



plexus involvement and cervical strain. The Office granted him a schedule award for 12 percent permanent impairment of his left upper extremity. Appellant sustained a second injury on November 12, 1975 resulting in a cervical and left shoulder strain. The Office terminated his compensation benefits on March 9, 1982.

Appellant filed a claim for recurrence of disability on May 24, 1985. On June 24, 1986 the Office accepted that he sustained brachial plexus neuritis and entered him on the periodic rolls. Appellant returned to light-duty work on September 12, 1986. The Office reduced his compensation based on his actual earnings as a modified distribution clerk on February 1, 1989. It granted appellant an additional schedule award for eight percent impairment of his right upper extremity on July 7, 1989.

On June 30, 1968 appellant's health benefits began with the Federal Government and on May 3, 1969 he was reassigned from the Naval Air Station to the employing establishment. Effective July 2, 1977 and August 16, 1978 he transferred his benefits enrollment to the Office. On September 10, 1980 he changed his health benefits to the Office of Personnel Management (OPM). Appellant transferred his health benefits to the Office on June 23, 1984 and April 21, 1986. On June 23, 1984 he returned from the Office rolls. Appellant completed a health benefits registration form on December 30, 1989 and January 13, 1990. He completed a form on January 13, 1990 indicating that he was on the Office rolls. On February 13, 1990 appellant transferred his health benefits back to the Office. He completed a change in health benefits effective on February 21, 1990 in health benefits enrollment effective January 14, 1990 and transferred in with code 452 to the Office. On June 23, 1994 appellant returned to work from the Office rolls. He assigned his health benefits to OPM effective December 24, 1996 on June 3, 1997. Appellant signed a health benefits registration form on January 28, 1997 effective December 12, 1992. A second notice of change in health benefits enrollment indicated that he transferred in to the federal retirement system from November 9 through December 24, 1996.

On July 26, 2004 the Office informed appellant that his ability to participate in the National Postal Mail Handlers health insurance was dependant upon payment of dues in the union. It informed appellant that he must completed a health benefits form if he wished to change to another benefit plan.

The Office completed a notice of change in health benefits enrollment on September 14, 2004 and informed appellant that his enrollment terminated on September 5, 2004 due to failure to pay National Postal Mail Handlers Union dues. Appellant's coverage was extended for an additional 31 days.

By letter dated September 17, 2004, the Office indicated that appellant's gross compensation every 28 days was \$2,488.00 and that his health benefits deduction was \$361.22 and that his net compensation was \$1,273.86.

On October 25, 2004 the Office computed appellant's health benefit arrears from September 5, 2004 and noted that he paid his union dues on October 21, 2004. It noted that appellant's health benefits for code 452 from September 5 to October 30, 2004 was \$722.44.

In a letter dated October 27, 2004, the Office informed appellant that he received an overpayment in the amount of \$722.44, as health insurance premiums were not deducted from his compensation checks for the period September 5 to October 30, 2004. It made a preliminary finding that appellant was without fault in the creation of the overpayment. The Office finalized this decision on December 15, 2004 and recovered the overpayment by withholding \$50.00 from appellant's continuing compensation benefits effective December 26, 2004.

The Office noted in a June 22, 2005 letter that appellant's gross compensation was \$2,576.00 every 28 days, that he had a miscellaneous deduction of \$50.00 and that his net compensation was \$2,526.00. It paid appellant compensation from October 30, 2004 through March 20 to June 22, 2005 and did not deduct health benefits insurance.

In a memorandum dated July 7, 2005, the Office noted that appellant had health benefit arrears from October 31, 2004 through July 9, 2005. Beginning December 23, 2007, it deducted health benefit insurance from appellant's periodic rolls payments. Through a telephone call on December 21, 2007, the Office found that appellant's health benefits were cancelled effective March 12, 2007. It voided this termination by faxing the appropriate information that appellant's union dues were up to date. In a memorandum dated January 8, 2008, the Office stated that it failed to deduct appellant's health benefits from October 31, 2004. It determined that for the period October 31, 2004 to December 22, 2007 for the health benefit code 452 appellant should have contributed \$24,994.78.

By letter dated January 15, 2008, the Office informed appellant that an overpayment of compensation in the amount of \$24,994.78 had occurred because the deductions for his health benefits insurance were not made for the period October 31, 2004 through December 22, 2007. It found that he was not at fault in the creation of the overpayment. The Office informed appellant of his appeal rights and provided him with an overpayment recovery questionnaire.

The Office contacted appellant on February 20, 2008 to resolve the issue of waiver of the overpayment. Appellant completed the overpayment recovery questionnaire on February 21, 2008 and indicated that he had not retained any of the incorrect payment. He listed his monthly income as \$3,036.00 and his monthly expenses as \$2,830.00. Appellant indicated that he had assets of \$2,065.00. He requested that the Office made a decision based on the written evidence.

The Office completed a memorandum of conference on February 29, 2008. On February 27, 2008 the claims examiner telephoned appellant who stated that there were eight people living in his household, including his wife, daughter and five grandchildren. Appellant stated that he did not know his wife's income or the amount of child support his daughter received. The claims examiner allowed him additional time to gather information and scheduled a conference for February 29, 2008. At that point appellant stated his income from the Office was \$2,957.50; his wife's salary was \$2,400.00 per month and his social security benefits were \$306.00 for a total monthly income of \$5,663.50. He stated that he had \$1,600.00 in savings, \$450.00 in checking and \$15.00 cash, assets totaling \$2,065.00. Appellant listed his expenses as: mortgage, \$878.38; taxes, \$100.00; groceries, \$500.00; utilities, \$624.40; clothing, \$250.00; telephone, \$221.00; car payment, \$587.00; gasoline, \$180.00; car insurance, \$149.18; car maintenance, \$30.00; medical expenses, \$325.00; charitable contribution, \$150.00 and home maintenance, \$450.00, for total monthly expenses of \$4,444.96.

By decision dated March 19, 2008, the Office finalized the finding of the \$24,994.79 overpayment and found that appellant was not entitled to waiver of the overpayment as his monthly income exceeded his expenses by more than \$1,200.00 per month. It determined to withhold \$500.00 from each of appellant's continuing compensation payments.

On appeal, appellant's representative alleged that the overpayment was not properly calculated as appellant's health benefits were cancelled from March 12 through December 22, 2007. He further argued that the amounts of the overpayments were very inconsistent and that appellant was not timely notified that his health benefits were in arrears. Appellant's representative alleged that it was against good conscience for the Office to refuse to waive the recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees' Compensation Act 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.<sup>1</sup> When an overpayment has been made to an individual because of 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.<sup>2</sup>

OPM rather than the Office, has jurisdiction over the matter of health insurance deductions from compensation and enrollment under the Federal Employees Health Benefits (FEHB) Program.<sup>3</sup> It is OPM regulations regarding the FEHB Program to provide 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 withholding or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs and indebtedness due the United States in the amount of the proper employee withholding required for that pay period.<sup>4</sup> The regulations further provided 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 5 U.S.C. § 8906 to OPM for deposit in the Employee's Health Benefits Fund.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes that the Office failed to withhold health insurance premiums from appellant's compensation benefits from October 31, 2004 to December 22, 2007. As the appropriate health insurance premiums were not withheld, appellant received an overpayment of

---

<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>2</sup> 5 U.S.C. § 8129(a).

<sup>3</sup> See *Raymond C. Beyer*, 50 ECAB 164 (1998).

<sup>4</sup> 5 C.F.R. § 890.502(b)(1).

<sup>5</sup> *Id.* at § 890.502(d); see *John Skarbek*, 53 ECAB 630, 632-33 (2002); *Jennifer Burch*, 48 ECAB 633 (1997).

compensation. On appeal, appellant's representative disagreed with the amount of the overpayment. However, the record supports that appellant's health insurance premiums are currently being withheld based on a cost of \$680.72 every 28 days. The Office included an appropriate calculation of the length of the overpayment and the cost of the premiums to reach the overpayment amount of \$24,994.78.

Appellant's representative also alleged that appellant's health insurance was cancelled on March 12, 2007 and that he was not, therefore, responsible for the entire overpayment. The Board notes that, on December 21, 2007, the Office found that his health benefits were cancelled effective March 12, 2007. It voided this termination by faxing the appropriate information that appellant's union dues were up to date and thus insured that he had continual health insurance coverage.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>6</sup> provides: "Adjustment or recovery by the United States may not be made when 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."<sup>7</sup> If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office's regulations.

According to section 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 or her current 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.<sup>8</sup> For waiver under the defeat the purpose of the Act standard, an appellant must meet the two pronged test and show that he needs substantially all of his current income to meet current ordinary and necessary living expenses<sup>9</sup> and that his assets do not exceed the resource base.<sup>10</sup>

---

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8129(b).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> Office procedures provide that the 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) (October 2004).

<sup>9</sup> 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. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

<sup>10</sup> *W.F.*, 57 ECAB 705 (2006).

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose. If the Office determines that the amount of certain expenses are not ordinary and necessary, particularly regarding the significant expenses of food, clothing and vehicles, the Office must state in writing the reasons for this finding. The finding must be supported by rationale, which may include reference to recognized research data that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.<sup>11</sup> The Office must be careful to avoid counting an expense twice when totaling the claimant's ordinary and necessary living expenses.<sup>12</sup>

In order to establish that recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that he would experience a severe financial hardship in attempting to repay the debt<sup>13</sup> or overpaid individual could also establish that in reliance on such payment or on notice that such payments would be made, she gave up a valuable right or changed her position for the worse.<sup>14</sup> If the claimant is not entitled to waiver under the "defeat the purpose of the Act" clause the "against equity and good conscience" clause must be considered by the Office in the written decision.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the Office properly concluded that appellant did not need substantially all of his income to meet his current ordinary and necessary expenses. Appellant provided his monthly household income as \$5,663.50 and his monthly expenses as \$4,444.96. As his monthly income exceeded his monthly expenses by more than \$50.00 per month, he did not establish that he needed substantially all of his income to meet his current ordinary and necessary expenses. Therefore, recovery of the overpayment would not defeat the purpose of the Act.

As appellant submitted no evidence that he would experience a severe financial hardship in attempting to repay the debt or that in reliance on the amount of his compensation payment without health benefit deductions, he gave up a valuable right or changed his position for the worse. Appellant's attorney argued that repayment of the overpayment would be against equity and good conscience as the overpayment could conceivably place appellant in a position of hardship and return him to bankruptcy. This unsupported allegation does not meet appellant's burden of establishing financial hardship such that the overpayment should be waived. Appellant's representative further stated that the Office erred in delaying the discovery of the failure to deduct health benefits. The Board has held that although the Office may have been at fault in making an overpayment, this fact alone does not relieve the overpaid individual or any

---

<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.200.6(a)(3) (May 2004).

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.437(a).

<sup>14</sup> *Id.* at § 10.437(b).

<sup>15</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.200.6(b) (May 2004).

other individual from whom the Office seeks to recover the overpayment from liability for repayment.<sup>16</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The method by which the Office may recover overpayments is defined by regulation. The applicable regulations, 20 C.F.R. § 10.441(a) provides as follows:

“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 his or her attention is called to the same. If no refund is made [the Office] 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.”

### **ANALYSIS -- ISSUE 3**

The Office found that recovery of overpayment should be made by an adjustment against continuing compensation at the rate of \$500.00 per payment. It gave no indication as to how it arrived at this figure or whether it gave due regard to the factors noted above.<sup>17</sup> The Office did not consider the financial documentation appellant submitted so that it could take into account relevant factors so as to minimize (but not necessarily eliminate)<sup>18</sup> any hardship when it decreased his compensation to recover the overpayment.<sup>19</sup>

The Board will remand the case for further development on the issue of recovery. Pending further development of appellant’s current financial status and the Office’s consideration of relevant factors so as to minimize any hardship in setting the rate of recovery, the Office should suspend its collection of the overpayment. After further development, the Office shall issue a final decision on an appropriate rate of recovery from continuing compensation.

### **CONCLUSION**

The Board finds that appellant has received an overpayment of compensation in the amount of \$24,994.78, for which he was not at fault. The Board further finds that appellant has not established entitlement to waiver of the recovery of this overpayment. On remand, the

---

<sup>16</sup> *Earl D. Long*, 50 ECAB 464, 472 (1999).

<sup>17</sup> *Darlene A. Luck*, 54 ECAB 740, 747-48 (2003).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Preliminary and Final Decisions*, Chapter 6.200.4(d)(1)(b) (May 2004).

<sup>19</sup> In judging whether repayment of the uncompromised portion of the debt would cause hardship, the Office should assess the debtor’s income and assets and the debtor should be required to submit a current financial report (OWCP-20) if one has not been provided within the previous six months. *Id.* at *Debt Liquidation*, Chapter 6.300.6(a). *See J.S.*, 58 ECAB \_\_\_ (Docket No. 06-2113, May 10, 2007).

Office should review appellant's financial information and determine based on the appropriate factors listed in 20 C.F.R. § 10.441(a) an appropriate overpayment recovery schedule.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 19, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded for further development consistent with this decision of the Board.

Issued: September 24, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board