

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

O.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 06-985
Issued: December 21, 2006**

Appearances:
Sylvia R. Johnson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 28, 2006 appellant, through his representative, filed an appeal from an overpayment decision of the Office of Workers' Compensation Programs dated April 22, 2005 and a nonmerit decision dated May 23, 2005 denying his request for a hearing following the overpayment decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment in this case and over the May 23, 2005 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing following the April 22, 2005 decision finalizing the overpayment; (2) whether appellant received an overpayment of compensation in the amount of \$3,963.35 because the Office failed to deduct premiums for optional life insurance for the period June 23, 1992 to September 9, 2000 and failed to deduct premiums for postretirement life insurance for the period September 1, 2000 to December 28, 2002; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly determined that the overpayment would be collected by deducting \$100.00 from his continuing compensation.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board reversed an August 15, 2001 decision terminating appellant's compensation benefits.¹ The Board determined that the medical evidence was insufficient to establish that he had no further disability due to his cervical spine condition.² The findings of fact and conclusions of law from the prior decision are incorporated by reference.

Appellant received compensation on the periodic rolls beginning March 28, 1988. He elected to receive optional life insurance at twice his pay effective June 23, 1992 and at five times his pay effective June 12, 1993. The Office paid appellant compensation for the periods June 23, 1992 to September 9, 2000 without deducting premiums for optional life insurance.

Appellant retired from the employing establishment September 10, 2000. He elected retirement benefits from the Office of Personnel Management (OPM) effective September 10, 2000. On October 11, 2001 appellant requested benefits from the Office effective September 10, 2000. The Office paid him retroactive compensation beginning September 10, 2000 minus the amount he received from OPM in retirement benefits. The Office did not deduct premiums for postretirement basic life insurance from September 10, 2000 to December 28, 2002.

In a letter dated July 25, 2002, OPM informed the Office that appellant had optional life insurance and postretirement basic life insurance commencing January 19, 1988. Appellant submitted election forms which indicated that he elected postretirement basic life insurance Options B and C with no reduction effective August 6, 2001.

By letter dated October 7, 2003, OPM requested recovery from the Office for the period in which it paid appellant retirement benefits while he also received compensation from the Office, August 1, 2001 to July 1, 2002. In letters dated March and April 15, 2004, the Office requested that OPM provide the effective date of withholdings for postretirement basic life.³ The Office also asked OPM to verify whether it deducted insurance premiums during the period it paid appellant retirement benefits. OPM did not respond to the Office with the requested information.

On June 10, 2004 the Office calculated that appellant received an overpayment of \$3,963.35 because it had not deducted premiums for optional life insurance from June 23, 1992 to September 9, 2000 and had not deducted premiums for postretirement basic life insurance

¹ *Oscar Anderson*, Docket No. 02-235 (issued October 10, 2002).

² The Office accepted that appellant sustained a head injury, cervical strain and a herniated disc at C5-6 due to a September 24, 1987 employment injury.

³ In a decision dated February 17, 2004, an Office hearing representative found that the case was not in posture for decision regarding whether appellant received a \$13,110.897 overpayment of compensation for the period January 19, 1998 through September 9, 2000 because it failed to deduct optional and postretirement life insurance premiums. The hearing representative determined that the Office should obtain information from OPM about the applicable dates he had both optional life and postretirement basic life insurance.

from September 1 to December 28, 2002. The Office determined that appellant owed \$84.46 in optional life insurance premiums for the period June 23, 1992 to June 11, 1993; \$128.96 for the period June 12, 1993 to January 18, 1994; \$519.86 for the period January 19, 1994 to January 18, 1996; \$602.61 for the period January 19, 1996 to January 18, 1998; \$598.33 for the period January 19, 1998 to January 18, 2000; and \$272.00 for the period January 19 to September 9, 2000, for a total of \$2,196.22. For the period September 1, 2000 to December 28, 2002, the Office took appellant's adjusted salary in thousands, 31 and multiplied that by the weekly premium rate in thousands for postretirement basic life in effect for the applicable period, 94. The Office then multiplied this amount by the number of pay periods to find a total overpayment due to the lack of deductions for postretirement basic life insurance of \$1,767.13. The Office added the \$2,196.22 overpayment which resulted from its failure to deduct optional life insurance and the \$1,767.13 overpayment which resulted from its failure to deduct postretirement basic life to find a total overpayment of \$3,963.35.

On June 10, 2004 the Office informed appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,963.35 because it failed to deduct premiums for optional life insurance from June 23, 1992 to September 9, 2000 and failed to deduct premiums for postretirement basic life insurance from September 1, 2000 to December 28, 2002. The Office found that he was not at fault in the creation of the overpayment. The Office informed appellant that he should complete the enclosed overpayment recovery questionnaire and submit financial documents to support waiver of the overpayment. Additionally, the Office notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

Appellant did not respond to the Office's June 10, 2004 preliminary overpayment determination. By decision dated April 22, 2005, the Office finalized the overpayment of compensation in the amount of \$3,963.35 because it failed to deduct premiums for optional life insurance from June 23, 1992 to September 9, 2000 and failed to deduct premiums for postretirement basic life insurance from September 1, 2000 to December 28, 2002. The Office found that appellant was without fault in the creation of the overpayment and that he was not entitled to waiver. The Office further determined that the overpayment would be collected by withholding \$100.00 from his continuing compensation benefits.

On April 26, 2005 appellant, through his representative, requested an oral hearing on the April 22, 2005 decision. By decision dated May 23, 2005, the Office denied appellant's request for a hearing on the grounds that the hearing provisions of section 8124(b) did not apply following a final overpayment decision.

LEGAL PRECEDENT -- ISSUE 1

Section 10.440(b) of the Office's regulations provides that "[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128 (concerning reconsiderations) do not apply to such a decision."⁴ The Board has found that the

⁴ 20 C.F.R. § 10.440(b).

implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.⁵

ANALYSIS -- ISSUE 1

By letter dated April 26, 2005, appellant, through his representative, requested an oral hearing after the Office's April 22, 2005 overpayment decision. By decision dated May 23, 2005, the Office denied his request for a hearing based on its finding that a final overpayment decision is not subject to the hearing provisions of section 8124. The Office's regulation at section 10.440(b) provides that the only review of a final decision concerning an overpayment is by the Board.⁶ The regulation further provides that the hearing provisions of section 8124(b) do not apply to an overpayment decision.⁷ The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.⁸ In view of the limitations on review rights set forth in section 10.440(b), the Board finds that the Office properly denied appellant's request for an oral hearing made after issuance of the final overpayment decision.

On appeal, appellant's representative argues that she timely requested a prerecoupment hearing and submitted evidence in support of her contention. The Board cannot consider this evidence as its jurisdiction is limited to review of evidence which was before the Office at the time of its final decision.⁹

LEGAL PRECEDENT -- ISSUE 2

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 duty.¹⁰ 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.¹¹

⁵ *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

⁶ 20 C.F.R. § 10.440(b).

⁷ *Id.*

⁸ *Charles E. Nance*, *supra* note 5.

⁹ *See* 20 C.F.R. § 501.2(c).

¹⁰ 5 U.S.C. § 8102(a).

¹¹ *Id.* at § 8129(a).

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.¹² The coverage for basic life insurance is effective unless waived¹³ and the premiums for basic and optional life coverage are withheld from the employee's pay.¹⁴ 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.¹⁵ 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 OPM upon discovery of the error.¹⁶

ANALYSIS -- ISSUE 2

The Office paid appellant compensation for total disability resulting from a September 22, 1987 employment injury. He authorized deductions for optional life insurance beginning June 23, 1992 but the Office did not deduct these premiums. The Office should have deducted premiums for optional life insurance from June 23, 1992 until September 9, 2000. Appellant, consequently, received an overpayment of compensation due to the Office's failure to deduct premiums for optional life insurance coverage.

Appellant retired from the employing establishment and elected to receive retirement benefits from OPM effective September 10, 2000. He subsequently elected to receive workers' compensation benefits from the Office effective September 10, 2000. The Office paid appellant retroactive compensation minus the amount he received from OPM in retirement benefits. By letter dated July 25, 2002, OPM informed the Office that appellant had elected postretirement basic life with no reduction effective January 19, 1988. Appellant requested postretirement basic life with no reduction effective August 6, 2001 on life insurance forms from the OPM. The Office did not deduct premiums for postretirement basic life insurance for the period September 10, 2000 to December 28, 2002. Consequently, he received an overpayment of compensation.

The Board finds, however, that the case is not in posture for decision on the period and amount of the overpayment. In letters dated March 4 and April 15, 2004, the Office requested that OPM clarify the date it should withhold premiums for postretirement basic life. The Office also asked OPM for information regarding whether it had deducted postretirement basic life insurance premiums while paying appellant retirement benefits. OPM did not respond to the Office's March 4 and April 15, 2004 letters. It is, therefore, unclear from the record the effective date that appellant elected postretirement basic life and whether OPM withheld premiums for

¹² *Id.* at § 8702(a).

¹³ *Id.* at § 8702(b).

¹⁴ *Id.* at § 8707.

¹⁵ *Id.* at § 8706(b).

¹⁶ *Id.* at § 8707(d); see *James Lloyd Otte*, 48 ECAB 334 (1997).

postretirement basic life when it paid him retirement benefits.¹⁷ The amount and period of the overpayment, consequently, are not in posture for decision. The case will be remanded for recalculation of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

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.”¹⁸

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.

(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.

¹⁷ It additionally appears that the Office meant the period of the overpayment to be from September 10, 2000, the date appellant retired, to December 28, 2002, rather than September 1, 2000 to December 28, 2002.

¹⁸ 20 C.F.R. § 10.436.

(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."¹⁹

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.²⁰ The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.²¹

ANALYSIS -- ISSUE 3

The Office, in its preliminary notification to appellant of the existence of the overpayment, informed him that he needed to explain his reasons for seeking a waiver, complete the recovery questionnaire form and submit financial documents to support his claimed income and expenses. The Form OWCP-20 overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of the Act. Appellant did not return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither did he submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment. Section 10.438 of the regulations states 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.²² Failure to submit the information, which will also be used to determine a repayment schedule if necessary, without 30 days of a request from the Office will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.²³

¹⁹ 20 C.F.R. § 10.437.

²⁰ *Linda Hilton*, 52 ECAB 476 (2001).

²¹ *Rudolph A. Geci*, 51 ECAB 423 (2000).

²² 20 C.F.R. § 10.438(a).

²³ 20 C.F.R. § 10.438(b); *James A. Gray*, 54 ECAB 277 (2002); *Robert B. Hutchins*, 52 ECAB 344 (2001).

As appellant submitted no evidence in this case to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.²⁴

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing after issuance of a final overpayment decision. The Board further finds that appellant received an overpayment of compensation but that the case is not in posture for decision on the amount and period of the overpayment. The Board further finds that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 23, 2005 is affirmed and the decision dated April 22, 2005 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 21, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁴ In view of the Board's determination that the amount of overpayment is not in posture for decision, it is premature to address the issue of whether the Office properly required recovery of \$100.00 from continuing compensation benefits.