

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

B.S., Appellant

and

**SMALL BUSINESS ADMINISTRATION,
Washington, DC, Employer**

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**Docket No. 06-546
Issued: November 27, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 5, 2005 which found that she received an overpayment in the amount of \$3,683.50 and a September 19, 2005 Office hearing representative's decision which found that appellant received an overpayment in the amount of \$1,802.10. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$3,683.50 from May 28, 2002 to November 29, 2003, due to receipt of compensation at the augmented rate during a period that she had no dependents; (2) whether the Office properly determined that appellant was at fault in the creation of this overpayment; (3) whether the Office properly determined that appellant received an overpayment in the amount of \$1,802.10 because premiums were not deducted for basic life insurance and post-retirement life insurance for the period August 1, 1998 through November 29, 2003; and (4) whether the Office properly determined that appellant was not entitled to waiver;

and (5) whether the Office properly required repayment by deducting the sum of \$50.00 per month from appellant's continuing compensation payments.

FACTUAL HISTORY

On June 9, 1998 appellant, then a 38-year-old secretary, injured her low back at work. The Office accepted her claim for a back strain, aggravation of degenerative disc disease and a herniated disc at L5-S1. Appellant received appropriate compensation.¹

In July 1998 appellant completed a CA-1032 form. She indicated that she had a dependent daughter, Barbara, born on May 23, 1981. On the portion of the form concerning dependents, appellant was advised of the circumstances in which a child or a spouse qualified as a dependent. On February 11, 2000 appellant completed the CA-1032. Under the certification part of the form, appellant was advised to immediately report any change in the status of her claimed dependents.

By letter dated August 22, 2000, the Office requested that appellant provide a copy of her marriage certificate. On February 19, 2001 appellant completed a CA-1032 form and indicated that she had a dependent husband, Kenneth Powell.

By letter dated March 17, 2003, the Office noted that appellant indicated that she had changed her insurance benefits from family to self-only in November 2002; however, her compensation check continued to deduct the benefit election for family insurance instead of self-only insurance. The Office provided appellant with a copy of the health benefits election form and advised her to complete and return the form.

By letter dated May 5, 2003, the Office advised appellant that it did not have a copy of her health benefit election form and requested that she provide this to the Office. The Office also explained that, although appellant changed her plan in November 2002 during open season, the change would not be effective until January 26, 2003, and that she would be reimbursed from January 26 to March 23, 2003. On May 27, 2003 the Office received appellant's health benefits election form dated May 12, 2003. Appellant did not list any family members.

By letter dated October 28, 2003, the Office notified appellant that augmented compensation for her daughter, Barbara Smith, would stop once she became 18 years old. Appellant was further advised that compensation could continue at the augmented rate after her daughter reached age 18 only if she was unmarried and either incapable of self-support or a student. The Office advised appellant that, if her daughter was incapable of self-support, she could claim continuing compensation by submitting a medical report from the attending physician fully describing any mental or physical disability which would cause her to be incapable of self-support. Appellant was also advised that, for her daughter to qualify as a

¹ The record reflects that she received compensation for total wage loss from August 2, 1998 to the present except for the period November 30, 2001 to July 29, 2002 when she was paid compensation for permanent impairment to both legs under the schedule award provisions of the Act. The award was modified by decision dated December 4, 2003.

student, she should submit documentation establishing that her daughter was regularly pursuing a full-time course of study or training at an appropriate educational facility.

An undated basic life insurance and post-retirement calculator worksheet provided the bi-weekly rates for premiums at the 50 percent reduction and 75 percent reduction rate. A separate worksheet indicated that, for the period January 1 to December 31, 2002, appellant's bi-weekly retirement premium was \$8.10 and the bi-weekly basic life premium was equal to \$4.65.

In a December 4, 2003 overpayment worksheet, the Office determined that incorrect deductions were made for basic life and post-retirement insurance. The Office found that basic life and post-retirement was not deducted from August 1, 1998 to November 29, 2003 and the wrong health benefit code was deducted from January 26 to November 29, 2003. The Office also noted that an incorrect compensation rate was applied from May 23, 1999 to November 29, 2003 after appellant's daughter turned 18. The Office also noted that appellant had not submitted a copy of any marriage certificate to verify her marital status.

An overpayment calculation worksheet dated September 14 2004 indicated that appellant incorrectly received compensation at the augmented three-fourths rate from May 23, 1999 to November 29, 2003 after appellant's daughter turned 18. The worksheet also revealed that basic life and post-retirement premiums were not deducted from August 1, 1998 through November 29, 2003. Appellant retired on August 1, 1998 and elected a 50 percent reduction in post-retirement basic life. She changed her benefit code from 105 to 104 effective January 26, 2003 but the premiums were taken out under code 105 from January 26 through April 19, 2003. The worksheets indicated that an overpayment had occurred in the amount of \$12,868.12.

On October 13, 2004 the Office issued a preliminary determination that appellant was at fault in the creating an \$11,066.02 overpayment of compensation for the period May 23, 1999 to November 29, 2003 because she was not entitled to receive augmented compensation since her daughter did not qualify as a dependent after she reached age 18 on May 23, 1999. The Office also found that appellant was at fault because she failed to furnish information which she knew or should have known to be material.

In a separate preliminary determination also dated October 13, 2004, the Office found that appellant received an overpayment in the amount of \$1,802.10 because premiums for basic life insurance coverage and post-retirement basic life insurance coverage were not deducted from appellant's compensation payments from August 1, 1998 through November 29, 2003. Appellant was found without fault in creating this overpayment.

On October 29, 2004 appellant requested a waiver and a hearing on the overpayment issues, which was held on July 13, 2005.

At the hearing, the hearing representative noted that appellant had submitted a copy of her marriage certificate, which indicated that she was married on June 20, 1998. Appellant testified that her husband lived with her until their divorce. She provided the Office with a copy of a "judgment of divorce," which was entered on May 28, 2002. Appellant testified that her daughter was not "attending school in 1999 when she reached age 18." Appellant testified that her daughter was awarded disability benefits by the Social Security Administration in

November 2002 and received her first check in December 2002. Appellant and her daughter lived together in an apartment, while her daughter's son lived with his father. Her daughter did not handle her own money and appellant had been named her daughter's conservator and took care of her daughter's bills. Appellant testified that her daughter paid the majority of the rent, but that she contributed \$300.00 per month.

Appellant testified that her income consisted of a monthly Social Security benefit of \$636.00 and compensation benefits every 28 days in the amount of \$1,468.00. She had only a checking account, did not own a car, and had no credit cards. The hearing representative noted that appellant completed an overpayment recovery questionnaire form (OWCP-20) on October 29, 2004.² Appellant alleged that she spent approximately \$200.00 per month in clothing costs, but did not have any receipts. She paid approximately \$100.00 per month in the summer for air conditioning and more than that in the winter. Appellant testified that she paid for medicine and co-pays for doctor's visits, but did not have receipts. She also paid \$20.00 for trips to the grocery store. Appellant had several loans that were still open but that she was not currently paying the loans as she could not afford to do so.

The Office received a copy of a July 11, 2004 letter from Cheryl Wilczak, a mental health clinician, who indicated that appellant's daughter was receiving long-term mental health services for a schizoaffective disorder. The Office also received a copy of a "Fiduciary's Certificate" from the state of Connecticut Court of Probate dated March 29, 2004. The certificate indicated that it was valid for one year and that appellant was appointed conservator of the estate and person of her daughter on March 29, 2004. A document from the Social Security Administration noted that appellant received a net payment of \$636.00 per month as of July 2005. She also received compensation payments every 28 days in the amount of \$1,468.08. Appellant provided the Office with copies of electric bills dated September 4, 2001 in the amount of \$878.71 and June 4, 2003 in the amount of \$1,183.64.³ A credit report dated May 27, 2005 showed that appellant had three active loan accounts with balances of \$1,475.00, \$1,006.00 and \$384.00. Appellant did not submit documentation regarding expenses related to being driven to and from any medical appointment or shopping.

In a July 11, 2005 report, Dr. Kenneth Blatt, a psychiatrist, opined that appellant's daughter, Barbara Smith, was "currently disabled and receiving long-term mental health services." He noted that "at the present time, she is not able to work." He indicated that Ms. Smith's most recent admission began on April 20, 2004 and she received medication and counseling to manage a psychiatric condition which included a schizoaffective disorder, alcohol and cannabis abuse.

By letter dated August 12, 2005, appellant clarified certain aspects of the hearing transcript. She indicated that her daughter attended high school full time in 1999. She also indicated that appellant worked and lived with her until 2000. Appellant stated that her daughter moved to an apartment in 2001 and had lived there since then. Her daughter was hospitalized on

² In her questionnaire, appellant indicated that her gross monthly income was \$2,023.00 and her expenses were equal to \$1,670.00.

³ They did not specify a particular month, but appeared to be for an accumulated time period.

several occasions, and was receiving social security benefits. Appellant again noted that she was her daughter's social security payee and conservator.

In a decision dated September 19, 2005, the Office hearing representative affirmed the Office's preliminary findings on the fact and amount of the \$1,802.10 overpayment based on the nondeduction of life insurance proceeds. He noted that the overpayment recovery questionnaire indicated that appellant had monthly expenses of \$1,450.00 and monthly loan payments of \$440.00. The Office hearing representative found that appellant was not entitled to waiver because her monthly income exceeded her monthly living expenses (\$2,246.42 minus \$1,890 yielded \$336.42). He determined that the overpayment would be recovered by deducting \$50.00 per month from continuing compensation payments. The hearing representative set aside the \$11,066.02 overpayment for further development. He noted that appellant's husband qualified as a dependent for a portion of the overpayment period. The Office hearing representative directed the Office to recalculate the amount of any overpayment from May 28, 2002 through November 29, 2003 and consider whether appellant was at fault.

By letter dated November 4, 2005, the Office issued a preliminary determination that appellant was at fault in creating a \$3,683.50 overpayment of compensation. It determined that appellant's compensation should have been reduced to the basic two thirds rate for the period May 28, 2002 through November 29, 2003 when her daughter was over 18 years old and she no longer had a husband. The Office noted that appellant did not submit any evidence establishing that her daughter qualified as a dependent.

Worksheets prepared by the Office reflect that appellant received compensation payments at the incorrect augmented (three fourths) compensation rate and a weekly pay rate of \$516.92 for which she received \$33,249.60 for the period May 28, 2002 to November 29, 2003. It also showed that, for the same time frame, if she was paid at the correct basic rate (two-thirds), she would have received \$29,566.10. The Office subtracted the amount she received for the aforementioned time frame; \$33,249.60 from the amount she should have received \$29,566.10 and determined that appellant received an overpayment in the amount of \$3,683.50.

In a December 5, 2005 decision, the Office finalized the Office's preliminary overpayment finding and found that appellant was at fault because she did not furnish documentation of her daughter's financial or medical status for the period May 28, 2002 to November 29, 2003.⁴

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 his duty.⁵ When an overpayment has been made to an individual

⁴ The Office requested that appellant forward a check in the amount of \$3,683.50 within 30 days. Appellant was advised that, if she was unable to refund the entire overpayment immediately, she should contact the Office so that appropriate arrangements for recovery could be made.

⁵ 5 U.S.C. § 8102(a).

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.⁶

The basic rate of compensation under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁷ An unmarried child living with the employee is a dependent if he or she is under 18 years of age or if he or she is under 23 years of age and is a full-time student.⁸ A husband is considered the employee's dependent if he is a member of the same household; or if she is receiving regular contributions from the employee for his support; or if the employee has been ordered by a court to contribute to his support.⁹ In determining dependency under the Act, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.¹⁰

Section 8110(a)(3)(B) of the Act¹¹ which provides for augmented compensation defines a dependent, in pertinent part, as an unmarried child, while living with the employee or receiving regular contributions from the employee, who is "over 18 years of age and incapable of self-support because of physical or mental disability."¹² The employee may establish that his or her child, who has turned 18 years of age, is incapable of self-support by submitting a medical report from the child's physician describing the mental or physical disability which caused the child's incapacity for self-support.¹³

Section 10.537 of the implementing regulations provides that at least twice each year, the Office will ask an employee who receives compensation based on a child's physical or mental inability to support himself or herself to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support. If the employee fails to submit proof within 30 days of the date of the request, the Office will suspend the employee's right to compensation until the requested information is received. At that time the Office will reinstate compensation retroactive to the date of suspension, provided the employee is entitled to such compensation.¹⁴

⁶ *Id.* at § 8129(a).

⁷ 5 U.S.C. §§ 8105(a), 8110(b).

⁸ 5 U.S.C. §§ 8110(a)(3), 8101(17).

⁹ 5 U.S.C. § 8110(a)(2).

¹⁰ *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

¹¹ 5 U.S.C. §§ 8101-8193.

¹² 5 U.S.C. § 8110(a)(3)(B).

¹³ *Teresa B. Tencati*, 21 ECAB 398, 402 (1970).

¹⁴ 20 C.F.R. § 10.537.

Office procedures provide that claims made for children over 18 who are physically or mentally incapable of self-support, must be investigated regarding the extent and expected duration of the illness involved. A child is deemed incapable of self-support if his or her physical or mental condition renders him or her unable to obtain and retain a job, or engage in self-employment that would provide a sustained living wage. This determination must be based on medical evidence. When medical evidence demonstrates incapacity for self-support, this determination will stand unless refuted by the sustained work performance. Office procedures further state that a medical report covering the child's past and present condition must be submitted and referred to the Office medical adviser to determine whether it establishes incapacity for self-support. A physician's opinion must be based on sufficient findings and rationale to establish unemployability.¹⁵

ANALYSIS -- ISSUE 1

Appellant received compensation at the augmented rate for employees with dependents at the time her daughter, who was living with her, reached 18 years of age on May 23, 1999. Appellant's July 13, 2005 hearing testimony establishes that her daughter was not a full-time student after her eighteenth birthday. However, appellant was married at that time and her husband qualified as a dependent until appellant's divorce on May 28, 2002.¹⁶ Therefore, she was entitled to augmented compensation until May 28, 2002.

Appellant alleged that her daughter met the criteria to be considered a dependent and testified that her daughter was awarded disability benefits by the Social Security Administration in November 2002, and received her first check in December 2002. She provided documentation which included a July 11, 2005 report from Dr. Kenneth Blatt a psychiatrist, who indicated that appellant's daughter was "currently disabled" and receiving "long-term mental health services." However, Dr. Blatt did not indicate that she was a dependent who relied, in whole or in part, upon the contributions given by appellant as a means of maintaining or helping to maintain a customary standard of living.¹⁷ He did not specifically address whether she was disabled such that she was incapable of self-support during the relevant period of May 28, 2002 to November 29, 2003. While appellant indicated that she was the conservator for her daughter, the only documentation regarding this was the March 29, 2004 Fiduciary Certificate of the Connecticut Court of Probate. However, this does not address the period at issue, May 28, 2002 to November 29, 2003. Thus, the Board finds that appellant's daughter did not meet the criteria to be considered a dependent.

The Office paid gross compensation of \$33,249.60 from May 28, 2002 until November 29, 2003, which was compensation paid at the augmented rate for dependents. At the basic rate for no dependents, during the same time frame, the Office should have paid gross compensation of \$29,566.10. This would result in a difference of \$3,683.50. The Board,

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10c (November 1996).

¹⁶ The Office accepted that appellant's husband was a dependent until the date of the divorce. Appellant did not show nor did she allege that he was a dependent after that date.

¹⁷ *Supra* note 15.

therefore, finds that appellant received an overpayment of \$3,683.50 from May 28, 2002 until November 29, 2003. Therefore, the Board finds that the Office correctly determined the fact and amount of overpaid compensation in this case.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁸

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the second criterion above, that she failed to provide information which she or she knew or should have known to be material. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time she received the compensation checks in question, she failed to provide information which he or she knew or should have known to be material.

In this case, appellant received and completed several CA-1032 forms which provided information to her regarding dependents and augmented compensation. The record reflects that, in July 1998, she listed her daughter, Barbara Smith, as a dependent and advised that she was born on May 23, 1981. She also listed her husband as a dependent on February 19, 2001. However, she did not advise the Office that her daughter turned 18 on May 23, 1999 and continued to receive augmented compensation through November 29, 2003. The Board notes that she was instructed to do so on several occasions. This included the February 11, 2000 CA-1032 which appellant signed and completed. At that time, appellant was advised under the certification part of the form that she must immediately report any change in the status of her claimed dependents. By signing the form, appellant is deemed to have acknowledged her duty to report any change in the status of her claimed dependents. In addition, on October 28, 2003, appellant was instructed by the Office of these procedures and the documentation needed to

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ 20 C.F.R. § 10.433(b).

establish that her daughter was incapable of self-support. The record reflects that appellant's husband qualified as a dependent until her divorce on May 28, 2002. However, she received compensation at the augmented rate until November 29, 2003 but did not provide documentation which showed that her daughter was incapable of self-support after she turned 18. The Board finds that appellant failed to furnish information which she knew or should have known to be material to the Office, once her daughter turned 18, and after her divorce became final on May 28, 2002. The Board finds that appellant was at fault in helping to create the overpayment that occurred from May 28, 2002 until November 29, 2003. The Board will affirm the Office's December 5, 2005 decision on the issue of fault. Since appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment is precluded.²⁰

LEGAL PRECEDENT -- ISSUE 3

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.²¹ The coverage for basic life insurance is effective unless waived²² and the premiums for basic and optional life coverage are withheld from the employee's pay.²³ 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.²⁴ When an under withholding 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.²⁵

ANALYSIS -- ISSUE 3

The record reveals that appellant retired on August 1, 1998; however, the elected basic life and post-retirement premiums were not deducted for the period August 1, 1998 to November 29, 2003. This caused an overpayment of compensation to appellant. The Office should have deducted premiums for the additional life insurance for the basic life and post-retirement premiums. Premiums were not deducted for the period August 1, 1998 through

²⁰ Because the Office has issued no final decision on repayment of the overpayment, the Board has no jurisdiction over repayment. 20 C.F.R. § 501.2(c).

²¹ 5 U.S.C. § 8702(a).

²² 5 U.S.C. § 8702(b).

²³ 5 U.S.C. § 8707.

²⁴ *Supra* note 22.

²⁵ 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). An under withholding of premiums results in a two-tiered liability. The claimant owes the agency the under withheld funds and similarly the agency owes the insurance fund/OPM. If this occurs, the Office must make OPM whole and remit the entire amount of the under withholding, even if the debt is eventually waived. Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Life Insurance*, Chapter 5.401.11(b)(2) (August 2004).

November 29, 2003. A worksheet provided by the Office indicates that no premiums were deducted during this time frame for which appellant elected a 50 percent reduction in post-retirement basic life. The period August 1, 1998 through November 29, 2003 was 5 years and 4 months or 276 weeks. Since the premiums are bi-weekly, the Board notes that two hundred and seventy six weeks divided by two would equate to 183 weeks. Multiplying the retirement premium of \$8.10 per week times 138 weeks is \$1,117.80 and multiplying the basic life premium of \$4.65 times 138 is \$641.17. When added together, \$1,758.97. The Office properly found that an overpayment in the amount of \$1,758.97. The Board will affirm the Office's September 19, 2005 decision on the issue of fact and award of overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act provides: Adjustment or recovery 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.²⁶ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 of the implementing regulation²⁷ provides that 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 or 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.²⁸ An individual is deemed to need 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 \$50.00.²⁹

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

²⁶ 5 U.S.C. § 8129(b).

²⁷ 20 C.F.R. § 10.436.

²⁸ 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 the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

²⁹ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

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.³⁰

Section 10.438 of the regulations 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 or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of the waiver.³¹

ANALYSIS -- ISSUE 4

In this case, although the Office found that appellant was without fault in the matter of the overpayment related to nondeduction of her life insurance premiums, she nonetheless bears responsibility for providing financial documents and information. Even if the Office makes a mistake, appellant is not relieved from repaying the overpayment.³²

Appellant submitted documentation to support that her income consisted of a monthly Social Security benefit of \$636.00 and a monthly compensation check in the amount of \$1,468.00. The Board notes that the combined income amounts to approximately \$2,104.00 per month. Regarding her expenses, appellant submitted documentation supporting the following expenses: \$300.00 per month towards the rent; \$200.00 per month in clothing costs; \$100.00 per month in the summer for air conditioning and more than that in the winter.³³ Appellant also alleged that she spent money for medicine and co-pays for doctor's visits. However, no particular monetary amount was listed. Additionally, appellant testified that she paid for transportation to the grocery store and medical appointments. She testified that she had several loans that were still open but was not currently paying the loans.³⁴ Appellant did not submit documentation regarding her expenses related to being driven to and from medical appointments or the grocery store. She indicated that she had a checking account, did not own a car and had no credit cards. The Board notes that these expenses are \$800.00 per month. In her overpayment recovery questionnaire, appellant testified that her expenses were approximately \$1,890.00 dollars per month. Thus, the Board notes that the income of \$2,104.00 per month less the expenses of \$1,890.00 per month would result in an excess of \$214.00 per month. This is more than \$50.00 per month, and thus, she is not deemed to need all of her income to meet current

³⁰ 20 C.F.R. § 437.

³¹ 20 C.F.R. § 10.438.

³² See 20 C.F.R. § 10.435; *Keith H. Mapes, supra* note 25 (although the Office found that the claimant was without fault in the matter of the overpayment, repayment is still required unless the claimant qualifies for waiver of the overpayment).

³³ As noted earlier, appellant provided the Office with copies of electric bills dated September 4, 2001 in the amount of \$878.71 and June 4, 2003 in the amount of \$1,183.64. However, these appeared to be accumulated bills over a period of time, as opposed to a particular monthly expense.

³⁴ A credit report dated May 27, 2005 showed that appellant had three active accounts with loan balances of \$1,475.00, \$1,006.00 and \$384.00.

ordinary and necessary living expenses since her monthly income exceeds her monthly expenses by more than \$50.00.³⁵

Appellant has also not submitted evidence supporting that repayment would be against equity and good conscience. She has not demonstrated how she would experience severe financial hardship attempting to repay the debt and she has not shown how, in reliance on such payments, she gave up a valuable right or changed his or her position for the worse.

There is no evidence to support either that she needs substantially all of her current monthly income to meet living expenses or that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation that he received. Therefore, appellant does not qualify for waiver under the “defeat the purpose of the Act” standard or the “against equity and good conscience” standard. The Board will affirm the Office’s decision on the issue of waiver.

LEGAL PRECEDENT -- ISSUE 5

Section 8129 of the Act provides that, 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.³⁶ The implementing regulations provide that, 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.³⁷

ANALYSIS -- ISSUE 5

The Board finds that the Office properly required repayment by withholding the overpayment amount of \$50.00 from appellant’s compensation checks until the overpayment was recouped. Appellant submitted documentation and receipts which indicate that her income exceeded her expenses by at least \$214.00 per month.

³⁵ See *supra* note 29.

³⁶ 5 U.S.C. § 8129(a).

³⁷ 20 C.F.R. § 10.441(a).

Based on the circumstances of this case, the Office acted properly in determining that the overpayment would be recovered by deducting this amount from appellant's continuing compensation.³⁸

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$3,683.50, for which she was at fault, due to receipt of augmented compensation during a period in which she had no dependents. The Board also finds that the Office properly determined that appellant received an overpayment in the amount of \$1,758.97 because premiums were not deducted for basic life insurance and post-retirement life insurance for the period August 1, 1998 through November 29, 2003; and the Office properly determined that appellant was not entitled to waiver. Additionally, the Board finds that the Office properly required repayment of the overpayment by deducting the sum of \$50.00 per month from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the December 5 and September 19, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 27, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

³⁸ On appeal, appellant alleged that amounts beyond the \$82.36 were being taken out of his compensation every 28 days. There currently is no final decision of record other than the August 4, 2004 decision, addressing the recovery issue, which indicates that \$82.36 will be taken out of appellant's compensation every 28 days. The Board only has jurisdiction over final decisions of the Office. See 20 C.F.R. § 501.2(c).