

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

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<b>WILLIAM J. DALTON, Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 04-245</b>
	)	<b>Issued: March 24, 2004</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>OKLAHOMA CITY AIR LOGISTICS CENTER,</b>	)	
<b>TINKER AIR FORCE BASE, OK, Employer</b>	)	

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*Appearances:*  
William J. Dalton, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On November 6, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 25, 2003 in which the Office found that an overpayment in compensation had been created. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that an overpayment of \$6,371.26 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly found that appellant should repay the overpayment by sending a check for \$6,371.26 to the Office within 30 days of the date of the Office's notice.

## **FACTUAL HISTORY**

On June 28, 1985 appellant, then a 52-year-old mechanic, filed a claim alleging he sustained an injury to his left elbow while in the performance of duty. The Office accepted his claim for left elbow strain and ulnar neuropathy and authorized surgeries which were performed on August 29, 1985 and February 10, 1987. Appellant was placed on the period rolls.<sup>1</sup> In a decision dated September 10, 1996, the Office determined that the selected position of hotel clerk represented appellant's wage-earning capacity and reduced his compensation accordingly. By decision dated December 31, 1997, an Office hearing representative affirmed the September 10, 1996 decision.

In a disability benefits payment worksheet dated August 26, 2002, the Office indicated that it had not deducted health benefits premiums from appellant's compensation payment since May 15, 1993 and, therefore, appellant was overpaid \$6,371.26. On August 19, 2003 the Office notified him that it had made a preliminary finding that he had been overpaid by \$6,371.26 because it failed to deduct health benefits premiums from May 15, 1993 to August 10, 2002. The Office determined that appellant was not at fault in the creation of the overpayment and requested that he indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment on an attached Office form.<sup>2</sup> The Office also asked that he complete an attached overpayment recovery questionnaire and submit financial information in support of any request for a waiver of recovery of overpayment. He was given 30 days in which to respond.

By letter decision dated September 25, 2003, the Office determined that an overpayment of \$6,371.26 had occurred and that appellant's circumstances did not warrant waiver of recovery of overpayment. The Office requested that he forward a check in the amount of \$6,371.26 within 30 days. The Office also advised that if appellant was unable to refund the entire overpayment immediately, he should contact the Office within 30 days so that appropriate arrangements for recovery could be made.

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<sup>1</sup> Appellant also received a 43 percent permanent impairment schedule award of the left arm on June 2, 1990.

<sup>2</sup> The form provides a claimant with three choices: (1) a request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and, (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

### **LEGAL PRECEDENT -- 1**

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,<sup>3</sup> 5 C.F.R. § 890.502(b)(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 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.”

In addition, 5 C.F.R. § 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.”

### **ANALYSIS -- 1**

The record indicates that no deductions were made for health benefits from appellant's compensation benefits during the period May 15, 1993 to August 10, 2003. Furthermore, there is no evidence in the record that appellant cancelled his health benefits enrollment or that the employing establishment terminated his health benefits. 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.<sup>4</sup> The amount of the overpayment due to lack of deduction for health benefits is \$6,371.26. The Board therefore finds that the Office properly determined that an overpayment in the amount of \$6,371.26 was created.

### **LEGAL PRECEDENT -- 2**

Section 8129(a) of the Federal Employees' Compensation Act<sup>5</sup> provides that, where an overpayment of compensation has been made “because of an error of fact or

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *James Lloyd Otte*, 48 ECAB 334 (1997).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

law,” adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>6</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b):

“Adjustments 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.”<sup>7</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>8</sup> The Office must 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 10.434-437 of the implementing federal regulations.<sup>9</sup> Furthermore, section 10.438 of the federal regulations provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request shall be considered until the requested information is furnished.”<sup>10</sup>

## ANALYSIS -- 2

In its August 19, 2003 letter, the Office offered appellant an opportunity to submit evidence regarding waiver of the overpayment prior to finalizing the overpayment determination. The record does not indicate that appellant submitted any evidence with respect to the relevant issues on waiver. Appellant has the responsibility to provide pertinent financial information and failure to provide such information will result in denial of waiver of the overpayment.<sup>11</sup> In the instant case, the Board finds that, as

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<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *James Lloyd Otte*, *supra* note 4; *see William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>9</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>10</sup> 20 C.F.R. § 10.438.

<sup>11</sup> *Id.*

appellant did not complete an overpayment recovery questionnaire, he is not entitled to waiver. Without an accurate and complete breakdown of appellant's monthly income, monthly expenses and assets, supported by financial documentation, the Office is not able to calculate whether appellant's assets exceed the specified resource base.<sup>12</sup> The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

Lastly, appellant has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

### **LEGAL PRECEDENT -- 3**

Section 10.441(a) of the Office's regulations 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."<sup>13</sup>

### **ANALYSIS -- 3**

In this case, appellant did not provide financial information to the Office to consider in determining how best to minimize any hardship on appellant. 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.<sup>14</sup> Appellant failed to respond to the preliminary notice of overpayment and the record contains no evidence that the Office abused its discretion in requiring appellant to repay \$6,371.26 within 30 days of the date of the overpayment letter.

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<sup>12</sup> *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>13</sup> 20 C.F.R. § 10.441(a).

<sup>14</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

**CONCLUSION**

The Office properly determined the amount of the overpayment and properly denied waiver of the overpayment. Further, the Office did not abuse its discretion in requiring appellant to repay \$6,371.26 within 30 days of the date of its notice of overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 25, 2003 is affirmed.

Issued: March 24, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member