

FACTUAL HISTORY

On January 21, 1988 appellant, then a 31-year-old test equipment operator, sustained a traumatic injury when he sprained his back while moving a load of metal pallets. The Office accepted his claim for low back strain and herniated nucleus pulposus L5-S1. Appellant underwent a lumbar laminectomy on February 18, 1988. He returned to light-duty work and, on August 8, 1991, sustained a recurrence of total disability. The Office authorized repeat surgery on September 9, 1993. Appellant returned to light-duty work on December 13, 1993. The Office granted him a schedule award for six percent impairment to his left lower extremity. The Board affirmed this decision of the Office on March 13, 1997.¹ The employing establishment terminated appellant's employment on November 12, 1995. On March 30, 1998 appellant elected to receive compensation benefits through the Office.

By decision dated August 24, 2004, the Office reduced his compensation benefits based on his capacity to earn wages in the constructed position of information clerk. Appellant requested an oral hearing on the issue of his wage-earning capacity on July 23, 2005. By decision dated August 2, 2005, the Branch of Hearings and Review denied his request for an oral hearing as untimely.

On September 21, 2004 the Office made a preliminary determination that appellant received an overpayment of compensation for the period June 21, 1998 to August 9, 2003, in the amount of \$819.06. The Office stated that the overpayment occurred as it failed to collect basic life insurance premiums. The Office found that appellant was not at fault in the creation of the overpayment. Appellant requested waiver of this overpayment and a prerescoupment hearing on October 10, 2004. By decision dated October 22, 2004, the Office finalized the preliminary overpayment determination. The Branch of Hearings and Review considered appellant's claim and, by decision dated March 23, 2005, set aside the October 22, 2004 decision. The hearing representative stated:

“Based on a review of the Office's payment history records for this case, it appears that the Office has not determined the correct premiums that should have been deducted for [appellant's] life insurance on and after May 1, 1998. I did not find evidence that the Office made any life insurance premium deductions for the period May 1, 1998 to June 20, 1998. For the period June 21, 1998 to August 7, 2004, the only premium deductions appear to have been for Optional Insurance (Options A, B and C). (It is unclear why the Office deducted premiums for that type of coverage, as OPM [Office of Personnel Management] did not indicate that [appellant] was eligible to continue that particular type of coverage.) For the period August 8, 2004 to the present, premiums have been deducted for Basic Life and Optional Life Insurance. It does not appear that any deductions have been made for [p]ost-[r]etirement coverage or that the Office used the salary rate given by OPM to calculate the insurance premiums.”

¹ Docket No. 95-826 (issued March 13, 1997).

On remand the Office made a preliminary finding that appellant had received an overpayment in the amount of \$3,004.36 on July 18, 2002. It found that it failed to collect post-retirement basic life insurance premiums for the period June 21, 1998 to July 9, 2005. The Office found that appellant was not at fault in the creation of the overpayment.

The Office provided calculations of the amount of optional life insurance benefits it had collected, the amount of \$2,509.66. It noted that appellant had paid basic life insurance from August 8, 2004 to July 9, 2005 in the amount of \$108.90. The Office found that appellant was due \$2,618.56. It then calculated that appellant owed basic life insurance premiums from June 21, 1998 to April 24, 1999 in the amount of \$583.44; from April 25, 1999 to January 25, 2003 in the amount of \$3,132.08 and from January 26, 2003 to July 9, 2005 in the amount of \$1,849.60, for a total overpayment of \$5,622.92. The Office reduced the total overpayment amount of \$5,622.92, by the amount owed appellant, \$2,628.56 and found that appellant owed the balance of \$3,004.36.

Appellant requested a prerecoupment hearing on July 27, 2005. He appeared at the hearing held on October 17, 2006 and stated his belief that this hearing was regarding his wage-earning capacity determination. The hearing representative allowed appellant 30 days to submit financial information in support of his request for waiver of the overpayment. Appellant submitted documentation to the hearing representative concerning his household monthly income.

By decision dated December 22, 2006, the hearing representative affirmed the Office's July 18, 2005 preliminary finding of fact and amount of overpayment. She concluded that appellant was not at fault in the creation of the overpayment but was not entitled to waiver as recovery would neither defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. The hearing representative found that the overpayment should be recovered by deducting \$300.00 every 28 days from appellant's continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

The 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.² When an overpayment has been made to an individual because of 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.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.⁴ The coverage of basic life insurance is effective unless waived⁵ and the

² 5 U.S.C. §§ 8101-8193, 8102(a).

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8702(a).

⁵ 5 U.S.C. § 8702(b).

premiums for basic and optional life coverage are withheld from the employee's pay.⁶ At separation from the employing establishing, the FEGLI insurance will either terminate or continue 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.⁷ 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 the OPM upon discovery of the error.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has received an overpayment of compensation due to the under-withholding of his basic life insurance premiums. However, the Office has not properly determined the amount of the overpayment. It determined that appellant received an overpayment of compensation in the amount of \$5,622.92. The Office, however, erred by offsetting the amount of overpayment with the over collection of optional life insurance premiums and prior payments of basic life insurance premiums in the amount of \$2,618.56. Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.⁹ In *Califano v. Yamasaki*,¹⁰ the Supreme Court held that, due process required the Social Security Administration to defer any measures to recover suspected overpayments until, *inter alia*, it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act and the Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act.¹¹

The Office's offset practice, as exercised in the December 22, 2006 decision, precludes the proper consideration of waiver of the entire amount of the overpayment. The Office's practice also permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a).¹² The Board finds that such

⁶ 5 U.S.C. § 8707.

⁷ 5 U.S.C. § 8706(b).

⁸ 5 U.S.C. § 8707(d); *Keith H. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004).

⁹ *Robert L. Curry*, 54 ECAB 675, 677 (2003).

¹⁰ 442 U.S. 682 (1979).

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994). *Robert L. Curry*, *supra* note 9.

¹² This section states that, in collecting an overpayment of compensation the Office shall decrease later payment of compensation by, 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.

practice denies administrative due process with respect to the amount offset.¹³ The case will, therefore, be remanded for the Office to properly calculate the entire amount of the overpayment of compensation.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation due to the under-withholding of basic life insurance premiums. It further finds that the Office improperly offset the overpayment amount by optional life insurance premiums improperly deducted by the Office. The case will be remanded for the Office to properly calculate the amount of the overpayment and to consider waiver of the entire amount of the overpayment. After conducting such further development as is deemed necessary, the Office shall issue a *de novo* decision.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2006 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of the overpayment. The December 22, 2006 decision is remanded for further action consistent with this decision of the Board.

Issued: September 13, 2007
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

¹³ *Diana L. Booth*, 52 ECAB 370, 373 (2001).

¹⁴ Due to the failure of the Office to properly calculate the amount of the overpayment, it is not necessary for the Board to address the issues of waiver of the overpayment and the scheduled recovery of the overpayment.