

\$50.00 from each of appellant's continuing compensation payments until the amount was paid in full.

FACTUAL HISTORY

This case has previously been before the Board on the issues of whether the Office properly found an overpayment because of a failure to properly deduct appellant's life insurance premiums from his compensation checks. The facts of this case are presented in the previous Board decisions and are hereby incorporated by reference. To briefly summarize, the Board remanded this case three times with instructions that the Office explain how it calculated the amount of the overpayment, explain why it denied waiver of the recovery of the overpayment and to provide proper notice to appellant with regard to the overpayment.¹

The Board notes that the Office began recovery of the alleged overpayment by deducting \$50.00 every 28 days from appellant's continuing compensation payments effective November 29, 2003 and apparently retains the sum deducted.

On June 5, 2006 the Office issued a preliminary determination of overpayment indicating that appellant received an overpayment in the amount of \$3,148.10 because basic life insurance premiums were not deducted for the period September 1, 1997 through June 14, 2003 and postretirement premiums were not deducted for the period September 13, 1998 through June 14, 2003. It also made a finding that appellant was not at fault in the creation of the overpayment and informed appellant of his right to contest the amount of the overpayment and his right to request waiver.

On June 9, 2006 appellant requested a hearing with regard to the overpayment. At the hearing held on February 15, 2007, he argued that the overpayment was not his fault and gave testimony with regard to his financial situation.²

In a decision dated March 28, 2007, the hearing representative found, "Before a decision can be rendered on whether the Office can recover this overpayment, the Office needs to properly compute the overpayment amount from September 1997 to June 2003 and issue a new preliminary decision with a detailed explanation of the overpayment calculation." However, the Office continued to deduct \$50.00 every 28 days from appellant's compensation.

¹ Docket No. 05-1864 (issued May 1, 2006); Docket No. 05-85 (issued July 19, 2005); Docket No. 04-411 (issued July 14, 2004).

² Appellant noted changes since his last overpayment recovery forms were completed. He indicated that he received \$2,014.00 monthly for compensation and veteran's benefits of \$700.00. Appellant noted that his wife's salary was \$28,000.00 per year. He noted that he had a mortgage of \$768.00 for one house and \$1,800.00 for a second house that he is trying to sell. Appellant testified that he spent between \$300.00 to \$400.00 a month on food, between \$200.00 and \$300.00 a month on clothes, \$115.00 a month on gas, \$200.00 on electric, \$2.00 to \$3.00 on water, \$68.00 a month for telephone and had two car payments in the amount of \$502.00 and \$626.35. He noted that he paid \$120.00 a month for gasoline and that insurance for the cars cost \$179.00 a month. Appellant estimated \$50.00 a month for medical expenses. He noted that utilities at the second house were about \$27.00 a month. He also noted monthly expenses of \$65.00 for cable and \$125.00 per month to church. Appellant noted that he had no savings.

On April 13, 2007 the Office made a preliminary determination that appellant was overpaid benefits in the amount of \$2,730.02 because basic life insurance premiums were not deducted for the period September 1, 1997 through June 3, 2003 and postretirement premiums were not deducted for the period September 13, 1998 through June 3, 2003. It noted that appellant paid \$5,728.50 for optional life insurance for the period September 1, 1997 through June 14, 2003.³ However, the Office noted that for this period, appellant owed \$8,458.52.⁴ The difference between these two figures was the amount of the overpayment, or \$2,730.02. The Office again found that appellant was not at fault in the creation of the overpayment.

On May 1, 2007 appellant requested a prerecoupment hearing. Furthermore, he stated that he disagreed with the amount of the overpayment, believed that the overpayment occurred through no fault of his own and requested a waiver. Appellant also indicated that from previous decisions, the Office was already deducting \$50.00 from his checks for this overpayment and that this should have stopped.

At a hearing held on October 25, 2007 with regard to the \$2,730.02 overpayment, the hearing representative noted that appellant had already paid the amount in full. Appellant's representative argued that the \$50.00 deductions should have stopped when he requested a hearing and that collecting overpayment would defeat the purpose of the Federal Employees' Compensation Act and be against equity and good conscience. He argued that the money deducted should be reimbursed and waiver granted. Appellant noted that his wife had triple bypass surgery and was no longer working and that he needed all of his income to meet his ordinary and necessary living expenses. He testified that taking the \$50.00 out of his checks caused hardship. Appellant offered testimony with regard to his income and expenses.

By decision dated January 17, 2008, the hearing representative affirmed the determination that appellant received an overpayment of compensation in the amount of \$2,730.02, that appellant was without fault with regard to the overpayment and denied waiver of

³ Appellant made payments for optional life insurance premiums as follows: September 1 through 27, 1997 equals \$57.80; September 28 through October 20, 1997 equals \$57.80; October 21 through November 8, 1997 equals \$28.90; November 9, 1997 through June 19, 1999 (\$57.80 multiplied by 21 pay periods) equals \$1,213.80; June 20, 1999 through July 15, 2000 (\$48.10 multiplied by 14 pay periods) equals -\$673.40; July 16, 2000 to February 22, 2003 (\$98.20 multiplied by 34 pay periods) equals \$3,338.80; February 23 through June 14, 2003 (\$89.50 multiplied by 4 pay periods) equals \$358.00 for a total of \$5,728.50. No basic life or postretirement reductions were made during this time.

⁴ For the period September 1, 1997 through June 14, 2003, appellant owed \$4,304.40 for optional life insurance (September 1 through 13, 1997 equals \$19.00; September 14, 1997 through April 24, 1999 (\$38.00 multiplied by 21 pay periods) equals \$798.00; April 25, 1999 through January 29, 2000 (\$31.60 multiplied by 10 pay periods) equals \$316.00; January 30, 2000 through January 25, 2003 (\$64.10 multiplied by 39 pay periods) equals \$2,499.90; and January 26 through June 14, 2003 (\$134.30 multiplied by 5 pay periods) equals \$671.50). Appellant also owed \$761.12 for basic life insurance premiums (September 1 through 13, 1997 equals \$5.28; September 14, 1997 through April 24, 1999 (\$10.56 multiplied by 28 pay periods) equals \$221.76; April 25, 1999 through January 25, 2003 (\$9.92 multiplied by 49 pay periods) equals \$486.08; and January 26 through June 14, 2003 (\$9.60 multiplied by 5 pay periods) equals \$48.00). Finally appellant owed postretirement premiums as follows: September, 12, 1998 through April 24, 1999 (\$46.80 multiplied by 8 pay periods) equals \$374.40; April 25, 1999 through January 25, 2003 (\$56.40 multiplied by 49 pay periods) equals \$2,763.60; January 26 through June 14, 2003 (5 pay periods multiplied by \$51.00) equals \$255.00 for a total of \$3,393.00. Adding these 3 figures together (\$4,304.40 plus \$761.12 plus \$3,393.00) equals \$8,458.52.

the recovery of the overpayment. The hearing representative noted that as the debt had previously been repaid, appellant's financial situation at the time the amount was first deducted in 2003 was relevant, not appellant's status in 2008. He noted that based on financial documentation previously submitted, appellant had a monthly income of \$4,450.00 and expenses of approximately \$4,000.00 which left him with \$450.00 of discretionary income. Accordingly, the hearing representative found that recovery did not create a financial hardship and that appellant had not proven that recovery of the overpayment would be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Group Life Insurance (FEGLI) program, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.⁵ The coverage for basic life insurance is effective unless waived⁶ and the premiums for basic and optional life insurance are withheld from the employee's pay.⁷ 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 while the compensation was an employee will be used to withhold premiums from his or her compensation payments.⁸ When an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment because the Office must pay the full premium to the Office of Personnel Management upon discovery of the error.⁹

ANALYSIS -- ISSUE 1

Payment records show that basic life insurance premiums were not deducted for the period September 1, 1997 through June 14, 2003 and postretirement premiums were not deducted for the period September 13, 1998 through June 14, 2003. The Office properly noted that appellant paid \$5,728.50 for the period September 1, 1997 through June 14, 2003 whereas appellant owed \$8,458.52 for this time period. The difference between these two figures, \$2,730.02, was the amount that it properly found that the Office overpaid appellant. Accordingly, the Board finds that the Office's underwithholding of the life insurance premiums created an overpayment of compensation in the amount of \$2,730.02.

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. If it finds that the recipient of an

⁵ 5 U.S.C. § 8702(a).

⁶ *Id.* at § 8702(b).

⁷ *Id.* at § 8707.

⁸ *Id.* at § 8706(b).

⁹ *Id.* at § 8707(d); *see James Lloyd Otte* 48 ECAB 334 (1997).

overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁰

Section 10.436 of the implementing regulations¹¹ provide 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 expense; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from the data furnished by the Bureau of Labor Statistics.¹² 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 \$50.00.¹³

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 position for the worse.¹⁴

ANALYSIS -- ISSUE 2

In the instant case, the Office found that appellant was not at fault in the creation of the overpayment and accordingly, consideration of whether appellant was entitled to waiver of the recovery of the overpayment was appropriate. Based on financial documentation previously submitted, the Office found that appellant had not established that recovery would defeat the purpose of the Act or would be against equity and good conscience. The hearing representative noted that appellant had already repaid the debt as recovery of overpayment actions had been completed. He also noted that appellant's financial situation at the time the amount was first deducted was relevant, not appellant's current status.

The Board finds that the Office erred in the manner in which it evaluated the issue of whether waiver of the recovery of the overpayment was warranted and in finding that the overpayment was properly collected. In the March 28, 2007 remand decision, the hearing representative noted that "before a decision can be rendered on whether the Office can recover this overpayment, the Office needs to properly compute the overpayment amount..." Accordingly, the March 28, 2007 decision effectively vacated the prior waiver decision whereupon the Office should have made a new determination on waiver using appellant's then

¹⁰ 20 C.F.R. § 10.441(a).

¹¹ *Id.* at § 10.440(b); *see also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

¹² *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 385 (1997).

¹³ 20 C.F.R. § 10.440(b).

¹⁴ *Id.*

current financial information. Accordingly, the Office's deductions of \$50.00 per compensation payment which began effective November 29, 2003 were premature because the issue of whether appellant was entitled to waiver has not yet been properly adjudicated.

Although such offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections.¹⁵ Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.¹⁶ In *Califano v. Yamasaki*,¹⁷ the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until 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.¹⁸ Accordingly, in order to protect appellant's rights, the Office must make a new determination with regard to waiver.¹⁹

CONCLUSION

The Board affirms the finding that appellant received an overpayment in the amount of \$2,730.02. However, the Board sets aside the Office's determination with regard to waiver and remands this case for further consideration consistent with this opinion.

¹⁵ See *Lawrence Sherman*, 55 ECAB 359 (2004).

¹⁶ See generally FECA Circular No. 82-48, Overpayments and Waiver (issued December 1, 1982).

¹⁷ 442 U.S. 682 (1979).

¹⁸ See *Lawrence Sherman*, *supra* note 15.

¹⁹ In light of the Board's holding on this issue, the third issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2008 is set aside and the case remanded for further consideration consistent with this opinion of the Board.

Issued: July 8, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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