

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

M.W., Appellant)

and)

U.S. POSTAL SERVICE, GENERAL MAIL)
FACILITY, Capitol Heights, MD, Employer)

**Docket No. 08-2148
Issued: February 17, 2009**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument January 7, 2009

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 31, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 30, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found an overpayment of \$24,017.83 was created; (2) whether the Office properly denied waiver of the overpayment and (3) whether the Office properly determined the overpayment should be recovered by deducting \$100.00 from continuing compensation payments.

FACTUAL HISTORY

The Office accepted that appellant sustained an injury in the performance of duty on September 25, 1990. Appellant filed a notice of recurrence of disability and began receiving compensation for temporary total disability as of January 12, 1998. The Office did not deduct premiums for health benefit insurance. On February 18, 1999 appellant returned to work in a

full-time light-duty position. The employing establishment requested the Office transfer health benefits back to the agency. Appellant underwent surgery on March 21, 2000 and filed a claim for compensation commencing March 13, 2000. She began receiving compensation for temporary total disability and again no deductions for health benefit insurance premiums were made.

In a December 10, 2007 memorandum of telephone call, the Office indicated that appellant stated that she was notified that her health benefit coverage had been cancelled December 1, 2007. It determined that she had been enrolled for health benefit insurance under code 105.

By letter dated March 7, 2008, the Office advised appellant that it preliminarily determined an overpayment of \$24,017.83 was created from January 12, 1998 to January 19, 2008 based on the failure to deduct health benefit premiums. Appellant was found not to be at fault in creating the overpayment and the Office enclosed an overpayment recovery questionnaire (OWCP-20).

Appellant submitted the OWCP-20 on April 30, 2008. She indicated that her income was \$2,056.00 per month based on her compensation payment and she had expenses of \$1,440.00 per month. With respect to assets, appellant indicated that she did not have stocks, bonds or real estate and she reported \$2.00 in a savings account.

By decision dated April 30, 2008, the Office finalized its preliminary determination of a \$24,017.83 overpayment of compensation. It denied waiver on the grounds that recovery would defeat the purpose of the Act or be against equity and good conscience. In addition, the Office found the overpayment would be recovered by deducting \$100.00 from continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits (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 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 benefits 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.”

In addition, 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.” When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.¹

ANALYSIS -- ISSUE 1

The overpayment in this case is based on the failure to deduct health benefit insurance (HBI) premiums. Appellant does not dispute that she was enrolled under code 105 of the FEHB program for the period commencing January 12, 1998 and no evidence was provided of a written cancellation of coverage by her. Since HBI deductions were not made from compensation payments commencing January 12, 1998, an overpayment of compensation was created.

As to the amount of the overpayment, the case requires further clarification from the Office. The record indicated that appellant did return to work in February 1999 and stopped working in March 2000.² The preliminary determination and the final Office decision do not acknowledge that she had returned to work during this period and did not receive continuing compensation. It is not clear whether the worksheet calculating the amount of the overpayment properly accounted for the period February 1999 to March 2000, as it reports the compensation period covered as January 12, 1998 to January 19, 2008. If appellant was not entitled to compensation for a period after January 12, 1998, then no HBI deductions would be appropriate and the period should not be included in calculating the overpayment amount. On remand the Office should make proper findings as to any periods that appellant worked after January 12, 1998 and clearly explain how the amount of the overpayment was calculated. After such further development as it deems necessary, the Office should issue an appropriate decision on the amount of the overpayment.

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.³ These statutory guidelines are found in section 8129(b) of the Act which states: “Adjustment or recovery [of an overpayment] 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 Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

¹ See *John Skarbek*, 53 ECAB 630 (2002).

² Appellant alleged that she worked during periods covered by the overpayment, but it is not clear whether she returned to work after March 2000.

³ *Robert Atchison*, 41 ECAB 83 (1989).

⁴ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

Section 10.436 of the implementing regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if 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 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.⁶ 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 \$50.00.⁷

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 in 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.⁸

ANALYSIS -- ISSUE 2

The financial information submitted by appellant on the OWCP-20 indicated that she had \$2,056.00 in monthly income and \$1,440.00 in monthly expenses. Based on this evidence, appellant did not need substantially all of her current income to meet current living expenses. Her monthly income exceeded her expenses by more than \$50.00 and therefore she did not need substantially all her current income to meet ordinary and necessary living expenses. On appeal, appellant indicated that she had additional expenses. The Board's jurisdiction is limited to evidence that was before the Office at the time of the final decision.⁹ The evidence before the Office at the time of the April 30, 2008 decision does not establish that recovery of the overpayment would defeat the purpose of the Act. In addition, the evidence does not establish that recovery would be against equity and good conscience, since it did not show appellant would experience severe financial hardship in attempting to repay the debt.

The Board accordingly finds the evidence of record does not show recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. In accord with the Act and its regulations, the Office properly denied waiver of the overpayment.

⁵ 20 C.F.R. § 10.436 (1999).

⁶ An individual's assets must exceed a resource base of \$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 base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

⁷ *Sherry A. Hunt*, 49 ECAB 467 (1998).

⁸ 20 C.F.R. § 10.437 (1999).

⁹ 20 C.F.R. § 501.2(c) (2008).

LEGAL PRECEDENT -- ISSUE 3

The Office's regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP 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.”¹⁰

ANALYSIS – ISSUE 3

In this case the Office noted that appellant had additional income over expenses as outlined in the OWCP-20. Based on this evidence, it found she could repay the overpayment by deducting \$100.00 from continuing compensation. While appellant contends that recovery of the overpayment at this rate causes financial hardship, the Office based its decision on the relevant evidence of record. The Office took into account the financial circumstances as reported on the OWCP-20. The evidence showed approximately \$600.00 in excess monthly income over expenses and it set the recovery at \$100.00 from continuing compensation payments. There is no evidence the Office failed to follow its regulations in this case.

CONCLUSION

The evidence established an overpayment of compensation based on the failure to deduct HBI premiums. Appellant was not entitled to waiver of the overpayment based on the relevant financial information and the Office properly recovered the overpayment by deducting \$100.00 from continuing compensation payments. The case will be remanded for further development as to the amount of the overpayment.

¹⁰ 20 C.F.R. § 10. 441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2008 is affirmed with respect to fact of overpayment, denial of waiver and recovery from continuing compensation. The decision is set aside and the case remanded for further development as to the amount of the overpayment.

Issued: February 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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