



## **FACTUAL HISTORY**

On April 21, 1993 appellant, then a 56-year-old electronics technician, filed a claim for compensation for a traumatic injury, a lumbar strain and hernia, sustained on April 20, 1993 while climbing a tower to perform an antenna check. Appellant stopped work on April 20, received continuation of pay from that date until June 4, 1993, and used paid leave until June 1, 1994. On December 3, 1993 his application for disability retirement was approved by the Office of Personnel Management (OPM), which began payments on June 2, 1994.

On February 18, 1995 appellant elected, effective April 20, 1993, to receive benefits under the Federal Employees' Compensation Act in preference to retirement benefits from OPM. In a March 6, 1995 letter, the Office advised OPM of this election, and noted that it had been advised that appellant's annuity paid by OPM was suspended effective March 5, 1995. On March 8, 1995 the Office advised appellant that, beginning March 5, 1995, he would be paid compensation in the amount of \$2,789.76 each four weeks. The amount of the deduction for health benefits was listed as \$.00. In an April 21, 1995 letter, OPM advised the Office that annuity payments to appellant were terminated effective June 2, 1994 but that such payments were made through April 30, 1995. OPM requested that the Office begin withholding premiums for health benefits on May 1, 1995. A Federal Employees' Health Benefits (FEHB) notice of change in health benefits enrollment form indicates that appellant's enrollment was transferred to the Office effective April 30, 1995. In a May 8, 1995 letter, OPM requested recovery from the Office of benefits paid from the Civil Service Retirement Fund for the period of time which was also covered under workers' compensation. This letter continued:

“The dual service coverage began on June 2, 1994 and ended on March 31, 1995. The annuity paid for this period total[ed] \$27,456.30 in civil service benefits. Any applicable deductions for health and/or life insurance [premiums] would have covered this same time period.”

On August 4, 1995 the Office transmitted \$27,456.30 to OPM. The Office's computation sheet indicated that this represented payment for the period June 2, 1994 to March 4, 1995. OPM's explanation of appellant's annuity payment indicates that a monthly premium for health benefits was deducted beginning June 2, 1994.

In an August 9, 2001 letter, the Mail Handlers Benefit Plan, with which appellant enrolled effective January 9, 1983 and with whom he was enrolled at the time he last worked at the employing establishment on April 20, 1993, advised appellant that its records indicated that he was currently enrolled, but that the payroll office did not show him as being enrolled. On November 1, 2001 the plan advised appellant it had received the necessary documentation to confirm his enrollment. On September 23, 2004 the Mail Handlers Benefit Plan advised appellant that its records indicated that he was currently enrolled, but that the payroll office did not show him as being enrolled. The Office's computer printout indicates that on November 27, 2004 appellant was paid compensation for the period October 31 to November 27, 2004, and that \$361.22 was deducted from his gross payment for health benefits insurance.

On December 8, 2004 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$27,547.32 that arose because the

Office failed to make deductions for premiums for health benefits from March 5, 1995 to November 27, 2004. The Office preliminarily found appellant without fault in the creation of the overpayment. In an overpayment recovery form appellant completed on December 15, 2004, he listed his monthly income as \$3,310.00 in compensation and \$1,336.00 in Social Security benefits for his wife, for a total of \$4,646.00. He listed their monthly expenses as \$4,690.00, which included \$2,000.00 in miscellaneous expenses. Appellant requested waiver of recovery of the overpayment.

By final decision dated March 4, 2005, the Office finalized its findings on the existence and amount of the overpayment, and found that waiver of recovery of the overpayment was not warranted, since appellant did not need substantially all his income to meet his ordinary and necessary living expenses of \$4,690.00 per month. The Office found that appellant's compensation from the Office amounted to \$3,769.69 per month (\$3,479.72 each 28 days times 13 divided by 12), making his total income per month \$5,105.69. The Office determined that the overpayment would be recovered by deducting \$330.00 from each of appellant's 28-day compensation payments, stating that the general guideline was to offset 10 percent of total income.

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

The regulations of OPM, which administers the FEHB Program, provide guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides: "An employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due the United States in the amount of the proper employee withholding required for that pay period." 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 -- ISSUE 1**

Appellant received an overpayment of compensation. The Office's computer printouts show that no deductions were made for premiums for health benefits in the Office's periodic payments beginning March 5, 1995. As appellant was enrolled in a health benefits plan during the entire period he received compensation, he is liable for the payment of premiums.

The case, however, is not in posture for a decision on the amount of the overpayment. First, the Office's calculation of the overpayment included the period October 31 to November 27, 2004 as one for which premiums for health benefits were not paid. The Office's computer printout sheet for that period indicates \$361.22 was deducted for such premiums for this 28-day period. This amount should be deducted from the amount of the overpayment.

Second, the case record contains conflicting information on the period the required premiums were paid by OPM. In an April 21, 1995 letter, OPM advised the Office that annuity payments were made through April 30, 1995. This corresponds to the change in health benefits enrollment form, which indicates appellant's enrollment was transferred to the Office effective April 30, 1995. In a May 8, 1994 letter OPM stated that dual benefits were paid until March 31, 1995, and that health benefits premiums were withheld until that time. The Office indicated in a March 6, 1995 letter to OPM that it had been advised that the OPM annuity was suspended March 5, 1995. As it appears that OPM paid premiums for health benefits during the period it paid appellant the annuity later repaid by the Office, the amount of the overpayment depends on how long OPM continued to pay appellant. The Office should determine the period of payments by OPM, determine whether it paid premiums for health benefits during this entire period, and, if necessary, adjust the amount of the overpayment accordingly.

### **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>1</sup> Section 8129 of the Act<sup>2</sup> provides that an overpayment of compensation 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 this subchapter of the [Act] or would be against equity and good conscience." 20 C.F.R. § 10.436 provides:

"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 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."

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

As the Office determined appellant was without fault in the creation of the overpayment, waiver could be granted if appellant showed that he needed substantially all of his current income (including compensation benefits) to meet his current ordinary and necessary living expenses. The Office properly found that he did not.

---

<sup>1</sup> *Frederick Arters*, 53 ECAB 397 (2002).

<sup>2</sup> 5 U.S.C. § 8129.

Appellant listed his monthly expenses as \$4,690.00. His monthly income, consisting of his workers' compensation from the Office and his wife's income as listed on his overpayment recovery form, was \$5,105.69. As his monthly income exceeded his monthly expenses (even accepting without further inquiry his miscellaneous expenses of \$2,000.00) by \$415.69, he does not need substantially all his income to meet his living expenses. The Office thus did not abuse its discretion by finding that recovery of the overpayment would not defeat the purpose of the Act.

### **LEGAL PRECEDENT -- ISSUE 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 the 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>3</sup>

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

The Office decided to deduct \$330.00 from each of appellant's continuing 28-day compensation payments on the basis that this was within the general guideline of deducting 10 percent. The Office's procedure manual no longer contains this general guideline, now stating that the circumstances of each case must be considered to minimize the hardship on the claimant.<sup>4</sup> This is consistent with the Office's regulation quoted above, which requires a determination based on the relevant factors particular to the individual case. As there is no indication that the Office considered the relevant factors so as to minimize any hardship, the case will be remanded to the Office for a proper decision on the rate of recovery from appellant's continuing compensation.<sup>5</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation because premiums for health insurance were not deducted from his compensation payments, and that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. The Board further finds that the amount of the overpayment must be recalculated, and that a proper decision on the rate of recovery must be issued.

---

<sup>3</sup> 20 C.F.R. § 10.441(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Chapter 6.200.4d(1)(b) (May 2004).

<sup>5</sup> The Board has required this individual determination in cases where an overpayment recovery questionnaire containing financial information was submitted. *Katherine Newton*, 54 ECAB \_\_\_\_ (Docket No. 03-926, issued June 12, 2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 4, 2005 decision of the Office of Workers' Compensation Programs is affirmed with regard to the existence of an overpayment of compensation and the finding that waiver of recovery was not warranted. The March 4, 2005 decision is set aside with regard to the amount of the overpayment and the rate of recovery, and remanded to the Office for action consistent with this decision of the Board.

Issued: August 15, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board