



## **FACTUAL HISTORY**

On March 11, 1998 appellant, then a 51-year-old system mechanic, filed a traumatic injury claim alleging that on March 10, 1998 he sustained extreme pain in his shoulder while loading an "AIM 9 Missile to shoulder station of aircraft." The Office accepted the claim for left shoulder strain with arthroscopy, performed July 9, 1998. Appellant stopped work and beginning July 20, 1998 the Office paid total disability compensation with premium deductions for health benefits and optional life insurance.

In a letter dated December 18, 2002, the Office of Personnel Management (OPM) advised the Office that it had been deducting for Code D (Option A Standard Only) for appellant's life insurance coverage and should have been deducting for Code E (Option C Family Only). When further researching the matter, the Office also determined, as reflected in a July 21, 2003 note to the file, that it had failed to withhold premiums for basic life insurance.

In a preliminary determination dated July 21, 2003, the Office informed appellant that an overpayment in the amount of \$673.67 had occurred because the Office had failed to withhold basic life insurance premiums and had deducted standard life insurance premiums rather than family insurance premiums from July 20, 1998 to January 25, 2003. The Office found that he was without fault in the creation of the overpayment. The Office informed appellant that if he disagreed with the fact or the amount of the overpayment, he could submit new evidence to support his contention or he could request a waiver of recoupment within 30 days of receipt of the Office's letter and submit appropriate evidence to justify his request. The Office enclosed an overpayment recovery questionnaire to be completed by him for review in determining whether the overpayment should be waived.

On August 22, 2003 appellant requested a waiver of the overpayment and a telephone conference with the district Office or prerecoupment hearing before the Branch of Hearings and Review. He enclosed a narrative statement in which he argued financial hardship with respect to the overpayment and submitted a completed questionnaire form in which he estimated his monthly income and expenses. Appellant listed his monthly income as \$3,305.04 per month, which included his wife's social security income of \$1,061.00 and his compensation payment of \$2,244.04. He itemized his monthly expenses including rent, food, utilities and other debts totaling \$3,271.79. On November 24, 2003 appellant clarified that he was requesting waiver of the overpayment and requested that the Office make a decision on his request based on the written evidence.

By decision dated January 29, 2004, the Office found that appellant received an overpayment of \$673.67 and that, while he was not at fault in creating the overpayment, he was not entitled to a waiver of recovery of the overpayment as such a waiver could jeopardize his life insurance coverage. The Office further held that he should repay the overpayment in full.

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustments shall be made by decreasing later payments to which an individual is entitled.

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.<sup>2</sup> The coverage for basic life is effective unless waived<sup>3</sup> and premiums for basic and optional life coverages are withheld from the employees' pay.<sup>4</sup> The Act and its implementing regulation provide that an employee entitled to disability compensation benefits may continue his or her basic life insurance coverage under certain conditions and may also retain the optional life insurance.<sup>5</sup> When an underwithholding 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 OPM upon discovery of the error.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Office found in its July 21, 2003 preliminary determination, that appellant received an overpayment in the amount of \$673.67 from July 20, 1998 through January 25, 2003 because the Office, through an administrative oversight, failed to withhold basic life insurance premiums and deducted the wrong premiums for the optional life insurance. OPM confirmed that with regard to optional life insurance premiums, the Office had been deducting for Code D when it should have been deducting for Code E.

Appellant argues on appeal that the overpayment determination was incorrect; that the overpayment amount listed on the ACPS manual/fiscal worksheet should have totaled \$628.53, instead of \$673.67 as shown. He argues that the first calculation for basic life premiums should be \$13.04, not \$13.18 and the third calculation under Option C should be \$16.20, not \$61.20. In reviewing the ACPS manual/fiscal payment worksheet which details the amount of insurance premium overpayment provided to appellant, an apparent error in the calculation of the amount of overpayment can indeed be found.

The first error in the calculation is in the first 27 days of the "Basic Life" insurance payments in the lined table of the ACPS manual/fiscal worksheet. The error is in multiplication

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; § 8129(a).

<sup>2</sup> 5 C.F.R. § 870.201.

<sup>3</sup> 5 C.F.R. § 870.204(a).

<sup>4</sup> 5 C.F.R. § 870.401(a).

<sup>5</sup> 5 C.F.R. §§ 870.701, subpart G, 871.201 subpart B.

<sup>6</sup> *James Lloyd Otte*, 48 ECAB 334 (1997).

and should be \$13.05, rather than \$13.18. Employee paid basic life July 20 to May 15, 1998 (27 days)  $41 \times .165 \div 14 \times 27 = \$ 13.18$ .<sup>7</sup>

The time period in question was 27 days. The rate per day is .4832. The rate is calculated by the following formula:  $(1/1000^{\text{th}}$  of the adjusted salary<sup>8</sup>)  $\times$  (the basic life insurance rate<sup>9</sup>) divided by (the days in a pay period<sup>10</sup> times the number of days. Therefore, to calculate the premium amount for 27 days, the calculation would be  $(41) \times (.165)$  divided by  $(14) \times (27)$ . The result of which is \$13.05 instead of \$13.18 listed on the worksheet.

Additionally, with regard to the overpayment calculated for deducting Code D life insurance premiums, there is a clerical error on the sixth line of the worksheet under Option C, which appellant raises on appeal. Line six of the worksheet reads:

Option C April 25, 1999 to December 1, 2001 (34 pay periods).  $\$90 \times 2 \times 9 = \$16.20$ . This line should read: Option C April 25, 1999 to December 1, 2001 (34 pay periods)  $\$0.90 \times 2 \times 34 = \$61.20$ .

Appellant is correct that the calculation above should have been \$16.20, but the Office erroneously used 9 pay periods instead of 34 pay periods as it had intended to do. When using the correct numbers of pay periods, the \$61.20 is correct.

The Board finds that the Office incorrectly determined the amount of the overpayment due to a slight miscalculation of basic life insurance premiums, which should have been deducted from July 20 to August 15, 1998. On remand the Office should recalculate to determine the exact overpayment amount for the above period.

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

Section 8129(b) of the Act<sup>11</sup> 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 be against equity and good conscience.

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<sup>7</sup> It is apparent looking at the manual/fiscal payment worksheet that a clerical error also occurred when this line was transcribed on the worksheet regarding the time period. This line indicates that the time period ran from July 20, 1998 to May 15, 1998 however it should read: Employee paid basic life July 20, 1998 to August 15, 1998 (27 days).

<sup>8</sup> See adjusted salary of \$41,000.00 on the manual/fiscal payment worksheet, Basic of Action Line dated January 22, 2003 and adjusted salary block, mid-page on the basic life insurance worksheet dated January 28, 2004.

<sup>9</sup> The basic life insurance rate effective January 10, 1993 was \$0.165.

<sup>10</sup> Pay periods are always 14 days each.

<sup>11</sup> 5 U.S.C. § 8129(b).

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 provides:

“(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.”<sup>12</sup>

Section 10.437 of the regulations 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.

The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.<sup>13</sup> 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. The Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.<sup>14</sup>

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 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.<sup>15</sup>

Section 10.438 of the regulation states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it

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<sup>12</sup> 20 C.F.R. § 10.436.

<sup>13</sup> *Rudolph A. Geci*, 51 ECAB 423 (2000).

<sup>14</sup> *Linda Hilton*, 52 ECAB \_\_\_\_ (Docket No. 00-2711, issued August 20, 2001).

<sup>15</sup> *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).

may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>16</sup> 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.<sup>17</sup>

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

In this case, the Office properly determined that appellant was not at fault in the creation of the overpayment because he could not have known that his life insurance premiums had been improperly calculated. As he was found not at fault he requested waiver of the overpayment and submitted an overpayment questionnaire requesting waiver, arguing that it would be a hardship to repay the overpayment because his expenses outweighed his income. Appellant completed the overpayment questionnaire but did not submit further supportive financial information. While he failed to submit supporting financial documentation, the Office did not consider the financial circumstances of appellant based on the recovery questionnaire that was submitted. Instead, the Office made other considerations for denying waiver of repayment of the overpayment. The Office claims examiner stated:

“[Appellant] was not entitled to waiver, as the monies owed are needed to continue his entitlement to optional and basic life insurance coverage. Although [he] was not aware that the Office had failed to make the proper deductions, he received payment that should have been paid to his optional and basic life insurance account. In order to make payment to this account and pay the OPM in full for the optional and basic life insurance entitlement, we must recover the debt from [appellant].”

Appellant had reported approximately \$3,271.79 per month in expenses, while his income, which included Social Security benefits and compensation payments, totaled \$3,305.04 per month. In view of the difference between the monthly income and expenses, the Office should have considered relevant factors to determine whether he qualified for a waiver. As the Office has not considered the financial circumstances of the case in calculating whether appellant qualified for waiver, the case must be remanded for further development. Furthermore, as the financial information of record is now almost a year old, this development shall include an opportunity for appellant to submit an updated overpayment recovery questionnaire, along with bank statements, copies of cancelled checks, credit card statements, utility bills, tax bills, store receipts and any other documentation required to substantiate the claimed expenses. The Office shall then review appellant’s updated financial information and issue a *de novo* decision adjudicating the issue of waiver.

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<sup>16</sup> 20 C.F.R. § 10.438(a).

<sup>17</sup> 20 C.F.R. § 10.438(b).

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

The method for recovery of an overpayment is spelled out in the implementing regulation at 20 C.F.R. § 10.441(a). This regulation 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 [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 payment of compensation, taking into account the probable extent of future payment, the rate of compensation, the financial circumstance of the individual and any other factors, so as to minimize any hardship.”

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

In the instant case, the Office found that appellant must repay the entire overpayment amount in a lump sum because the lump sum was owed to OPM. There is no evidence of record that the Office considered the factors enumerated by section 10.441(a)<sup>18</sup> to determine an appropriate repayment schedule.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation for the period July 20, 1998 to January 25, 2003, because the Office failed to withhold basic life insurance premiums and used an incorrect code when deducting optional life insurance premiums, but that the case is not in posture for decision on the amount of the overpayment. The Board further finds that, as the case is also not in posture for a decision regarding waiver and recovery of the overpayment.

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<sup>18</sup> 20 C.F.R. § 10.441 (a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed with regard to the fact of the overpayment; the decision is set aside for further development consistent with this decision with regard to the issues of amount, waiver and repayment of the overpayment.

Issued: September 23, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member