

FACTUAL HISTORY

On January 25, 2001 appellant, then a 34-year-old city letter carrier, sustained left shoulder arthropathy, left knee strain, left wrist strain, cervical strain and cervical intervertebral disc displacement when she slipped and fell while delivering mail. On September 20, 2004 she filed a claim for right shoulder repetitive stress injury and strain. She missed work under both claims, stopped work on November 2, 2006 and did not return, due to the unavailability of limited-duty work within her restrictions.¹ On November 21, 2001 appellant elected to change her Federal Employees' Health Benefit Program (FEHB) enrollment from Aetna, code BU2, to Blue Shield of California Access, code SJ2. An enrollment change form dated August 15, 2007 noted that appellant's FEHB premiums, effective November 2, 2006, would be transferred into the Office from the employing establishment. Appellant received wage-loss compensation and was placed on the periodic rolls effective April 15, 2007. No FEHB premiums were deducted from November 2, 2006 to August 4, 2007.

On May 8, 2008 the Office issued a preliminary finding that an overpayment in the amount of \$1,306.94 had been created. It explained that the overpayment resulted because deductions were not made for FEHB premiums for the period November 2, 2006 to August 4, 2007.² Appellant was found to be without fault and was provided an overpayment questionnaire and given instructions on appropriate responses to the preliminary finding. She was given 30 days to respond. On June 5, 2008 appellant submitted an overpayment questionnaire and financial information. She listed expenses totaling \$2,560.00 and requested a decision on the record.³

On June 18, 2008 the Office finalized the overpayment decision, finding that appellant was not at fault and denied waiver.⁴ It ordered repayment by deduction \$150.00 every four weeks from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The Office of Personnel Management (OPM), rather than the Office, has jurisdiction over the matter of health insurance deductions from compensation and over enrollment under the

¹ The 2001 claim was adjudicated under Office file number xxxxxx525 and the 2004 claim under file number xxxxxx832.

² The Office specifically stated that the correct deductions under code SJ2 for the period November 2, 2006 to January 20, 2007 totaled \$266.74 and for January 21 to August 4, 2007 totaled \$1,040.20, noting that the 2006 biweekly premium was \$46.68 and the 2007 premium was \$148.60 every four weeks.

³ Appellant reported no income other than child support of \$342.00 a month and listed monthly expenses as follows: rent \$905.00, food \$350.00, clothing \$200.00, utilities \$480.00, other household expenses \$300.00 and credit card payments of \$425.00.

⁴ The Office noted that appellant received periodic wage-loss compensation of \$2,450.38 every four weeks plus \$342.00 a month for child support and noted that her monthly expenses totaled \$2,235.00. It reviewed her financial statements and found that her additional monthly expenses totaled \$182.69 for a monthly expense total of \$2,417.69 and concluded that she had \$324.69 available for debt repayment.

FEHB.⁵ OPM regulations provide guidelines for the registration, enrollment and continuation of enrollment for federal employees. Section 890.502(a)(1) provides that 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.⁶ Section 890.502(c)(1) provides that 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 Title 5 of the United States Code, to OPM for deposit in the Employees' Health Benefits Fund.⁷ When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment in compensation is created.⁸ The Board has recognized that when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment in compensation because the Office must pay the full premium to OPM when the error is discovered.⁹

ANALYSIS -- ISSUE 1

Office computer print-outs in the record support that from November 2, 2006 to August 4, 2007 it did not deduct FEHB premiums from appellant's periodic wage-loss compensation. On an FEHB enrollment form dated November 11, 2001, appellant selected health benefits under code SJ2.¹⁰ An overpayment worksheet documented that the correct deductions under code SJ2 for the period November 2, 2006 to August 4, 2007 total \$1,306.94. Since no FEHB deductions were made for this period, an overpayment in compensation in that amount was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Federal Employees' Compensation Act¹² provides that an overpayment in compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat

⁵ *Raymond C. Beyer*, 50 ECAB 164 (1998).

⁶ 5 C.F.R. § 890.502(a)(1).

⁷ 5 U.S.C. § 8906; 5 C.F.R. § 890.502(c)(1).

⁸ *See John Skarbek*, 53 ECAB 630 (2002).

⁹ *James Lloyd Otte*, 48 ECAB 334 (1997).

¹⁰ *See* 5 U.S.C. §§ 890.502(a)(1), 890.502(c)(1).

¹¹ *James Lloyd Otte*, *supra* note 9.

¹² 5 U.S.C. §§ 8101-8193.

the purpose of the Act or would be against equity and good conscience.”¹³ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.¹⁴

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment in compensation, waiver must be considered. Repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁵

Appellant furnished the Office with an overpayment questionnaire on June 5, 2008 which described monthly expenses totaling \$2,560.00. Although not reported on the overpayment questionnaire, the record supports that appellant receives monthly FECA benefits of \$2,654.58 and \$342.00 in monthly child support for a total monthly income of \$2,996.58.¹⁶ 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. By using the expense figures provided by appellant in this case, the difference between current income and household living expenses is \$436.58, and reducing this by \$50.00 yields \$386.58, the amount of monthly funds available for debt repayment.¹⁷ The Board finds that the Office properly determined that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act. Furthermore, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. The Board finds that the Office properly denied waiver of the overpayment and is required by law to recovery the debt by decreasing later payments to which appellant is entitled.¹⁸

LEGAL PRECEDENT -- ISSUE 3

The Office’s implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future

¹³ 5 U.S.C. § 8129.

¹⁴ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁵ 20 C.F.R. §§ 10.436, 10.437.

¹⁶ Appellant’s wage-loss compensation every four weeks was \$2,450.38 which yields \$2,654.58 in compensation each month.

¹⁷ The Board notes that the Office did not covert appellant’s wage-loss compensation to monthly compensation and determined that her total monthly income was \$2,792.38 (\$2,450.38 + 342.00). By using the monthly income of \$2,996.58 and the expense figures determined by the Office or \$2,417.69, an amount of \$528.69 would be available for debt repayment.

¹⁸ 5 U.S.C. § 8129(a).

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

The Board finds that the Office gave due regard to the relevant regulatory factors in setting a rate of recovery of \$150.00 every 28-day compensation period. The record establishes that appellant has discretionary income of \$386.58 per month, or \$356.84 each four-week compensation period. The Office therefore did not abuse its discretion in finding that appellant could repay the overpayment at the rate of \$150.00 per compensation period.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in compensation in the amount of \$1,306.94, that the Office properly denied waiver and required recovery of the overpayment by deducting \$150.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 22, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ 20 C.F.R. § 10.441(a).