

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

T.S., Appellant

and

**DEPARTMENT OF THE NAVY, MILITARY
SEALIFT COMMAND, Norfolk, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1604
Issued: March 13, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 9, 2008, which found an overpayment of compensation. 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 appellant received an overpayment in the amount of \$36,285.11 for the period January 10, 1988 through February 16, 2008; (2) whether the Office abused its discretion under section 8129(a) of the Federal Employees' Compensation Act in denying waiver of the recovery of the overpayment; and (3) whether the Office properly required repayment at the rate of \$92.31 every 28 days from continuing compensation payments.

FACTUAL HISTORY

On November 25, 1987 appellant, then a 43-year-old clerk typist, sustained injuries to her back in the performance of duty. Her claim was accepted for low back strain and she was placed on the periodic rolls.

In an August 2, 1989 preliminary determination, the Office found that an overpayment of compensation in the amount of \$1,135.44 had occurred, as health benefit premiums had not been deducted from compensation payments from January 10, 1988 to July 29, 1989, due to a coding error. It further advised appellant that she was found to be without fault in the creation of the overpayment. However, the record does not contain any final overpayment decision or evidence that the overpayment amount was repaid. An internal Office memorandum dated July 29, 1989 reflected that deductions would be made from appellant's compensation payments to cover health insurance premiums. However, the Office continued to make compensation payments to appellant without making any deductions for health insurance premiums.

On February 13, 2008 the Office advised appellant that it had made a preliminary determination that an overpayment of \$36,285.11 had occurred, as health insurance premiums had not been deducted from compensation payments from January 10, 1988 to February 16, 2008. It further advised appellant that she was found to be without fault in the creation of the overpayment. The Office advised appellant of actions available to her if she believed that she should receive a waiver, including the ability to request a preresoupment hearing and to submit a completed overpayment recovery questionnaire and financial evidence. The record does not contain information or evidence submitted by appellant in response to the preliminary determination of overpayment.

Computer records reflect that appellant received compensation in the gross amount of \$246,254.54 for the period January 10, 1988 through January 19, 2008 and \$1,192.00 from January 20 through February 16, 2008, for a total of \$247,446.54. However, the records indicate that health benefit premiums were not deducted from her compensation for the period January 10, 1988 through February 16, 2008. A worksheet dated January 23, 2008 reflects that the cost of appellant's health insurance benefits from January 10, 1988 through January 19, 2008 was \$35,994.83. A worksheet dated February 16, 2008 reflects that the insurance cost from January 20 through February 16, 2008 was \$290.28 for a total insurance cost of \$36,285.11. The Office's worksheet indicates that appellant should have received the amount of \$210,259.71 for the period January 10, 1988 through January 19, 2008 and \$901.72 from January 20 through February 16, 2008 or a total amount of \$211,161.43.

In an April 9, 2008 decision, the Office finalized its determination that an overpayment of compensation in the amount of \$36,285.11 had occurred, due to the fact that health insurance premiums had not been deducted from compensation payments from January 10, 1988 to February 16, 2008. It further found that, although appellant was without fault in the creation of the overpayment, she did not provide any basis for a waiver. The claims examiner concluded that appellant did not have the present or prospective ability to pay the full amount of the claim within a reasonable period of time and that her situation qualified her for a waiver of charges, including interest and a mandatory compromise of the debt. The Office determined that full settlement of the claim for recovery of the overpayment would be accepted in the amount of \$20,869.31, to be paid by deducting \$92.31 from compensation every 28 days. An accompanying compromise order and waiver of charges reflected that appellant's net benefits every 28 days after proper deductions for health benefits, was \$866.82.

In an April 7, 2008 waiver of charges/compromise of principal worksheet, the Office stated that interest charges "must be waived if [appellant] is without fault in the creation of the

overpayment and the application of charges will extend the period of indebtedness beyond the debtor's life expectancy." It found that a compromise of accrued charges and principal must be considered if the application of charges would increase the period of indebtedness by more than 35 percent. The Office calculated that, without charges, the debt would take 362.85 months to repay. Therefore, the debt with charges would have to be repaid within 489.85 months (135 percent x 362.85). Noting that the monthly payment was less than the amount of interest accruing each month, the Office concluded that accrued charges and principal would have to be compromised in order to reduce the repayment period to 489.85 months. It determined that it would compromise the accrued charges and principal by \$15,415.80, accepting the amount of \$20,869.31 in full settlement of the overpayment. The Office's calculations reflect that the overpayment could thus be collected in 227 payments.

LEGAL PRECEDENT -- ISSUE 1

The Act¹ 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.² When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.

The regulations of the Office of Personnel Management, which administers the FEHB program, provide guidelines for registration, enrollment and continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

“[A]n employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs an indebtedness due the United States in the amount of the proper employee or annuitant withholding required for each pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues.³

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

“An agency that withholds less than the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected contributions and applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees' Health Benefits Fund.⁴

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8102(a).

³ 5 C.F.R. § 890.502(a)(1).

⁴ *Id.* at § 890.502(c).

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁵ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁶ 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.⁷

ANALYSIS -- ISSUE 1

The Board notes that the Office failed to make deductions for health insurance benefits from appellant's compensation payments for more than 20 years. Appellant does not dispute the fact that she received the benefits. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$36,285.11 for the period January 10, 1988 through February 16, 2008.⁸

The record reflects that appellant received compensation for the period January 10, 1988 through February 16, 2008 in the amount of \$247,446.54, with no deductions for health insurance. The record further reflects that the cost of her health insurance during that period was \$36,285.11. As deductions should have been made from appellant's compensation payments for the health insurance premiums, she should have received the amount of \$211,161.43, which represents the amount she actually received minus the cost of health insurance premiums for the designated period ($\$247,446.54 - \$36,285.11 = \$211,161.43$). The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$36,285.11.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act¹⁰ provides that an overpayment must be recovered unless "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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether

⁵ *Id.* at § 890.502(a)(1).

⁶ *Supra* note 5.

⁷ *See Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

⁸ The Board notes that appellant does not contest the fact or amount of overpayment. On appeal, appellant asserts that she should not be required to make repayment because the overpayment was not her fault.

⁹ The Board notes that the Office issued a compromise order and waiver of charges, wherein it accepted the amount of \$20,869.31 in full settlement of the overpayment. The compromise order is not subject to review by the Board. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Liquidation, *Initial Overpayment Actions*, Chapter 6.0300.5(d) (May 2004).

¹⁰ 5 U.S.C. § 8129.

recovery of the overpayment would defeat the purpose of the [Act] or would be against equity and good conscience.¹¹

Section 10.436 of the implementing federal regulations¹² provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.”

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 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.¹³

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office, as this information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

ANALYSIS -- ISSUE 2

In its February 13, 2008 preliminary overpayment determination, the Office informed appellant of actions available to her if she believed that she should receive a waiver. It advised appellant to submit a completed overpayment recovery questionnaire as well as information and evidence regarding her income and expenses.

Appellant did not submit a completed overpayment recovery questionnaire form nor did she submit financial information outlining her income and expenses. As a result, there was no evidence before the Office establishing that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁶ As appellant failed to submit the requested information, as required by section 10.438 of its regulations, she was not

¹¹ *Wade Baker*, 54 ECAB 198 (2002).

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437.

¹⁴ 20 C.F.R. § 10.438(a).

¹⁵ *Id.* at § 10.438(b).

¹⁶ *See* 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

entitled to a waiver.¹⁷ The Board finds that the Office properly denied waiver of recovery of the overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Office regulations provide that, 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 her attention is called to same. If no refund is made, it 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.¹⁸

In cases where the claimant is being paid compensation on the periodic rolls and the claimant does not respond to the preliminary overpayment decision, a final decision should be issued without conducting a conference, and the debt should be recovered from such benefits as quickly as possible.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that the Office did not abuse its discretion by ordering the deduction of \$92.31 every four weeks from appellant's continuing compensation payments.

Appellant did not respond to the preliminary overpayment decision. She failed to complete an overpayment recovery questionnaire or to provide financial information to the Office, as requested. Therefore, under its own procedures, it properly issued a final decision, without conducting a hearing, in an attempt to collect the debt as quickly as possible.²⁰

Section 10.441(a) of the Office's regulations directs it to take certain matters into consideration in establishing the repayment schedule, including 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.²¹ In this case, it was disadvantaged by appellant's failure to provide appropriate financial documentation. The Board notes that the Office did consider the information available, including her age and monthly compensation benefit, in setting its repayment schedule. Based upon those considerations, it compromised the principal and charges, reducing the amount to be repaid from \$36,285.11 to \$20,869.31. The Board finds that the Office gave due consideration to the relevant factors and properly imposed a repayment schedule of \$92.31 every 28 days from appellant's continuing compensation.

¹⁷ *Supra* note 17.

¹⁸ 20 C.F.R. § 10.441(a).

¹⁹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (December 2004).

²⁰ *Id.*

²¹ 20 C.F.R. § 10.441(a).

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$36,285.11 for the period January 10, 1988 through February 16, 2008. The Board further finds that the Office properly denied waiver and did not abuse its discretion in requiring repayment at the rate of \$92.31 every 28 days from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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