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁴ 5 U.S.C. § 8101-8193.

⁵ 5 U.S.C. § 8129.

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433(a) (January 1999).

weekly pay rate was \$298.25 and the Office did not make health benefit deductions for the time period from August 11 to October 5, 2002. In addition, appellant's total payment for the time period was \$2,178.00, instead of \$1,781.20. This time period equates to a period of eight weeks. During this timeframe, instead of receiving the regular pay of \$298.25, minus any deductions, appellant received an additional \$49.60 a week for 8 weeks. The Board finds that he accepted a payment which he knew or should have been expected to know was incorrect. As appellant accepted a payment which he knew or should have known to be incorrect, the Office correctly determined that appellant was at fault and not entitled to waiver.⁸

The March 28, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ See *Frederick C. Smith*, 48 ECAB 132 (1996) (no waiver is possible if the claimant is with fault in helping to create the overpayment).