

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

M.C., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Long Beach, CA, Employer**

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**Docket No. 07-1613
Issued: August 26, 2008**

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 May 22, 2007 appellant filed a timely appeal from the May 9, 2007 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,339.86 due to an under-deduction of health insurance premiums for which he was without fault; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required recovery by deducting \$250.00 every four weeks from his continuing compensation.

FACTUAL HISTORY

On August 21, 1989 appellant, then a 30-year-old maintenance mechanic, sustained injury to his low back and left leg while removing a valve from a sandblasting machine. His

claim was accepted by the Office for postlaminectomy syndrome. Appellant received appropriate compensation benefits.

On January 15, 2003 the Office determined that deductions for appellant's health insurance premiums had been made using the wrong policy code resulting in an underdeduction of \$12,339.86. It noted that from October 18, 1989 to January 4, 1997 deductions had been made in the amount of \$3,309.98 and from January 5, 1997 to December 28, 2002 deductions had been made in the amount of \$3085.10, or a total of \$6,395.08. However, under Code 105, total deductions for the period October 18, 1989 to December 28, 2002 should have been made in the amount of \$18,734.94, resulting in an overpayment to appellant of \$12,339.86.

By letter dated January 17, 2003, the Office issued a preliminary finding that appellant had been overpaid compensation benefits as it had used the wrong deduction plan code in making premium payments. It advised that the error was not corrected until December 29, 2002, resulting in an overpayment to appellant in the amount of \$12,339.86, which should have been remitted for his Blue Cross-Blue Shield standard option plan. Appellant was advised that he was found to be without fault in the creation of the overpayment and that he could submit financial information in support of any request for waiver of the overpayment.

On January 24, 2003 appellant submitted a completed Form OWCP-20 requesting waiver of the overpayment. He listed total monthly income as \$2,700.00, consisting of his wife's income of \$1,200.00 a month and monthly rental income of \$1,500.00. Appellant listed monthly expenses of \$1,400.00 in mortgage, \$200.00 for food, \$200.00 for clothing, \$200.00 in utilities and \$700.00 for automobiles. He listed other monthly installments of \$400.00 to Bank One and \$1,300.00 to a private creditor, bringing the total to \$4,400.00 a month. Appellant stated that the approximate market value of his rental property was \$450,000.00 with an outstanding mortgage of \$250,000.00. He indicated that he had no stocks or bonds and a checking account balance of \$200.00.

In a May 9, 2007 decision, the Office finalized the overpayment determination, finding that appellant was without fault in the creation of the \$12,339.86 overpayment. It noted that appellant was not eligible for waiver as his had omitted his receipt of compensation benefits under his monthly income, which would increase his total to \$4,700.00.¹ The Office indicated that appellant's total monthly expenses of \$4,400.00 would leave an excess of \$300.00. Based on the financial information submitted, appellant was found not eligible for waiver of the overpayment and was directed recovery of \$250.00 every 28 days from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The implementing regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefit (FEHB) Program, provides 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

¹ The record reflects that, as of January 19, 2006, appellant was in receipt of monthly compensation benefits in the net amount of \$1,995.82 after deductions.

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 benefit 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 to the United States in the amount of the proper employee withholding required for that pay period.²

Furthermore, 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 the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.³ When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.

ANALYSIS -- ISSUE 1

The record reflects that appellant was enrolled in the FEHB program. However, the Office made deductions from his compensation using an erroneous enrollment code, thereby deducting an incorrect amount for the health benefit premium associated with his enrollment in Blue Cross/Blue Shield standard option. For the period October 8, 1989 to January 4, 1997 deductions were made in the amount of \$3,309.08. From January 4, 1997 to December 28, 2002 deductions in the amount of \$3,085.10 were made. However, the record reflects that the Office deducted premiums associated with enrollment in Pacific Care insurance rather than Blue Cross/Blue Shield. For the periods noted, the total cost of deductions made for enrollment in Blue Cross/Blue Shield insurance should have been \$18,734.94. The difference of \$12,339.86 represents the amount by which the Office under-deducted the health premiums from appellant's compensation benefits thereby resulting in an overpayment of compensation to appellant. As the Office is required to withhold the proper amount for health benefit premiums, the record supports the fact and amount of overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation 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.⁴ As appellant was found 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 the Office's implementing federal regulations.

² See *John Skarbek*, 53 ECAB 630 (2002).

³ *Id.*

⁴ 5 U.S.C. § 8129(b).

Under section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses, and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁵ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificates of deposit.⁶ An individual's nonliquid assets include but are not limited to the fair market value of the owner's equity in property such as a camper, boat, second home or furnishings and supplies.⁷

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment as erroneous deductions were made from his compensation for the payment of his health benefit premiums. However, the fact that the Office may have been negligent in the deductions of the premiums does not entitle appellant to waiver of the overpayment. An overpayment may be waived only upon a showing that recovery would defeat the purpose of the Act or would be against equity and good conscience.

In his submission to the Office, appellant did not raise any argument that he relinquished a valuable right in reliance on the incorrect premium withholding or otherwise demonstrate that recovery of the overpayment would be against equity and good conscience.⁹ Rather, he submitted financial information pertaining to his monthly income and expenses, appearing to argue that recovery of the overpayment would defeat the purpose of the Act as it would deprive him of substantially all of his current income to meet ordinary and necessary living expenses. However, the record reflects that he reported non-liquid assets in a rental property well in excess

⁵ Current Office procedures provide that the assets must not exceed a resource based of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁶ *Id.* at Chapter 6.200.6(a) (May 2004).

⁷ *Id.*

⁸ 20 C.F.R. § 10.437(b)(1).

⁹ In his appeal to the Board, appellant contended that recovery of the overpayment would cause an undue financial hardship. However, this argument was not raised before the Office and the Board may not consider it for the first time on appeal. See 20 C.F.R. § 501.2(c).

of \$100,000.00.¹⁰ Moreover, in reporting the extent of his monthly income, appellant identified the income of his wife and from his rental property. He neglected to include his receipt of monthly compensation benefits of approximately \$2,000.00, bringing his total monthly income to \$4,700.00 and in excess of his reported monthly expenses of \$4,400.00.

For waiver under the defeat the purpose of the Act standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the applicable resource base. As appellant reported liquid and non-liquid assets well in excess of \$100,000.00, he has not demonstrated that recovery of the overpayment by the Office would defeat the purpose of the Act.

LEGAL PRECEDENT -- ISSUE 3

The Office's implementing regulations provide that, when an overpayment has been made to an individual who is entitled to further payments of compensation, the individual shall refund the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same.¹¹ 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.¹²

ANALYSIS -- ISSUE 3

The Office directed recovery of the overpayment from appellant's continuing compensation benefits in the amount of \$250.00 every four weeks. The financial information of record reveals that he is in receipt of compensation in the amount of approximately \$2,000.00 per month. In addition, appellant reported income from his wife of \$1,200.00 per month and rental income of \$1,500.00, or a total of \$4,700.00. As noted, he also listed other assets, including equity in a rental property of approximately \$200,000.00. In view of the financial information submitted, there is no evidence of any financial hardship in setting the rate of recovery of the overpayment at \$250.00 from appellant's continuing compensation payments every four weeks. The Board finds that the Office gave proper consideration to the implementing regulations in setting the rate of recovery of the overpayment in this case.

CONCLUSION

The Board finds that an overpayment of \$12,339.86 was created due to the deduction of health premiums at an incorrect rate. The Office properly denied waiver of the overpayment and set the rate of recovery at \$250.00 from appellant's continuing compensation payments.

¹⁰ Appellant noted an outstanding mortgage on a rental property of \$250,000.00 while estimating the fair market value of the property at \$450,000.00. This represents that his equity in the property was approximately \$200,000.00.

¹¹ 20 C.F.R. § 10.441.

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 26, 2008
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