United States Department of Labor
Employees' Compensation Appeals Board

WILMA J. GONZALES, Appellant	)	
	)	**Docket No. 04-1503**
and	)	**Issued: December 1, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Fort Lyon, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 20, 2004 appellant filed a timely appeal of a March 3, 2004 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant received an overpayment of $2,765.10 from January 1, 2001 to January 25, 2003; (2) whether the Office properly denied waiver of the overpayment; (3) whether the Office properly required repayment of the overpayment by deducting $100.00 from her continuing compensation payments.

FACTUAL HISTORY

On January 28, 1973 appellant, then a 41-year-old nursing assistant, filed a claim alleging that on December 10, 1972 she injured her back when she slipped and fell on ice. The Office accepted that appellant sustained a ruptured intervertebral disc at C6-7 and an aggravation of degenerative disc disease, and authorized an anterior cervical fusion at C6-7. Appellant stopped work on January 13, 1973 and worked intermittently thereafter. She retired on a medical disability on October 10, 1973.[1] Appellant returned to the employing establishment on a part-time basis on September 12, 1983 and stopped working on September 11, 1992.

The Federal Employees' Health Benefits Program (FEHB) issued a notification of a change in health benefits enrollment dated September 11, 1992 and advised that appellant's health benefits were terminated in error effective September 11, 1992, and that coverage would be transferred to the Office of Workers' Compensation Programs. After inquiries from the Office in April and July 1997, the employing establishment provided a statement of withholding of health benefit premiums for appellant showing that benefits were withheld from December 5, 1987 through May 30, 1992.

On August 15, 2001 the Mail Handlers Benefit Plan Enrollment Services notified appellant that there were discrepancies in their records with regard to her health benefits' coverage. The records revealed that appellant was enrolled in the Mail Handlers Benefit Plan; however, the enrollment information provided by the payroll office did not show appellant as being enrolled in the plan or that deductions were made from her compensation. Enrollment services requested that appellant send documentation confirming her enrollment.

In a letter to the Office dated January 17, 2002, appellant indicated that prior to her retirement in 1992 the Office of Personnel Management (OPM) informed her that she was eligible for workers' compensation benefits or disability retirement and requested that she chose which benefit she preferred to receive. Appellant elected workers' compensation benefits and was advised that her health and life insurance benefits would be deducted by the Office. In correspondence dated January 22, 2002, the Office advised appellant that her health insurance coverage was terminated effective October 20, 1992 and that premiums were not withheld from her compensation checks. In letters dated February 19 and October 22, 2002, appellant informed the Office that she was unaware that she was not covered by health insurance and indicated that her medical claims had been paid on a timely basis since 1992 by the Mail Handlers Benefit Plan.

In a letter dated February 3, 2003, the Office notified appellant that her benefits would be reinstated with the Mail Handlers Benefit Plan effective January 1, 2001. The Office noted that January 1, 2001 was the effective date of reinstatement because the Mail Handlers Benefit Plan statute of limitations would provide coverage only to that date.

[1] The record reflects that appellant filed a claim for a shoulder injury, claim number 120116870. However, this claim is not before the Board at this time.

In a preliminary overpayment determination dated March 5, 2003, the Office advised appellant that she had received a $2,765.10 overpayment because health insurance premiums were not deducted for the period January 1, 2001 through January 25, 2003. The Office made a preliminary finding that appellant was without fault in creating the overpayment. The Office advised appellant that, if she believed she should receive a waiver of the overpayment, she should complete a financial recovery questionnaire form and submit documents such as income tax returns, bank statements, bills, canceled checks, pay slips and other records to support her claimed income and expenses.

On March 25, 2003 appellant requested waiver of the overpayment and submitted the overpayment questionnaire. Appellant listed monthly income of $1,854.00 and monthly expenses of $1,801.00.

By letter dated June 10, 2003, the Office notified appellant that page three of the questionnaire was not completed and advised that this information must be provided for consideration of waiver of the overpayment of benefits. The Office specifically noted that appellant did not provide information regarding the ownership of valuable property, real property, cash or savings on hand.

Appellant, through her attorney, indicated that the Office and Mail Handlers Benefit Plan were negligent for failing to deduct the proper medical insurance benefits for the period of January 1, 2001 to January 25, 2003. Appellant further indicated that she relinquished a valuable right as she was entitled to Medicare coverage but neither she nor her providers made application for the payment because the Mail Handlers Benefit Plan was paying her claims. Subsequently, when the error surfaced, Medicare refused payment because the claim was not timely presented. Appellant advised that she incurred debt in the form of unpaid medical claims.

By decision dated March 3, 2004, the Office found that appellant received an overpayment of compensation in the amount of $2,765.10 that occurred because health benefit premiums were not deducted from January 1, 2001 to January 25, 2003. The Office found that she was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted. The Office noted that the overpayment questionnaire was incomplete and that appellant did not provide information regarding the ownership of valuable property or real property and also failed to note whether she had cash or savings on hand. The Office dismissed appellant's claim that she relinquished a valuable right as a result of the failure to deduct the insurance premiums and incurred debt in the form of unpaid hospital bills. The Office noted that appellant failed to list any debts on the overpayment questionnaire and failed to respond to the Office's letter of June 10, 2003 requesting that she complete the entire overpayment questionnaire for full financial disclosure. The Office found that the sum of $100.00 would be withheld from her continuing compensation effective April 17, 2004.

LEGAL PRECEDENT -- ISSUE 1

The regulations of the OPM, which administers the 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 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."[2]

In addition, 5 C.F.R. § 890.502(c) 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 title 5 United States Code, to OPM for deposit in the Employees' Health Benefits Fund."[3]

ANALYSIS -- ISSUE 1

In this case, deductions for health insurance premiums were not taken from appellant's compensation payments for the period January 1, 2001 to January 25, 2003. Although she no longer worked for the employing establishment, she carried health benefits which she had previously elected while receiving compensation for wage loss due to the employment-related injury.[4] The Office calculated that health benefits of $2,765.10 should have been deducted from appellant's compensation during the above period. As no health benefit deductions were made from her compensation during that time period and there is no evidence that appellant cancelled her health benefits enrollment, the Board finds that an overpayment was created in the amount of $2,765.10 due to the underwithholding of health insurance premiums. Appellant does not dispute that she received the overpayment in question nor does she dispute the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

> "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

[2] *See* 5 C.F.R. § 890.502(a)(1).

[3] *See* 5 C.F.R. § 890.502(c).

[4] *See supra* note 2.

> adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[5] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[6]

Sections 10.441(a) of Title 20 of the Code of Federal Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides "[a]djustment or recovery by the United States may not be made when incorrect payment had 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."[7]

Section 10.436 of Title 20 of the Code of Federal Regulations[8] provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

> "(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [Federal] FECA monthly benefits) to meet current ordinary and necessary living expenses; and
>
> "(b) The individual's assets do not exceed the 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."[9]

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus $50.00.[10]

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in

---

[5] 5 U.S.C. § 8129(b).

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

[7] *Id*. at § 8129(b).

[8] 20 C.F.R. § 10.436.

[9] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (September 1994).

[10] *Id.*

attempting to repay the debt, with "severe financial hardship" determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.[11] To establish a change in position for the worse, the individual must show that he made a decision she otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose. In making such a decision, the individual's present ability to repay the overpayment is not considered.[12]

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. Because she is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

Following appellant's request for a waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act or would be against equity and good conscience. The information provided by appellant in the questionnaire claimed that she had monthly expenses which included, $550.00 for rent or mortgage, $300.00 for food, $75.00 for clothing, $226.00 for telephone, electricity and gas, totaling $1,801.00. The questionnaire further noted that appellant earned $1,854.00 in monthly compensation.[13] On June 10, 2003 the Office notified appellant that page three of the questionnaire was incomplete as she did not provide information regarding the ownership of valuable property or real property and also failed to note whether she had cash or savings on hand. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act.[14] Section 10.438 of the regulations mandates that failure to furnish the information shall result in a denial of the waiver.[15] As such additional evidence as requested by the Office was not submitted and the evidence of record does not otherwise show that appellant was eligible for waiver, the Office properly denied waiver under the "defeat the purpose of the Act" standard.

With respect to whether recovery would be against equity and good conscience, section 10.438 of the federal regulation provides that information about income, expenses and assets is needed to determine whether or not recovery of an overpayment would be against equity and good conscience. On appeal appellant contends that she relinquished a valuable right as a result of the failure to deduct the insurance premiums and incurred debts in the form of unpaid hospital

[11] *See* 20 C.F.R. § 10.437.

[12] *See Jorge O. Diaz*, 51 ECAB 124, 129 (1999).

[13] The Board notes that analyzing the limited financial information provided by appellant, her income exceeds her expenses by $53.00.

[14] 20 C.F.R. § 10.438.

[15] *Id*. (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

bills which the Mail Handlers Benefit Plan as well as Medicare have refused to pay. However, the Office indicated that appellant did not list unpaid hospital bills as debts on the overpayment questionnaire and failed to respond to the Office's letter of June 10, 2003 requesting her to complete the entire overpayment questionnaire. As noted above, appellant did not submit complete financial information to show that she would experience severe financial hardship, nor has she submitted sufficient evidence to show that she relinquished a valuable right, or that her position changed for the worse. Therefore, appellant has not established eligibility for waiver under the "against equity and good conscience" standard.

Accordingly, appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience." The Board finds that the Office properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.[16] Section 10.441(a) of the regulations[17] provides:

> "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

The record reflects that appellant continues to receive wage-loss compensation under the Act. When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.[19] The Board finds that the Office did not abuse its discretion in following those guidelines in this case, where appellant has not submitted complete financial information, and deducting $100.00 every four weeks.

[16] *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

[17] 20 C.F.R. § 10.441(a).

[18] *Id.*

[19] *Gail M. Roe*, 47 ECAB 268 (1995); *Robin D. Calhoun*, Docket No. 00-1756 (issued May 21, 2001).

CONCLUSION

The Board finds that appellant received an overpayment of $2,765.10 in compensation from January 1, 2001 to January 25, 2003. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment. The Board further finds that the Office properly determined to recover the overpayment from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member