

\$8,085.65 in medical bills related to his accepted injuries. Appellant also contends that he submitted all financial information requested.

FACTUAL HISTORY

The Office accepted that on September 4, 1997 appellant, then a 42-year-old painter, fractured two cervical vertebrae when he fell off a ladder. It later accepted cervical stenosis, a neck sprain, complications of an implant device,¹ disturbance of cutaneous sensation, genital contusions and psychosexual dysfunction. Appellant stopped work on October 29, 1997 and did not return. He received compensation on the periodic rolls beginning in April 2004, retroactive to December 1997. Appellant remained under medical treatment.

Appellant was enrolled in the Federal Employees' Health Benefit (FEHB) plan at the time he was injured. It is not clear whether he had selected family or individual coverage. In a December 1, 2002 form, appellant noted that he had family health insurance coverage under FEHB plan 105. On May 23, 2003 the employing establishment indicated that he was enrolled in FEHB plan 104, providing "self only" benefits. The Office deducted health benefits premiums based on plan code 104.

Effective April 13, 2008, the Office corrected the amount of appellant's health benefits deduction from plan code 104 to 105. It calculated that, for the period December 5, 1997 to April 12, 2008, it should have deducted \$14,310.10 from appellant's compensation for family coverage under plan code 105. Instead, it deducted only \$6,224.45 based on plan code 104. The underdeduction of \$8,085.65 constituted an overpayment of compensation.

By notice dated May 15, 2008, the Office advised appellant of its preliminary determination that an \$8,085.65 overpayment of compensation was created in his case as the Office failed to deduct the correct health insurance premiums for the period December 5, 1997 to April 12, 2008. It found that he was not at fault in creating the overpayment. The Office afforded him 30 days to provide financial information and to request a hearing.

On May 30, 2008 appellant requested a precoupment hearing. He submitted an overpayment recovery questionnaire (Form OWCP-20) and supporting documentation. Appellant listed monthly income of \$1,485.00 in compensation, \$117.00 in Veterans' Administration benefits and \$860.00 from his wife's salary. He lived with his wife and minor child. Appellant listed monthly household expenses of \$350.00 for food, \$75.00 for clothing, \$780.00 for utilities and \$548.00 for medication, burial insurance, internet and cable. He also noted approximately \$1,000.00 in monthly debt and insurance payments. Appellant and his wife had no bank accounts, stocks, bonds or valuable personally.

At the hearing, held October 29, 2009, appellant asserted that he intended to have family insurance coverage under code 105. He noted that he and his wife owned their home and there was no mortgage on it. In addition, appellant's wife owned half an acre of land valued at

¹ On December 8, 1997 appellant underwent a C4-5 discectomy and fusion with plating from C3 to 6. He underwent implantation of a spinal cord stimulator at C1-2 on April 29, 2002. The implant required emergency removal on September 11, 2002 due to infection.

approximately \$1,100.00. Also, his wife was laid off shortly before the hearing and received unemployment benefits. Appellant noted an additional expense for gas heating but that he had not yet received a bill. The Office hearing representative afforded him 30 days to submit verification of his wife's unemployment benefits, the cost of gas heat and a valuation of his wife's real property. The hearing representative noted that it appeared that the Office had not yet reimbursed appellant for work-related medical expenses. She advised him to submit his medical bills to the Office for payment.

By decision dated and finalized January 22, 2009, the Office hearing representative finalized the fact and amount of overpayment and that appellant was not at fault in its creation. The Office noted that he did not submit information regarding his wife's unemployment benefits, real property or his gas heating bill as instructed. Without this information, the amount of income, assets and expenses could not be calculated to determine if waiver could be granted. Therefore, the hearing representative directed recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation, with interest, from February 15, 2009 to June 30, 2013.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² 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 duty.³ Section 8129(a) of the Act provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter 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 an individual is entitled."⁴

The regulations of the Office of Personnel Management (OPM), 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."⁵

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 5 C.F.R. § 890.502(a)(1).

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.”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

Appellant received total disability compensation on the periodic rolls. During the period December 5, 1997 to April 12, 2008, the Office deducted health insurance premiums at an incorrect rate. Appellant was enrolled in family health insurance coverage under plan code 105. He does not dispute that he received family health insurance benefits. However, the Office deducted premiums at the lower individual coverage rate under plan code 104. It calculated that it should have deducted \$14,310.10 in health insurance premiums during the period in question, but only deducted \$6,224.45, a difference of \$8,085.65. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,085.65 for the period December 5, 1997 to April 12, 2008.

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.” 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.¹¹

⁶ *Id.* at § 890.502(c).

⁷ *Id.* at § 890.502(a)(1).

⁸ *Supra* note 5.

⁹ *T.S.*, 60 ECAB ___ (Docket No. 08-1604, issued March 13, 2009); 5 C.F.R. § 890.502.

¹⁰ 5 U.S.C. § 8129.

¹¹ *Wade Baker*, 54 ECAB 198 (2002).

Section 10.436 of the implementing federal regulations¹² provide 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 May 15, 2008 preliminary overpayment determination, the Office informed appellant of actions available to him if he believed that he should receive a waiver. It advised him to submit a completed overpayment recovery questionnaire as well as information and evidence regarding his income and expenses.

Appellant submitted a completed overpayment recovery questionnaire with financial information outlining his income and expenses, but there was additional information needed regarding his home heating bill and his wife’s income and assets. On appeal, he asserts that he did submit the information as requested by the hearing representative, but there is no indication in the record that he provided such documents.

As appellant did not submit complete financial information, there was insufficient 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 he failed to submit the requested information, as required by section 10.438 of its regulations, he was not entitled to a

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437.

¹⁴ *Id.* at § 10.438(a).

¹⁵ *Id.* at § 10.438(b).

¹⁶ *See id.* at § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

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

On appeal, appellant contends that he should not have to repay the overpaid compensation as the Office failed to pay a greater amount of medical bills. However, whether the Office paid appellant's medical bills is unrelated to the issue of whether the Office deducted the appropriate amount of health benefit premiums from his compensation. The Board notes that at the preresoupment hearing, the Office hearing representative advised appellant to submit his medical bills to the Office for payment.

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 his 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

ANALYSIS -- ISSUE 3

The Board finds that the Office did not abuse its discretion by ordering the deduction of \$150.00 every four weeks from appellant's continuing compensation payments.

Section 10.441(a) of the Office's regulations direct 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.¹⁹ In this case, it was disadvantaged by appellant's failure to provide complete financial documentation. The Board notes that the Office did consider the information available. The Board finds that the Office gave due consideration to the relevant factors and properly imposed a repayment schedule of \$150.00 every 28 days from appellant's continuing compensation.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$8,085.65 for the period December 5, 1997 through April 12, 2008. The Board further finds that the Office properly denied waiver and did not abuse its discretion in requiring repayment at the rate of \$150.00 every 28 days from continuing compensation payments.

¹⁷ *Id.*

¹⁸ *Id.* at § 10.441(a).

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 22, 2009 is affirmed.

Issued: April 6, 2010
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