

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

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**EDWARD M. LOPEZ, Appellant** )  
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**and** ) **Docket No. 04-392**  
 ) **Issued: August 26, 2004**  
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**DEPARTMENT OF COMMERCE, NATIONAL** )  
**WEATHER SERVICE, Bohemia, NY, Employer** )  

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*Appearances:*  
*Edward M. Lopez, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On November 25, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' overpayment decision dated May 13, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$1,023.84 for the period May 1, 1994 through May 17, 2003 because insurance premiums were not deducted from his compensation; and (2) whether the Office abused its discretion in denying waiver of the overpayment.

**FACTUAL HISTORY**

Appellant, a 57-year-old construction representative, injured his lower back on March 8, 1989 when he slipped on a patch of ice. He filed a claim for benefits on March 18, 1989 which the Office accepted for a cervical strain and synovitis of the left knee.

By letter dated February 27, 2002, the Office of Personnel Management (OPM) advised the Office that, although appellant's commencing date for postretirement life insurance deductions was May 1, 1994 no such deductions had been made from appellant's postretirement compensation checks. The premiums were based on the "No reduction" to Basic option which appellant elected in choosing his postretirement life insurance, with a "Basic" salary of \$46,000.00. The letter stated that the Office had been informed on two occasions that such deductions should be made, on May 6, 1994 and May 5, 2000, but that the deductions were not reflected in appellant's compensation. In a letter to the Office dated November 26, 2002, OPM reiterated that the postretirement deductions still had not been made.

On May 13, 2003 the Office issued a preliminary determination that an overpayment of compensation had been created in the amount of \$1,023.84 for the period May 1, 1994 through May 17, 2003 because postretirement life insurance premiums had not been deducted from his Federal Employees' Compensation Act benefits. The Office found that appellant was without fault in the matter because he could not have been aware that the payments he had been receiving were incorrect. The Office advised that, if he disagreed with the fact or amount of the overpayment, he could submit new evidence in support of his contention. The Office further advised appellant that, when he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the Act or would be against equity and good conscience. The Office informed appellant that he had the right to request a precoupment hearing on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the May 13, 2003 letter. He did not respond to this request within 30 days.

In a decision finalized on October 20, 2003, the Office found that appellant was not entitled to waiver of the overpayment. The Office noted that he had been advised by letter dated May 13, 2003, that a preliminary finding had been made that an overpayment had occurred, but that appellant did not respond.

### **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 with one or more options. The coverage for basic life is effective unless waived and premiums for basic and optional life coverage are withheld from the employees' pay. With certain restrictions, insurance benefits continue postretirement. Insurance remains in effect until canceled and premiums due are to be deducted from the injured employees' compensation payments.<sup>1</sup> When FEGLI premiums, including postretirement insurance premiums are incorrectly withheld, the entire amount of the unpaid premium is deemed an overpayment of compensation because the Office must pay the full premium to the OPM upon discovery of the error.<sup>2</sup>

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<sup>1</sup> 5 C.F.R. §§ 870-73.

<sup>2</sup> See *James Lloyd Otte*, 48 ECAB 334, 337 (1997).

### ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,023.84, for the period May 1, 1994 through May 17, 2003. The record shows that he received compensation during the period in question and postretirement life insurance premiums were not deducted from his compensation. The Office calculated the amount of overpayment by taking appellant's salary at the time of his retirement, \$43,685.00, rounding it off to \$44,000.00 and adding another \$2,000.00 for a total final salary of \$46,000.00. Pursuant to FECA Bulletin #93-5, the Office divided \$46,000.00 by \$1,000.00, which amounted to 46 and multiplied this figure by \$0.94, the amount mandated under the "No reduction" provision, to arrive at a biweekly premium of \$4.32. The Office multiplied 4.32 times 232, the number of biweekly periods between May 1, 1994 through May 17, 2003, to arrive at the final overpayment total of \$1,023.84. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period due to the nonwithholding of FEGLI premiums.

### LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act<sup>3</sup> provide that an overpayment must be recovered 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." (Emphasis added.) Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then 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 10.436<sup>4</sup> and 10.437<sup>5</sup> of the implementing federal regulation.

Office regulation provide 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.<sup>6</sup> The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than \$50.00.<sup>7</sup> Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must

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<sup>3</sup> 5 U.S.C. § 8129(a)-(b).

<sup>4</sup> 20 C.F.R. § 10.436.

<sup>5</sup> 20 C.F.R. § 10.437.

<sup>6</sup> *Frederick Arters*, 53 ECAB \_\_ (Docket No. 01-1237, issued February 27, 2002).

<sup>7</sup> *Id.*

show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

In the instant case, appellant did not submit any information regarding his financial situation within 30 days in response to the Office's May 13, 2003 preliminary overpayment determination.<sup>9</sup> He failed to submit evidence showing that he needs substantially all of the current monthly income to meet living expenses as requested by the Office in its May 13, 2003 letter. Therefore, appellant does not qualify for waiver under the "defeat the purpose of the Act" standard.<sup>10</sup> Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from May 1, 1994 through May 17, 2003. Accordingly, the Office properly found that his failure to respond to its May 13, 2003 letter, by submitting the requested financial information after informing him that he had 30 days in which to respond and submit evidence supporting a waiver was sufficient grounds to find that he does not qualify for waiver. Pursuant to its regulation, the Office, therefore, did not abuse its discretion by issuing its October 20, 2003 final decision denying waiver of recovery of the overpayment in the amount of \$1,023.84.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,023.84, for the period May 1, 1994 through May 17, 2003 because insurance premiums were not deducted from his compensation. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment.

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<sup>8</sup> The Office Procedure Manual provide that an individual's assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, *etc.* Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

<sup>9</sup> The Office's Federal regulation provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets. Failure to submit the requested information within 30 days of the request will result in a denial of waiver. *See* 20 C.F.R. § 10.438. *See also* *Demitri J. Fasi*, 49 ECAB 278 (1998).

<sup>10</sup> *See Nina D. Newborn*, 47 ECAB 132 (1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member