

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

LARRY E. RICHARDSON, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SYSTEMS COMMAND STATION,
Seal Beach, CA, Employer**

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**Docket No. 03-1065
Issued: April 27, 2004**

Appearances:
Larry E. Richardson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 20, 2003 appellant filed a timely appeal from a March 5, 2003 overpayment decision of the Office of Workers' Compensation Programs. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue. The Board's jurisdiction is limited to review of the evidence that was before the Office at the time it issued its final decision. The Board may not consider new evidence on appeal.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,084.21 due to incorrect deductions made for health and life insurance; (2) whether appellant is entitled to waiver of the overpayment; and (3) whether the Office properly directed recovery of the overpayment by deducting \$50.00 every four weeks from appellant's continuing compensation.

¹ See 20 C.F.R. § 501.2(c); *Ricky S. Storms*, 52 ECAB 349 (2001).

FACTUAL HISTORY

On May 7, 1996 appellant, then a 48-year-old materials handler, was injured in the performance of duty. The Office accepted his traumatic injury claim for a lumbar strain and herniated disc with L4-5 laminectomy. Appellant last worked on March 1, 1999 and has received compensation on the periodic rolls for total disability. He retired effective April 5, 2002.

The record contains a Standard Form 2817 (Life Insurance Election), which was completed by appellant on December 22, 1986. He elected basic life and option B additional insurance. On November 4, 2002 the Office made a preliminary determination that an overpayment was created in the amount of \$1,084.21 because it had neglected to deduct health benefits, optional life and basic insurance premiums from appellant's compensation for the period April 10 through October 5, 2002. The Office determined that appellant was without fault in the creation of the overpayment. Appellant was informed that he could request waiver of the overpayment by taking one of three actions within 30 days: (1) request a telephone conference; (2) request a final decision on the written record; or (3) request a precoupment hearing before a representative of the Branch of Hearings and Review. The Office further requested that appellant complete an overpayment questionnaire setting forth his income and expenses.

Appellant completed the overpayment questionnaire indicating that he had \$5,000.00 in cash and \$5,000.00 in a checking account. He listed household expenses as \$650.00 for rent, \$100.00 for food, \$40.00 for gas, \$60.00 for electric, \$200.00 for maintenance to his car, \$5800 for the telephone, \$50.00 for gasoline and \$400.00 per year for car insurance.²

In a decision dated March 5, 2003, the Office finalized the overpayment in the amount of \$1,084.21 and determined that appellant was not entitled to wavier. The Office ordered repayment by withholding \$50.00 a month from appellant's continuing compensation effective March 22, 2003.

LEGAL PRECEDENT -- ISSUE 1

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits (FEHB) Program, provide guidelines for the registration, enrollment and continuation of enrollment for federal employees. Section 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due the United States in the amount of the proper employee withholding required for that pay period.”³

² This would equal approximately \$33.00 per month.

³ 5 C.F.R. § 890.502(b)(1); *see Jennifer Burch*, 48 ECAB 633 (1997).

In addition section 890.502(d) provides:

“An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or *compensation* must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”⁴ (Emphasis added.)

If an employee becomes entitled to benefits from the Office for a job-related injury or illness, which prevents him or her from working, the employee may continue his or her Federal Employee Group Life Insurance (FEGLI) coverage (basic life) as a “compensationeer” without cost if the employee is in receipt of compensation; is unable to return to duty; and the employee has been insured under the FEGLI Program for:

“(a) The five years of service immediately preceding the date he/she becomes entitled to benefits under the Federal Employees’ Compensation Act, or

“(b) The full period(s) of service since the employee’s first opportunity to be insured, if less than five years.”⁵

An employee retains the optional life insurance while in receipt of compensation if the employee is eligible to continue the basic insurance and if, in addition, the optional insurance has been in force for no less than:

“(1) The full period or periods of service during which the optional insurance was available to the employee; or

“(2) The five years of service immediately preceding the beginning date of entitlement to compensation.”⁶

The full cost of optional insurance shall be withheld from compensation for any period prior to the employee’s 65th birthday during which he or she receives compensation.⁷

When an under-withholding health insurance, basic life, or optional life insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to the OPM when the error is discovered. Such overpayment is subject to the waiver provisions of the Federal Employees’ Compensation Act as well as to other statutes and regulations relative to overpayments and collections of debt.⁸ For an

⁴ 5 U.S.C. § 890.502(d); *Jennifer Burch*, *supra* note 3.

⁵ *Glen B. Cox*, 42 ECAB 703 (1991).

⁶ *Id.*

⁷ *Glen B. Cox*, *supra* note 5.

⁸ *See Ian Mansom Graham*, 40 ECAB 1103 (1989).

employee to be found at fault in creating the overpayment, the evidence must establish that the employee knew or should have known that the Office was not deducting the premiums, and that it should have been deducting the premiums from his or her compensation checks.⁹

ANALYSIS -- ISSUE 1

The Board finds that the Office incorrectly found that an overpayment occurred in this case in the amount of \$1,084.21. The record establishes that the Office was notified by OPM that appellant had elected to receive coverage for health benefits, basic life and optional insurance. Under 5 U.S.C. §§ 890.502(b)(1) and 890.502(d), appellant was responsible for payment of the cost of his share of the enrollment in his health benefits plan and those payments should have been made by the Office through deductions from his compensation. The Office properly found that an overpayment occurred in the amount of \$669.57 when it neglected to deduct health benefit premiums for the period of April 10 through September 7, 2002. Similarly, since appellant was eligible to continue his basic insurance and his optional insurance had been in force for no less than five years prior the beginning date of his entitlement to disability compensation, the total amount of his optional insurance premiums should have been withheld from his compensation and created an overpayment in the amount of \$341.25 for the period of April 10 through September 7, 2002 when those deductions were not made by the Office.

The Board, however, notes that the Office was not required to deduct appellant's basic life insurance premiums. The record establishes that appellant had five years of service immediately preceding the date he became disabled; therefore, he was entitled to continue his basic life insurance without cost or without deductions from his compensation. The total amount of \$73.39 for nondeduction of basic life insurance does not constitute an overpayment.

The Office calculated the overpayment by adding together the total premiums to reach the amount of \$1,084.21 ($\$669.57 + \$341.25 + \$73.39 = \$1,084.21$). The Board must subtract the amount of \$73.39 for non-deduction of basic life insurance from the overpayment amount and finds that the total amount of overpayment in the case is \$ 1010.82.

LEGAL PRECEDENT – ISSUE 2

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁰ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹¹ Since the Office found appellant to be without

⁹ See *Ian Mansom Graham*, *supra* note 6.

¹⁰ *Carroll R. Davis*, 46 ECAB 361 (1994); see also *Robert Atchison*, 41 ECAB 83 (1989).

¹¹ 5 U.S.C. § 8129(b).

fault in the creation of the overpayment,¹² in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹³ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴ An individual's assets must 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.¹⁵

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.¹⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the creation of the overpayment and, therefore, considered waiver. Appellant completed an overpayment questionnaire indicating that he has total monthly expenses of \$1,183.00.¹⁷ The record establishes that he receives \$1,153.46 in monthly compensation. As previously discussed, recovery of the overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses. The Office recognizes an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by

¹² The Board affirms that appellant was without fault in the creation of the overpayment since the Office acknowledged that several of appellant's benefit statements had been returned for the wrong address; therefore, it seemed reasonable that appellant would not have been aware that the deductions for health and life insurance were not being made.

¹³ 20 C.F.R. § 10.436 (1999).

¹⁴ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁵ See *Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁶ 20 C.F.R. § 10.437 (1999).

¹⁷ The Board's calculation of monthly expenses differs from the Office's determination of \$1,191.13.

more than \$50.00. Appellant also reported that he had \$5,000.00 in cash and \$5,000.00 in a checking account. The amount in appellant's checking account alone is in excess of the resource limit of \$3,000.00 for recovery of overpayment. Accordingly, the Board concludes that recovery would not defeat the purposes of the Act nor would it be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 3

The method by which the Office may recover overpayments is defined by regulation at section 10.441(a), which provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.”¹⁸

ANALYSIS -- ISSUE 3

With respect to the Office's decision to deduct \$50.00 every four weeks from appellant's continuing compensation payments, the Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must take into account 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 hardship.” It may be impossible to eliminate all financial hardship given appellant's reported income and monthly expenses. However, section 10.441(a) does not require the elimination of financial hardship. The Office is required to take into account certain factors “so as to minimized any hardship.” The Board finds that the Office reasonably concluded that a repayment schedule of \$50.00 every four weeks, deducted from appellant's continuing compensation, would minimize any resulting hardship while effecting recovery of the overpayment.

CONCLUSION

The Board finds that an overpayment occurred in this case in the amount of \$1,010.82. The Board also finds that while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver. The Board further finds that the Office properly directed recovery of the overpayment by deducting \$50.00 every four weeks from appellant's continuing compensation until such time as the amount of \$1,010.82 is repaid.

¹⁸ 20 C.F.R. § 10.441(a) (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 5, 2003 is affirmed as modified.

Issued: April 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member