



## **FACTUAL HISTORY**

The Office accepted that appellant sustained a right shoulder strain, an aggravation of right shoulder adhesive capsulitis and right rotator cuff tendinitis due to factors of her federal employment.<sup>1</sup> Appellant stopped work on August 3, 1999 and returned to part-time limited-duty employment on January 10, 2000. She again stopped work and the Office paid her compensation for temporary total disability from June 3, 2000 to February 22, 2003. Computer records from the Office establish that during the period June 3, 2000 to March 24, 2001, the Office deducted premiums for health benefits using code ED1 for single coverage instead of code ED2 for family coverage.

On March 5, 2003 the Office notified appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$961.67 because it deducted premiums for health benefits using the code for single rather than family coverage. The Office found that appellant was not at fault in the creation of the overpayment and informed her that she should complete the enclosed overpayment recovery questionnaire and submit financial documents to support any request for waiver of the overpayment.

Appellant, on March 26, 2003, requested an oral hearing on the preliminary determination of overpayment. She submitted an overpayment recovery questionnaire without any supporting financial documents. Appellant listed her monthly income as \$1,938.00 and her monthly expenses as \$70.00 for housing, \$200.00 for food, \$60.00 for clothing, \$515.00 for utilities and \$350.00 in miscellaneous expenses. She also provided a list of monthly expenses from credit cards totaling \$926.00. Appellant listed assets of \$62.00 in a savings account.

At the hearing, held on January 27, 2004, appellant, through her attorney, noted that she did not provide information on her spouse's earnings because she did not share income with her husband and paid all of the bills. Appellant related that she received \$1,938.00 every four weeks as compensation from the Office and that monthly she paid \$70.00 for property tax, \$200.00 for food, \$60.00 for clothing, \$515.00 for utilities, including past due utilities, \$50.00 for cleaning products, \$80.00 for public transportation, \$60.00 for cable television, \$50.00 for a cellular telephone and \$15.00 for charity. She further indicated that she paid around \$886.00 per month on various credit cards and listed the balances. Appellant also asserted that she owed \$3,000.00 in back taxes. The hearing representative requested a copy of her most recent utility bills, credit card statements and documents verifying her financial information.

Appellant did not submit any additional evidence subsequent to the hearing.

By decision dated March 18, 2004, the hearing representative finalized the finding that appellant received an overpayment of \$961.67 because the Office incorrectly deducted her premiums for health benefits. She further finalized the determination that appellant was without fault in the creation of the overpayment. The hearing representative noted that appellant had not submitted any evidence subsequent to the hearing documenting her credit card and loan expenses. She found that monthly appellant paid \$585.00 in ordinary expenses and \$515.00 for

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<sup>1</sup> A portion of the record appears to be missing; however, the missing section is not relevant to the pertinent issues of overpayment, waiver and recovery.

utilities. The hearing representative found that, based on her total credit card debt of \$28,000.00, a payment of \$560.00 per month was reasonable based on the standard required repayment for credit cards of 2 percent of the total amount owed. She found that as appellant's monthly income of \$2,099.00 exceeded her monthly expenses of \$1,660.00 by around \$429.00, she was not entitled to waiver.<sup>2</sup> The hearing representative determined that the overpayment of \$961.67 was due and payable and would be collected by deducting \$200.00 every four weeks from appellant's continuing compensation.

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

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.<sup>3</sup> When an overpayment has been made to an individual 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 the individual is entitled.<sup>4</sup>

Under the Federal Employees' Group Life Insurance Program (FEGLI), most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.<sup>5</sup> The coverage for basic life insurance is effective unless waived<sup>6</sup> and the premiums for basic and optional life coverage are withheld from the employee's pay.<sup>7</sup> At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status. If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from his or her compensation payments.<sup>8</sup> When an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to the Office of Personnel Management upon discovery of the error.<sup>9</sup>

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

The record indicates that appellant received an overpayment as a result of an incorrect deduction of health benefit premiums. The Office deduced health benefit premiums of \$450.48

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<sup>2</sup> The hearing representative noted that appellant received periodic roll payments of \$1,938.00 every 28 days which yielded a total monthly income of \$2,099.00.

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> 5 U.S.C. § 8702(a).

<sup>6</sup> 5 U.S.C. § 8702(b).

<sup>7</sup> 5 U.S.C. § 8707.

<sup>8</sup> 5 U.S.C. § 8706(b).

<sup>9</sup> 5 U.S.C. § 8707(d); *see Keith H. Mapes*, 56 ECAB \_\_\_\_ (Docket No. 03-1747, issued October 20, 2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

for the period June 30, 2000 to March 24, 2001 using code ED1 for self-only benefits instead of the appropriate amount of \$1,412.15 for family benefits under code ED2. Consequently, appellant received an overpayment for this period.

The Office calculated that the difference between the amount owed, \$1,412.15, from the amount paid, \$450.48, resulted in an overpayment of \$961.67 for the period June 30, 2000 to March 24, 2001. Appellant does not dispute that she received the overpayment in question and the Board finds that the Office properly determined that she received an overpayment of \$961.67 due to an underdeduction of health benefit premiums during the period June 30, 2000 to March 24, 2001.

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

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>10</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

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<sup>10</sup> 20 C.F.R. § 10.436.

position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."<sup>11</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>12</sup> 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>

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

Following appellant's request for waiver, the Office sought financial information and documentation to determine whether recovery of the overpayment would defeat the purpose of the Act. Appellant submitted an overpayment recovery questionnaire and provided information at the hearing regarding her financial circumstances. She did not, however, submit documentation substantiating her credit card debt payments or loans.<sup>14</sup> The hearing representative found that appellant paid \$585.00 in ordinary expenses<sup>15</sup> monthly and \$515.00 for utilities. She further estimated that appellant paid around \$560.00 per month for credit card debt.<sup>16</sup> The hearing representative concluded that appellant's monthly income of \$2,099.00

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<sup>11</sup> 20 C.F.R. § 10.437.

<sup>12</sup> *Linda Hilton*, 52 ECAB 476 (2001).

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

<sup>14</sup> 20 C.F.R. § 10.438 provides that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

<sup>15</sup> The hearing representative added the expenses provided by appellant at the hearing of \$70.00 for property tax, \$200.00 for food, \$60.00 for clothing, \$50.00 for cleaning products, \$80.00 for public transportation, \$60.00 for cable television, \$50.00 for a cellular telephone and \$15.00 for charity in determining her usual monthly expenses.

<sup>16</sup> The hearing representative based this amount on her calculation that appellant owed around \$28,000.00 for credit card debt with a mandatory repayment of around two percent of the debt each month. As appellant did not submit any financial information documenting her credit card expenses, as required, the hearing representative's determination is reasonable.

exceeded her monthly expenses of \$1,660.00 by around \$429.00, and thus she was not entitled to waiver as she did not need substantially all her income to meet current ordinary and necessary expenses.<sup>17</sup> The Board finds that the hearing representative's analysis is reasonable and her determination that appellant is not entitled to waiver of the overpayment under the "defeat the purpose of the Act" standard is affirmed.

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 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>18</sup>

In this case, appellant has neither alleged nor submitted evidence demonstrating that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation payments she received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

On appeal, appellant argues that the hearing representative incorrectly found that her monthly income was \$2,099.00 per month rather than \$1,938.00. The hearing representative properly found, however, that as appellant received \$1,938.00 every four weeks from compensation benefits, she received \$2,099.00 as an average monthly amount of income.

Appellant argues that it is unfair to collect the overpayment as she was not at fault in its creation. Section 10.435(a) provides that an error by a government agency, including the Office, which resulted in an overpayment, does not by itself relieve a claimant from liability for repayment.<sup>19</sup> As appellant does not need all her income to meet ordinary and necessary living expenses, the Board finds that the Office properly denied waiver of recovery of the overpayment.<sup>20</sup>

On appeal appellant submitted a list of expenses and financial documentation. The Board's jurisdiction, however, is limited to review of the evidence which was before the Office at the time of its final decision.<sup>21</sup> The Board, therefore, may not consider this evidence for the first time on appeal.

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<sup>17</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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

<sup>18</sup> 20 C.F.R. § 10.437.

<sup>19</sup> 20 C.F.R. § 10.435(a).

<sup>20</sup> See *Howard Nakikien*, 53 ECAB 406 (2002).

<sup>21</sup> See 20 C.F.R. § 501.2(c).

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

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“Whenever 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 hardship.”<sup>22</sup>

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

Based on appellant’s information regarding her income and expenses, the hearing representative’s decision to withhold \$200.00 every four weeks from appellant’s continuing compensation payments was made with due regard to her monthly household income and expenses and is therefore appropriate under the circumstances of the case. The Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case and thus did not abuse its discretion in finding that repayment of the overpayment could be accomplished by withholding \$200.00 every four weeks from appellant’s compensation.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$961.67 for the period June 3, 2000 to March 24, 2001 due to an underdeduction of health benefit premiums. The Board further finds that the Office properly denied waiver of the overpayment and properly found that the overpayment should be repaid by deducting \$200.00 every four weeks from continuing compensation.

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<sup>22</sup> 20 C.F.R. § 10.441(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 18, 2004 is affirmed.

Issued: May 23, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member