

FACTUAL HISTORY

On November 2, 1994 appellant, then a 49-year-old licensed practical nurse, filed a claim for traumatic injury alleging that she sustained injuries to her back in the performance of duty. She explained that, while sitting in a chair, she pushed back from a table, causing the chair to flip over with her to fall to the floor and the chair to strike her in the back. Appellant stopped work on November 2, 1994 and returned to modified duty on November 7, 1994. She continued to work in a modified position until April 29, 1996 when the employing establishment was no longer able to accommodate her. The Office accepted appellant's claim for lumbar and thoracic strains and paid appropriate compensation.

In a preliminary determination dated July 9, 2003, the Office found that an overpayment in the amount of \$1,942.34, had occurred from October 21, 2000 through June 14, 2003, because on May 1, 2003 the Office of Personnel Management (OPM) informed the Office that it should begin withholding appellant's basic life insurance and post-retirement premium deductions effective October 21, 2000. The Office updated its periodic rolls to include the deduction effective June 15, 2003, however, as the Office had not deducted appellant's post-retirement life insurance premiums for the period October 21, 2000 to June 14, 2003, an overpayment was created. The Office found that appellant was without fault in the creation of the overpayment. The Office informed her of her options, including that if she disagreed with the fact or the amount of the overpayment she could submit new evidence to support her contention or she could request a waiver of recoupment within 30 days of receipt of the Office's letter and submit appropriate evidence to justify her request.

By decision dated November 19, 2003, the Office finalized the overpayment determination. The Office noted that, as appellant had not responded to its preliminary determination or provided any financial information, she was not entitled to waiver of the overpayment. The Office concluded that 10 percent of the overpaid amount, approximately \$194.00, would be withheld from her continuing compensation payments until the overpayment was repaid.

LEGAL PRECEDENT -- ISSUE 1

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.¹ The coverage for basic life is effective unless waived² and premiums for basic and optional life coverages are withheld from the employee's pay.³

¹ 5 C.F.R. § 870.201.

² 5 C.F.R. § 870.204(a).

³ 5 C.F.R. § 870.401(a).

The Board notes that, when an under-withholding 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 the OPM upon discovery of the error.⁴

ANALYSIS -- ISSUE 1

By letter dated May 1, 2003, the OPM notified the Office that it should have withheld appellant's basic life insurance and post-retirement premium deductions effective October 21, 2000. From October 21, 2000 through June 14, 2003, the bi-weekly premium for basic life insurance was \$4.19 and the bi-weekly premium for the post-retirement premium was \$25.38. The number of days between October 21, 2000 and June 14, 2003 was divided by 14, the result was multiplied by the applicable premiums and the two premiums were added together equaling \$1,942.34. The Office, therefore, correctly found that appellant received an overpayment in the amount of \$1,942.34, when the Office underdeducted basic life insurance and post-retirement premiums from appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Federal Employees' Compensation Act⁵ 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 would be against equity and good conscience."⁶ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁷ In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to 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;
- (2) Failed to provide information which he or she knew or should have known to be material; or

⁴ 5 C.F.R. § 872.401(h); see *James Lloyd Otte*, 48 ECAB 334, 337 (1997) (finding that appellant was responsible for basic life insurance premiums that were not deducted from his compensation, resulting in an overpayment).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129.

⁷ See *Diana L. Booth*, 52 ECAB 370 (2001) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

(3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”⁸

ANALYSIS -- ISSUE 2

The evidence establishes that the overpayment occurred because the Office under deducted life insurance premiums from October 21, 2000 through June 14, 2003. Appellant did not know and had no reason to know that the amount being deducted was incorrect. Therefore, the Office properly found that she was without fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Federal Employees’ Compensation Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.⁹ The only exception to this requirement must meet the tests 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 this subchapter or would be against equity and good conscience.”¹⁰ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹¹

ANALYSIS -- ISSUE 3

In this case, appellant was found without fault in creating the overpayment because the Office failed to make the proper insurance premium deductions. To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436 of Office regulation:

“(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current 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. A higher amount is specified for a beneficiary with one or more dependents.”¹²

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ 5 U.S.C. § 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Anthony V. Knox*, 50 ECAB 402, 409 (1999).

¹² 20 C.F.R. § 10.436.

Section 10.437 of the regulation covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”¹³

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁴ The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment.¹⁵ The Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.¹⁶

For waiver under the first 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 a specific resource base. An individual is deemed to need substantially all

¹³ 20 C.F.R. § 10.437.

¹⁴ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹⁵ See *Howard R. Nahikian*, 53 ECAB ___ (Docket No. 01-138, issued March 4, 2002) (finding that waiver of recovery of the overpayment is not automatic because appellant is without fault in creating it).

¹⁶ *Linda Hilton*, 52 ECAB 476 (2001). Pursuant to the second standard, the evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Nor did appellant claim any lost right or detrimental reliance; see *Christine P. Burgess*, 50 ECAB 444, 449 (1999) (appellant sustained no loss due to detrimental reliance because her compensation was offset by her wage-earning capacity).

of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses, and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁸ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁹

In this case, appellant failed to submit any financial information or respond to the Office overpayment. The preliminary determination of overpayment dated July 9, 2003 asked appellant to submit documentation, such as copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed. The Office letter explained that this information would be used to determine whether to waive the overpayment or, if not waived, how to collect repayment. Because appellant failed to submit supporting financial documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment for this reason.²⁰

LEGAL PRECEDENT -- ISSUE 4

Section 10.441(a) states in relevant 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 factors, so as to minimize any hardship.”²¹

¹⁷ *Jan K. Fitzgerald*, 51 ECAB 659 (2000); see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹⁸ 20 C.F.R. § 10.438(a).

¹⁹ 20 C.F.R. § 10.438(b).

²⁰ See *John Skarbek*, 53 ECAB ____ (Docket No. 01-1396, issued June 21, 2002) (finding that the Office properly denied waiver of recovery of the overpayment because appellant failed to submit financial information supporting his claimed monthly income and expenses).

²¹ 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 4

Appellant received \$1,093.78 in wage-loss compensation every four weeks. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.²² Appellant failed to respond to the preliminary notice of overpayment and the record contains no evidence that the Office abused its discretion in finding that she could repay \$194.00 every four weeks.

Further, the record demonstrates that the Office gave due regard to the factors enumerated in section 10.441(a)²³ and there is no indication that the Office failed to consider other factors to ensure that any resulting financial hardship would be minimal. Therefore, the Board finds that the Office acted within its discretion in requiring appellant to repay the overpayment at the rate of \$194.00 every four weeks from her continuing compensation.²⁴

CONCLUSION

For the foregoing reasons, the Board finds that appellant received an overpayment in the amount of \$1,942.34. The Board further finds that the Office properly found that she was without fault in the creation of the overpayment, that the Office acted within its discretion in denying waiver of recovery of the overpayment and that the Office properly determined that appellant should repay the overpayment by deducting 10 percent of the overpaid amount every four weeks from her continuing compensation.

²² *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

²³ *Supra* note 20.

²⁴ *See Donzel R. Yarbour*, 50 ECAB 179, 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 19, 2003 is affirmed.

Issued: April 26, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member