

FACTUAL HISTORY

This is the third appeal before the Board. In an August 25, 1997 decision, the Board set aside decisions of the Office dated February 15 and April 14, 1994.¹ The Board found the evidence of record sufficient to warrant further development as to whether appellant sustained a recurrence of disability beginning November 29, 1993 causally related to her accepted April 13, 1992 employment injury.² In a decision dated July 24, 2001, the Board found an unresolved conflict in medical opinion as to whether appellant sustained a recurrence of disability beginning November 29, 2003.³ The Board remanded the case for further development. The facts of the case as provided in the Board's prior decisions are incorporated herein by reference.

On September 10, 2002 appellant elected to receive benefits under the Federal Employees' Compensation Act effective November 29, 1993 in lieu of benefits from the Office of Personnel Management (OPM).

A September 26, 2002 computer printout indicated that appellant was paid wage-loss compensation for the period October 1 to 4, 2002 at the augmented 3/4 rate. No payment for health benefits was indicated.

On October 23, 2002 the Office placed appellant on the periodic rolls for temporary total disability effective October 6, 2002. It noted that she would be paid at the augmented 3/4 rate and \$82.24 would be deducted for health benefits. In a computer printout worksheet dated October 23, 2002, the Office noted the health benefits code as 104 in addition to other deductions, period of payment and the actual payment amount.

A November 19, 2002 worksheet, the OPM noted that appellant had been paid compensation benefits through September 30, 2002 and that her health benefits code was 105.

In a November 4, 2005 notice of change in health benefits enrollment, the code for appellant's health benefits was listed as 104. Under remarks, the Office noted that she was transferred from receiving benefits from the OPM to receipt of benefits under the Act.

A daily roll payment worksheet dated July 23, 2007, indicated that deductions for health care premiums were taken out under code 104 for single benefits instead of code 105, for family benefits. The worksheet indicated that an overpayment of \$8,384.53 occurred.

On August 2, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$8,384.53 because it deducted health benefits premiums for single coverage rather than family coverage from October 1, 2002 through July 7, 2007. It informed appellant of its preliminary determination that she was with fault in the

¹ Docket No. 95-619 (issued August 25, 1997).

² On April 24, 1992 appellant, then a 26-year-old respiratory therapist, filed a traumatic injury claim alleging that she injured her back while lifting a patient on April 13, 1992. The Office accepted the claim for cervical and lumbosacral sprain.

³ Docket No. 99-1516 (issued July 24, 2001).

creation of the overpayment as she knew or should have reasonably known the payment she accepted was incorrect. The Office referenced an accompanying memorandum, which described the calculation of the overpayment. It deducted a total of \$6,341.25 from her compensation using health benefits code 104 from October 1 through July 7, 2002.⁴ Instead, the Office should have deducted \$14,725.78 in health benefits code 105 for family coverage. Appellant received an overpayment of \$8,384.53.

On August 19, 2007 appellant, through counsel, disagreed with the preliminary overpayment determination and requested a telephonic hearing.

On October 29, 2007 the Office provided appellant's counsel with calculations for the overpayment. It noted that the calculations were different from those noted in the notice of overpayment due to an incorrect start date and that health benefits were not deducted on two payments issued to appellant. The Office found that appellant paid a total of \$5,383.52 for the period October 5, 2002 to November 25, 2006 and \$687.60 for the period January 21 to July 7, 2007 using health benefits code 104 or a total of \$6,071.12. It noted that \$14,635.74 should have been deducted for health benefits using code 105 for family coverage during this period. Therefore, appellant received an overpayment of \$8,564.62.

In a memorandum of conference dated January 14, 2008, appellant's counsel stated that appellant agreed to the withholding of \$200.00 from continuing compensation, but that she still objected to the overpayment.

By decision dated January 17, 2008, the Office finalized its finding that appellant received an overpayment of \$8,564.62 for the period October 6, 2002 through July 7, 2007. It noted deductions for code 105 should have been made in the amount of \$14,635.64 and that deductions were made under code 104 in the amount of \$6,071.12, which resulting an overpayment of \$8,564.62. The Office further determined that appellant was at fault in the creation of the overpayment as the October 23, 2002 letter detailing the amount of her health benefit deduction, which was less than the amount deducted from her benefits she had received from OPM and that a reasonable person should have questioned this. Moreover, it noted that the specific health code was listed on the benefit statement issued with every compensation payment. The Office found that the overpayment should be repaid by withholding \$200.00 from her continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits Program. The regulations of the OPM, which administers the Federal Employee Health Benefits Program, provides guidelines for the

⁴ There appears to be a typographical error as the Office notes the ending date as July 2, 2007 instead of July 7, 2007.

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 to the United States in the amount of the proper employee withholding required for that pay period.”⁵

In addition, 5 C.F.R. § 890.502(c)(1) provide:

“An agency that withholds less than or none of the proper health benefits contributions for 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.”⁶

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁷ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁸ The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.⁹

ANALYSIS -- ISSUE 1

On appeal, appellant contends that the record does not establish that she requested health coverage for the family as opposed to self. Contrary to her contention, the record does contain evidence that she elected to receive health coverage for her family. Correspondence from the OPM regarding the transfer of appellant’s claim to the Office noted deductions for health benefits were made under code 105, which is for family coverage.

The record in this case supports that, for the period October 6, 2002 through July 7, 2007, the Office deducted health benefit premiums based on code 104 for standard single coverage rather than code 105 for standard family coverage. Prior to electing to receive benefits under the Act, appellant had been paid benefits under the OPM, which deducted health benefit premiums based on code 105. The Office was obligated to deduct appropriate health benefit premiums for

⁵ 5 C.F.R. § 890.502(b)(1).

⁶ *Id.* at § 890.502(d).

⁷ *Id.* at § 890.502(b)(1).

⁸ *Id.* at § 890.502(d).

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

code 105.¹⁰ An overpayment worksheet documented that the deductions under code 104 for the period October 6, 2002 through July 7, 2007 totaled \$6,071.12 whereas the deductions that should have been made under code 105 for the same period totaled \$14,635.74. This yielded an overpayment in compensation of \$8,564.62. The Board finds that, because deductions were made under the incorrect health benefit enrollment code for the period October 6, 2002 through July 7, 2007, an overpayment in compensation in the amount of \$8,564.62 was created.

LEGAL PRECEDENT -- ISSUER 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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹¹

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹²

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect.¹³

The Office found that appellant was at fault because she should have reasonably been aware that an incorrect amount for her health premiums was being deducted from her compensation for the period October 6, 2002 through July 7, 2007. It based its finding of fault on appellant's receipt of an October 23, 2002 letter from the Office, which advised that \$82.24 would be deducted from her compensation benefits for health benefits. Appellant does not dispute that she was paid during this period or the amount deducted for health benefits. She questions how she would know that she had received an incorrect payment. The record shows

¹⁰ 5 C.F.R. §§ 890.502(a)(1), 890.502(c)(1).

¹¹ *Id.* at § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ *See Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

that the specific health code was listed on appellant's transfer into receipt of benefits under the Act and on the November 19, 2002 the OPM worksheet. The compensation information appellant received detailed deductions, payment and listed the health benefits code such that a reasonable person would question whether the correct health benefits code and amount was being used by the Office. In addition, appellant knew or should have known that the amount for the health insurance premiums being deducted was incorrect based upon both the Office's November 6, 1992 letter and the health insurance deduction made by the OPM when it paid her compensation benefits. Thus, the evidence shows that she accepted a payment which she knew or should have been expected to know was incorrect. As appellant accepted a payment she knew or should have known was incorrect, she was at fault in creating the overpayment and no waiver of the overpayment is possible.

CONCLUSION

The Board finds that an overpayment of \$8,564.62 occurred because the Office neglected to deduct proper health insurance premiums from appellant's continuing compensation. The Board further finds that the Office properly denied waiver of the recovery of the overpayment as it found her at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2008 is affirmed.

Issued: June 16, 2009
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