

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

C.E., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Celina, OH, Employer)

**Docket No. 08-2133
Issued: May 20, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2008 appellant filed a timely appeal from a July 7, 2008 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and denying waiver of the overpayment and a July 11, 2008 decision denying waiver.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decisions.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,846.62 for the period September 23, 2002 to April 12, 2008 because the Office failed to deduct the proper premiums for health benefits; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly determined that

¹ The July 11, 2008 correspondence does not contain appeal rights and does not purport to be a decision. However, as the Office provided factual and legal findings the Board finds that it constitutes a decision under 20 C.F.R. § 10.126.

it would recover the overpayment by withholding \$182.00 from his continuing compensation payments.

FACTUAL HISTORY

On December 15, 2000 appellant, then a 35-year-old city letter carrier, filed a traumatic injury claim alleging that on November 30, 2000 he injured his back, neck, right thigh, right shoulder, right hip and left elbow when he fell down steps from a porch stoop. The Office accepted the claim for lumbosacral strain, right hip strain and right shoulder strain. Appellant began working limited duty on December 19, 2000.

On May 18, 2001 appellant underwent surgery to repair a torn right rotator cuff. The Office paid him compensation beginning May 19, 2001. Appellant returned to part-time work on June 7, 2001 but stopped work again on August 3, 2001. On January 31, 2002 the Office placed him on the periodic rolls. It deducted premiums for health benefits using code 314.

On May 28, 2002 appellant completed a health benefits election form and indicated that he was enrolled in health benefits under code 315. The effective date was June 1, 2002.

On March 20, 2008 the Office received a notice of change in health benefits enrollment form changing appellant's health benefits from code 314 to code number 315 effective September 23, 2002. On April 17, 2008 appellant's health insurance carrier related that on May 28, 2002 appellant changed his plan from single to family coverage.

On June 2, 2008 the Office notified appellant of its preliminary determination that he received a \$5,846.62 overpayment of compensation from September 23, 2002 to April 12, 2008 because it withheld premiums for health insurance at an incorrect rate. It found that it should have withheld \$10,322.62 in health benefit premiums under code 315 for the period September 23, 2002 through April 12, 2008. The Office withheld instead \$4,476.00 for health benefits premiums using code 314 applicable to claimants with single rather than family coverage. It subtracted \$4,476.00 from \$10,322.62 to find an overpayment of \$5,846.62. The Office advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit financial documents supporting waiver. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precouplement hearing.

By decision dated July 7, 2008, the Office finalized its finding that appellant received a \$5,864.62 overpayment of compensation because it had incorrectly deducted his premiums for health benefits. It further finalized its finding that he was without fault in creating the overpayment but denied waiver as he had not submitted the overpayment recovery questionnaire or any supporting financial information. The Office determined that it would recover the overpayment by withholding \$232.00 every 28 days from appellant's continuing compensation payments.

On July 8, 2008 appellant submitted a completed overpayment recovery questionnaire. He requested waiver, asserting that his daughter had never used health insurance. Appellant

related that he had total monthly income of \$2,555.64 and total monthly expenses of \$3,050.50. He listed his expenses as \$666.46 for a mortgage, \$362.04 for food, no clothing expenses, \$236.26 for utilities, \$319.88 for child support and minimum monthly payments on credit cards of \$286.00. Appellant related that his “normal gas budget was \$163.00 per month, but because I was unable to pay, my gas was *turned off* at the beginning of November 2007.” (Emphasis in the original.) He provided the check numbers for his utility payments, automobile payments and credit card payment. Appellant listed in detail his other expenses, including medical expenses, eating out and transportation costs. He submitted his bank statement showing his deductions for May 2008.

On July 11, 2008 the Office noted that appellant claimed income of \$2,555.64 and living expenses of \$1,870.66 for his mortgage, child support, food, utilities and credit card expenses. It further noted that he claimed \$1,179.00 in other expenses which he did not fully substantiate. The Office stated:

“You included an auto[mobile] payment of \$436.84 as well as other gas/transportation expenses. While noted debited from your bank account, you did not include the value of your vehicle as an asset for consideration of your whole financial picture.... And while you have presented your monthly financial picture in a clear and organized way, you did not include any utility bills, auto[mobile] payment stubs, tax returns, or any further documentation to substantiate all of your income and expenses.”

It indicated that it had conducted a “cursory review” of appellant’s request and found that the amount collected as repayment should be reduced from \$232.00 to \$182.00.

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 regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(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.”²

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

“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

² 5 C.F.R. § 890.502(a)(1).

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.”³

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.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in the amount of \$5,846.62. The Office deducted health benefit premiums of \$4,476.00 for single coverage under code 314 for the period September 23, 2002 to April 12, 2008. It should have deducted premiums of \$10,322.62 using code 315 for family coverage. The Office’s failure to deduct the premiums for health insurance under the family plan coverage from September 23, 2002 to April 12, 2008 resulted in an overpayment of \$5,846.62. 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.⁵ The Board finds appellant received an overpayment of \$5,846.62 due to the underdeduction of health benefit premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁶ 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 recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁷ An individual’s liquid assets

³ *Id.* at § 890.502(c).

⁴ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁵ *Id.*

⁶ 5 U.S.C. § 8129.

⁷ 20 C.F.R. § 10.436. Office procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (December 2004).

include but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.⁸ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.⁹

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.¹⁰ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹¹

ANALYSIS -- ISSUE 2

In its July 7, 2008 decision, the Office denied waiver as appellant failed to submit an overpayment recovery questionnaire and supporting financial information. Appellant submitted an overpayment recovery questionnaire and requested waiver on July 8, 2008. He described in detail his expenses. Appellant related that he earned \$2,555.64 per month and had \$3,050.50 in monthly expenses. He indicated that he paid \$447.50 for his monthly mortgage, \$98.10 in taxes and \$120.86 for car and home insurance. Appellant paid \$362.04 for food and nothing for clothing. He listed utility expenses of \$236.26, child support payments of \$319.88 and minimum monthly credit card payments of \$286.00 per month. Appellant had a car payment of \$436.84, medical expenses of \$81.02 and gasoline expenses of \$324.71, for total expenses of \$2,713.21.¹² He listed the check numbers or debit dates for his food, utility expenses, car payment and minimum monthly credit card payments. Appellant noted that his bank statement listed his child support payment of \$319.88 as "miscellaneous debt." He submitted his bank statement for the period May 7 through June 3, 2008.

On July 11, 2008 the Office reviewed appellant's waiver request and determined that his expenses were "largely unsubstantiated." It further found that while he listed his automobile payment as an expense he failed to include the value of his vehicle as an asset. Under the Office's procedures, however, one or two vehicles are not considered assets.¹³

⁸ *Id.*

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.436.

¹¹ *Id.* at § 10.437(b)(1).

¹² Appellant included other expenses, such as movie rentals and money spent on his daughter in finding that he had expenses of \$3,050.50.

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(4) (December 2004).

The Office indicated that it had made “a cursory review” of appellant’s request and determined that he was not entitled to waiver. Decisions by it, however, must include findings of fact and a statement of reasons regarding the material facts of the case.¹⁴ The Office found that he did not substantiate his expenses but did not specifically explain what it rejected as unsubstantiated or why it found that his bank statement was insufficient to support various claimed expenses. As it did not provide a complete factual discussion of its waiver determination, the case will be remanded for an appropriate determination regarding whether appellant has established that he is entitled to waiver of the recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$5,846.62 for the period September 23, 2002 to April 12, 2008. The Board further finds that the case is not in posture for decision on the issue of whether he is entitled to waiver of the overpayment.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated July 11, 2008 is set aside and the decision dated July 7, 2008 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 20, 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

¹⁴ See *Beverly Dukes*, 46 ECAB 1014 (1995).

¹⁵ In view of the Board’s determination regarding waiver, it is premature to address the issue of whether the Office properly determined the amount to be recovered to repay the overpayment from appellant’s continuing compensation payments.