



## **FACTUAL HISTORY**

On November 7, 2002 appellant, then a 30-year-old border patrol agent trainee, sustained a subdural hematoma while in the performance of duty as a result of his participation in physical training exercises (boxing).

Effective December 18, 2002 appellant was placed on the periodic rolls to receive compensation for temporary total disability. The first compensation payment was for the period December 18, 2002 to January 25, 2003 and included a health benefits deduction premium of \$132.44. Subsequent compensation payments every four weeks included a \$91.32 deduction for health benefits premiums.

A February 5, 2003 letter from the Office to the employing establishment indicated a transfer of appellant's health benefits enrollment from the employing establishment to the Office as of December 18, 2002. The health benefits code given by the Office was 104.

By letter dated September 9, 2003, the Office advised appellant of its preliminary determination that an overpayment of \$1,084.68 occurred in his case because his health benefits premiums for the period December 18, 2002 to September 6, 2003 were based on an incorrect health benefits code. The Office advised appellant that he was not at fault in the creation of the overpayment and he could submit additional information within 30 days, including a completed overpayment recovery questionnaire and supporting financial documents to support the income and expenses listed in the questionnaire, if he disagreed with the fact or amount of the overpayment. A worksheet completed by the Office shows that appellant received \$1,947.68 in compensation for the period December 18, 2002 to September 6, 2003 but, because health benefits premiums were deducted based on an incorrect code,<sup>1</sup> he was entitled to receive only \$863.00, creating a \$1,084.68 overpayment (\$1,947.68 minus \$863.00).

Appellant did not submit any additional information.

By decision dated December 3, 2003, the Office finalized its determination that an overpayment occurred in the amount of \$1,084.68 and the circumstances of appellant's case did not warrant waiver of recovery of the overpayment. The Office advised that it would recover the overpayment by deducting \$50.00 from appellant's continuing compensation every four weeks.

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<sup>1</sup> Health insurance premiums for the period December 18, 2002 to September 6, 2003 were deducted based on code 104. However, appellant had changed his health benefits enrollment code from 104 to 105 effective November 11, 2000 during a health insurance open season. Due to this health benefits code error, appellant received funds that should have gone to his health benefits insurance account.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits (FEHB) Program, provide guidelines for the 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's 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 benefits withholdings or direct premium payments are not made but during which the enrollment continues.”

In addition, 5 C.F.R. § 890.502(c)(1) 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 the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”

**ANALYSIS -- ISSUE 1**

The record establishes that appellant received \$1,947.68 in compensation for the period December 18, 2002 to September 6, 2003. However, health benefits premiums were deducted at an incorrect code for this period, code 104 instead of 105. Appellant should have received \$863.00 in compensation under the correct health benefits code, 105, thus a \$1,084.68 overpayment resulted (\$1,947.68 minus \$863.00). The Board has previously recognized that when an underwithholding 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

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<sup>2</sup> 5 U.S.C. § 8129(a).

when the error is discovered.<sup>3</sup> The Board finds that the amount of the overpayment due to underdeduction for health benefits premiums in this case is \$1,084.65.<sup>4</sup>

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>5</sup> 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 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>6</sup>

Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it 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 regulation<sup>7</sup> provides that recovery of an overpayment will defeat the purpose of the Act if 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 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>8</sup> 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.<sup>9</sup>

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

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<sup>3</sup> *John E. Rowland*, 39 ECAB 1377 (1988).

<sup>4</sup> The Office calculated an overpayment of \$1,084.68. There appears to be a mathematical error in the Office's worksheet. The Office indicated that the correct health benefits premium deduction for December 18 to 28, 2002 was \$74.50 (11 days multiplied by \$6.77 a day). However, 11 days multiplied by \$6.77 equals \$74.47.

<sup>5</sup> *See Robert Atchison*, 41 ECAB 83 (1989).

<sup>6</sup> *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> 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; *see Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>9</sup> *See Sherry A. Hunt*, 49 ECAB 467 (1998).

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.<sup>10</sup>

Section 10.438 provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.<sup>11</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.<sup>12</sup>

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

In this case, appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The Office advised appellant in its September 9, 2003 letter that he needed to submit a completed overpayment recovery questionnaire and provide supporting documents such as copies of income tax returns, bank account statements, bills, canceled checks and any other records to support the income and expenses listed in the questionnaire. However, appellant failed to provide a completed overpayment recovery questionnaire and supporting documentation of his income and expenses as requested by the Office and as required under section 10.438. Therefore, the Office properly denied waiver of the overpayment.

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

Section 10.441(a) 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.”<sup>13</sup>

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<sup>10</sup> 20 C.F.R. § 10.437.

<sup>11</sup> 20 C.F.R. § 10.438(a).

<sup>12</sup> 20 C.F.R. § 10.438(b).

<sup>13</sup> 20 C.F.R. § 10.441.

As noted above, section 10.438 provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.

### **ANALYSIS -- ISSUE 3**

On September 9, 2003 the Office requested that appellant submit supporting documents such as copies of income tax returns, bank account statements, bills, canceled checks and any other records to support the income and expenses listed in the overpayment recovery questionnaire. However, appellant did not submit the requested financial information. The Office's regulations provide that such evidence must be presented, or a request for a hearing made, within 30 days of the written notice of overpayment.<sup>14</sup> Based on the circumstances of this case, including appellant's failure to provide the required financial information, the Office acted properly in requiring repayment of the \$1,084.68 overpayment by deducting \$50.00 from appellant's continuing compensation checks.

### **CONCLUSION**

The Board finds that the Office properly determined that there was an overpayment of compensation<sup>15</sup> in this case and properly denied waiver of recovery of the overpayment. The Office also acted properly in recovering the overpayment of compensation by deducting \$50.00 from appellant's continuing compensation checks.

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<sup>14</sup> 20 C.F.R. § 10.432.

<sup>15</sup> As noted above, the amount of the overpayment should be corrected to \$1,084.65.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 3, 2003 is affirmed as modified.

Issued: September 22, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member