

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

W.J., Appellant)	
)	
and)	Docket No. 07-1909
)	Issued: September 25, 2008
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Baltimore, MD, Employer)	
)	

Appearances:
Appellant, pro se
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 July 11, 2007 appellant filed a timely appeal of the May 10, 2007 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment in the amount of \$2,195.10 for which she was not at fault and deducting \$40.00 per month from her continuing compensation to recover the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this overpayment case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,195.10 during the period July 12, 2003 to October 1, 2005 when life insurance premiums were not deducted from her compensation; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether it properly determined that the overpayment would be recovered by deducting \$40.00 from her continuing compensation.

FACTUAL HISTORY

On January 27, 1998 appellant, then a 48-year-old distribution clerk, filed a traumatic injury claim for neck, shoulder and left arm injuries sustained as a result of her work duties. The Office accepted the claim for sprain of the cervical spine and left wrist and depression.

On March 5, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$2,195.10, during the period July 12, 2003 to October 1, 2005 because postretirement life insurance premiums were not deducted from her compensation benefits. It received notification from the Office of Personnel Management (OPM) on September 8, 2005 that effective July 12, 2003 appellant had elected postretirement life insurance. The Office determined that no premiums had been deducted from her compensation until October 2, 2005. It found that \$2,195.10 in premiums should have been deducted from her compensation during this period. The Office determined that appellant was not at fault in the creation of the overpayment. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On March 13, 2007 appellant requested a telephone hearing. On an OWCP-20 form dated March 15, 2007, she reported her monthly income and expenses. Appellant's income included \$2,329.40 in benefits under the Federal Employees' Compensation Act, \$115.00 in benefits from the Department of Veterans Affairs (VA) and \$400.00 from a roommate, totaling \$2,844.40. Her estimated expenses included: \$1,006.49 for rent or mortgage; \$200.00 for food; \$296.53 for utilities; \$1,265.43 in miscellaneous expenses; and \$20.00 for a Bank of America credit card, totaling \$2,788.45.¹ Appellant's assets included: undeveloped land that had no market value; \$145.00 cash on hand; \$399.00 in a checking account; \$221.23 in a savings account; and approximately \$2,000.00 in stocks and bonds, totaling \$2,765.23. She separately provided other monthly expenses which included \$135.00 for carpet cleaning. Appellant submitted financial records in support of the stated expenses.

During an April 18, 2007 telephone hearing, an Office claims examiner noted that appellant's compensation under the Act would be increased by \$61.00 per month to \$2,390.40 due to a recent consumer price index increase. He advised her that her gross income and regular monthly deductions would be considered in issuing a final decision on the preliminary overpayment determination. The claims examiner informed appellant that her listed monthly expenses and evidence accompanying her statement were unclear. Appellant stated that she did not have any expenses for clothes because she could not afford any. She further stated that \$135.00 for carpet cleaning was paid three to four times a year and not monthly. Appellant owned her car but, the claims examiner noted that she did not list an expense for car insurance costs. He requested that appellant complete another OWCP-20 form with a detailed explanation of her actual monthly expenses.

¹ The Board notes that appellant incorrectly calculated a total of \$2,796.34 in monthly expenses.

In an OWCP-20 form dated May 1, 2007, appellant restated her prior monthly income and expenses for food and a Bank of America credit card. She stated that her roommate had given notice for moving out and that she would no longer receive \$400.00 in income. Appellant's estimated expenses included: \$1,019.50 for rent or mortgage; \$20.00 for dry cleaning; \$290.00 for utilities; \$1,527.57 for miscellaneous expenses; \$25.00 to \$90.00 for a Sears credit card. Her assets included: \$150.00 cash on hand; \$1,401.13 in a checking account; approximately \$321.23 in a savings account; and \$1,428.00 in stocks and bonds, totaling \$3,300.36. In accompanying letter dated May 1, 2007, appellant listed additional expenses which included: \$90.00 for car maintenance; \$46.00 for escrow shortage; \$92.95 for Direct TV; \$19.95 for Microsoft; \$263.00 for church; \$20.00 for medical bills; \$23.25 for flood insurance; \$25.00 for cutting the lawn and snow removal; \$49.00 for yard treatment; \$45.00 for carpet cleaning; \$1,500.00 for home repairs; \$32.99 for pet stain remover; \$59.35 for pet insurance; approximately \$27.00 for veterinary expenses; \$80.00 for car registration; \$200.00 for gas for the car; \$80.93 for car insurance; \$3.00 for Bank of America service charge; \$30.00 for American Association of Retired Persons; \$30.50 for hair maintenance; \$30.00 for pedicure; \$4.00 for Provident Bank service charge; and \$45.00 for pet food. She submitted financial records in support of the stated expenses.

By decision dated May 10, 2007, the Office found that appellant received an overpayment in the amount of \$2,195.10, during the period July 12, 2003 to October 1, 2005 because postretirement insurance premiums were not deducted from her compensation. It denied waiver of recovery of the overpayment. The Office determined that appellant had income under the Act of \$2,390.40 every 28 days or \$31,075.20 annually, \$115.00 per month in VA benefits or \$1,380.00 annually and \$400.00 per month from her roommate or \$4,800.00 annually which totaled \$37,255.20 annually. It further determined that she had \$3,300.00 in cash, checking and savings accounts, stocks and bonds. The Office determined that appellant had monthly expenses of \$3,018.60² or \$36,223.20 annually. It determined that appellant's annual income of \$37,255.20³ less her annual expenses of \$36,223.20 resulted in a balance of \$1,002.00. The Office divided \$1,002.00 by 12 months to determine that appellant had \$83.50 per month of disposable income. The Office found that her monthly expenses did not exceed her monthly income. It directed recovery of the overpayment by deducting \$40.00 per month from her continuing compensation benefits effective May 13, 2007. The Office advised appellant that, if she disagreed with the decision, the only right of appeal was to the Board.

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.⁴ When an overpayment has been made to an individual

² The Board notes that the Office rounded up the dollar amounts for appellant's monthly expenses, apparently allowing the full amount of claimed miscellaneous expenses.

³ The Board notes that the Office inadvertently stated that appellant's annual income was \$37,225.20 rather than \$37,255.20.

⁴ 5 U.S.C. § 8102(a).

because of an error of fact or law, adjustment shall be made under regulation prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

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.⁶ The coverage for basic life insurance is effective unless waived⁷ and the premiums for basic and optional life coverage are withheld from the employee's pay.⁸ 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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The record establishes that appellant elected postretirement life insurance effective July 12, 2003 but no premiums were deducted from her compensation until October 2, 2005. The Office calculated the amount of \$2,195.10 for postretirement life insurance premiums which should have been deducted from appellant's compensation from July 12, 2003 through October 1, 2005. The Board finds that, during the period July 12, 2003 through October 1, 2005, appellant received an overpayment of \$2,195.10, based upon the amount of deductions that should have been made for her postretirement life insurance.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹¹ As noted, the statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment recovery [of an overpayment] by the United States may not be made when [an] 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."¹²

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8702(a).

⁷ *Id.* at § 8702(b).

⁸ *Id.* at § 8707.

⁹ *Id.* at § 8706(b).

¹⁰ *Id.* at § 8707(d); *see Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

¹¹ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

¹² *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulation¹³ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship in a currently or formerly entitled beneficiary because: 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.¹⁴ 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 \$50.00.¹⁵

Section 10.437 provides that recovery of an overpayment is considered 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.¹⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the creation of the overpayment. In determining that she was not entitled to a waiver of the recovery of the overpayment, it reviewed her income, expenses and assets as listed in her May 1, 2007 OWCP-20 form and letter. Appellant had monthly expenses of \$3,018.60 or \$36,223.20 annually, monthly income of \$3,104.60 or \$37,255.20 annually and \$3,300.00 in assets. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷ The Board finds that, as appellant's monthly income of \$3,104.60 exceeds her monthly expenses of \$3,018.60 by \$86.00, she is not entitled to waiver as she does not need substantially all of her income to meet current ordinary and necessary expenses.

Further, there is no evidence in this case, and appellant did not allege and there is no evidence, that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received for the period July 12, 2003 to October 1, 2005. Pursuant to its regulations, the Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

¹³ 20 C.F.R. § 10.436.

¹⁴ An individual's assets must exceed a resource based on \$4,800.00, for an individual or \$8,000.00, for an individual with a spouse or one dependent plus \$960.00, for each additional dependent. This includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1)(b) (December 2004).

¹⁵ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁶ 20 C.F.R. § 10.437.

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial overpayment Actions*, Chapter 6.200.6(a)(3) (October 2004).

As the evidence in this case fails to support 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 denying a waiver of recovery of the overpayment of \$2,195.10.

LEGAL PRECEDENT -- ISSUE 3

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.¹⁸ With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“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.”¹⁹

ANALYSIS -- ISSUE 3

After determining that appellant was not entitled to waiver, the Office found that she could repay the overpayment by withholding \$40.00 every 28 days from her continuing compensation. The record indicates that after \$40.00 is added to appellant's ordinary and necessary monthly expenses of \$3,018.60 her current monthly income of \$3,104.60 does not exceed expenses by more than \$50.00, which in this case is \$46.00 (\$86.00-\$40.00). The Board finds that the Office abused its discretion in determining the rate of recovery of the overpayment in this case. The case will be remanded to determine the rate of recovery after considering the evidence of record concerning appellant's financial circumstances.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,195.10, during the period July 12, 2003 to October 1, 2005, because life insurance premiums were not deducted from her compensation. The Board further finds that the Office properly denied waiver of the recovery of the overpayment. The Board, however, finds that the Office abused its discretion in directing recovery of the overpayment by deducting \$40.00 from appellant's continuing compensation.

¹⁸ *Howard R. Nahikian*, 53 ECAB 406 (2002).

¹⁹ 20 C.F.R. § 10.441(a).

²⁰ *See Stephen A. Hund*, 47 ECAB 432 (1996) (where the Board found that the Office abused its discretion in determining the rate of adjustment without considering the evidence of record including an overpayment questionnaire).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2007 decision of the Office of Workers' Compensation Programs is affirmed, in part, as to the issues of fact and amount of overpayment and waiver of recovery of the overpayment but is set aside and remanded on the issue of rate of recovery.

Issued: September 25, 2008
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