

FACTUAL HISTORY

On June 19, 1996 appellant, then a 39-year-old supervisor of distribution operations, filed an occupational disease claim for an emotional condition due to his federal employment. The Office accepted that events occurring on November 29, 1995 resulted in anxiety; single episode depressive disorder, temporary aggravation alcoholism and gastritis. It paid wage-loss compensation for disability. By decision dated November 2, 2004, the Office determined that the position of administrative clerk represented appellant's wage-earning capacity and adjusted his compensation, finding a 59 percent capacity to earn wages.¹

On November 25, 2006 appellant was reinstated as supervisor of distribution operations. The Office discontinued deductions for his basic life and optional life insurance premiums as well as his health insurance premiums and transferred enrollment back to the employing establishment. The record reflects that appellant was in receipt of compensation for loss of wage-earning capacity. On March 14, 2007 appellant stopped work and did not return. The employing establishment transferred his health benefit premiums to the Office on March 14, 2007. The Office resumed life insurance premium deductions and health insurance premium deductions on April 12, 2009.

The record reflects that premiums for basic life and optional life insurance were not withheld from March 14, 2007 to April 11, 2009. This represented \$374.08 in basic life insurance and \$1,794.49 in optional life insurance, for a total of \$2,168.57. As to health insurance premiums, the employing establishment verified that appellant stopped paying premiums on his health insurance on March 27, 2008. Accordingly, it transferred appellant's health insurance enrollment to the Office effective March 28, 2008. The record reflects premiums for health insurance were not paid from March 28, 2008 to April 11, 2009, in the amount of \$5,032.67.²

On June 9, 2009 the Office advised appellant that it made a preliminary determination that he received a \$5,032.67 overpayment of compensation that arose because premiums for health benefits were not deducted from March 28, 2008 to April 11, 2009. It found that he was without fault in the creation of the overpayment. Appellant was informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment within 30 days. If he wished a waiver of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire within 30 days. A copy of the overpayment recovery questionnaire was attached along with the Office's worksheet which showed that the premiums were not deducted from his compensation during the period March 28, 2008 to April 11, 2009 and which calculated the amount of premiums which should have been deducted for health insurance.

¹ Appellant was referred for vocational rehabilitation after the employer advised it could not accommodate his restrictions.

² On May 28, 2009 the Office notified appellant that, effective April 12, 2009, it reduced his compensation to \$946.32 every four weeks to reflect premium deductions for health benefits and life insurance.

On June 11, 2009 the Office issued a preliminary determination that appellant was not at fault in the creation of an overpayment of compensation from March 14, 2007 to April 11, 2009 in the amount of \$2,168.57 for the nonwithholding of premiums for basic life and optional life insurance. Appellant was advised of his right to challenge the amount of the overpayment or request a waiver within 30 days. If he sought waiver of the overpayment, he was directed to submit financial information by completing an overpayment recovery questionnaire within 30 days. The Office attached a copy of the overpayment recovery questionnaire together with a worksheet which showed that appellant's premiums for basic life and optional life insurance from March 14, 2007 to April 9, 2009 were \$374.08 and \$1,794.49, respectively.

Appellant did not respond or submit any additional evidence within the allotted time regarding either overpayment.

By decision dated July 14, 2009, the Office finalized the overpayment of \$5,032.67 for health benefit premiums not withheld from March 28, 2008 through April 11, 2009. It noted that no financial documentation was submitted to support waiver of the overpayment. The Office determined that \$200.00 would be deducted from appellant's future compensation payments.

By decision dated July 20, 2009, the Office finalized the overpayment of \$2,168.57 for nonwithholding of basic life and optional life insurance from March 14, 2007 to April 11, 2009. It noted that appellant had not provided justification for the Office to waive recovery of the overpayment. The Office determined that \$100.00 would be withheld from appellant's future compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act³ 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.⁴ 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.

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits (FEHB) program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB program, provides guidelines for registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides that an 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

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues.⁵

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

Under the Federal Employees Group Life Insurance Program (FEGLI), most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.¹⁰ The coverage for basic life insurance is effective unless waived¹¹ and the premiums for basic and optional life coverage are withheld from the employee's pay.¹² While the employee is receiving compensation under the Act, deductions for insurance are withheld from the employee's compensation.¹³ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under compensation status. If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from his or her compensation payments.¹⁴ When an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM upon discovery of the error.¹⁵

⁵ 5 C.F.R. § 890.502(a)(1).

⁶ *Id.* at § 890.502(c).

⁷ *Id.* at § 890.502(a)(1).

⁸ *Id.*

⁹ See *James Lloyd Otte*, 48 ECAB 334 (1997); *Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

¹⁰ 5 U.S.C. § 8702(a).

¹¹ *Id.* at § 8702(b).

¹² *Id.* at § 8707.

¹³ *Id.* at § 8707(b)(1).

¹⁴ *Id.* at § 8706(b).

¹⁵ *Id.* at § 8707(d); see *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, *supra* note 9.

ANALYSIS -- ISSUE 1

The Board notes that appellant did not dispute either the fact or the amount of the overpayment regarding his health insurance and life insurance premiums. The record contains detailed information from the Office documenting its determination of the amount of the overpayment due to the nondeduction of these premiums.

As to the health insurance premiums, the record reflects that appellant returned to work in November 2006 and paid premiums for his health benefits directly through the employing establishment to March 27, 2008. No premiums were paid thereafter. Appellant returned to the compensation rolls but the Office failed to deduct premiums for health insurance from his compensation payments for the period March 28, 2008 to April 11, 2009. During this period, \$5,032.67 in health insurance premiums was not deducted. In the absence of a specific waiver of coverage by appellant, which is not evidenced by the record, the Office should have deducted the premiums. This created an overpayment in compensation in the amount of \$5,032.67. The Board will affirm the Office's July 14, 2009 decision on the issues of fact and amount of overpayment for the health insurance premiums.

With regard to appellant's life insurance premiums, the record reflects that the Office failed to deduct premiums from appellant's compensation payments for the period March 14, 2007 to April 11, 2009. The worksheets reflect that during this period \$374.08 in basic life insurance and \$1,794.49 in optional life insurance premiums, a total of \$2,168.57, were not deducted. Again, there is no evidence of record that appellant waived coverage and the Office should have deducted the premiums. This created an overpayment of compensation in the amount of \$2,168.57. The Board will affirm the Office's July 20, 2009 decision on the issues of the fact and amount for the nondeduction of life insurance premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.¹⁶ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹⁷ 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 to 10.437 of Title 20 of the Code of Federal Regulations.¹⁸

Office regulations, at 20 C.F.R. § 10.438, state that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an

¹⁶ 5 U.S.C. § 8129.

¹⁷ *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁸ 5 U.S.C. §§ 10.434-10.437.

overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁹

ANALYSIS -- ISSUE 2

On appeal, appellant noted that he was found without fault in the overpayment determinations and that deduction of \$300.00 a month caused an extreme hardship for him and his family as he has limited income. The Act and implementing federal regulations are clear that entitlement to waiver is not established solely by a finding that a claimant is without fault in creating an overpayment. Rather, such a finding entitles appellant the opportunity to submit evidence and establish a basis for granting waiver of the recovery of the overpayment.²⁰

The Office found that appellant was without fault in the matter of the overpayment, payment is required unless it is established that adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.²¹ While appellant contends that he would suffer financial hardship in attempting to repay the debt, he did not submit any financial information to the Office for its consideration to determine whether recovery of the overpayments would defeat the purpose of the Act or be against equity and good conscience.

Although requested with both preliminary notices, appellant did not submit a completed overpayment recovery questionnaire form or any other financial information on his monthly income or expenses. As a result, there was no evidence before the Office to establish whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.²² In its June 9 and 11, 2009 preliminary overpayment determinations, the Office informed appellant of the steps to take should he seek waiver of the overpayments. It advised him to submit a completed overpayment recovery questionnaire, as well as information and evidence regarding his income and expenses, within 30 days. Appellant did not respond prior to issuance of the Office's final overpayment decisions. As he failed to submit the requested information, under section 10.438 of the Office's regulations he is not entitled to waiver.²³ The Board finds that the Office properly denied waiver of recovery of the overpayments.

¹⁹ 20 C.F.R. § 10.438. See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

²⁰ See *James Lloyd Otte*, *supra* note 9.

²¹ See *Keith H. Mapes*, *supra* note 15.

²² *T.S.*, 60 ECAB ____ (Docket No. 08-1604, issued March 13, 2009). See 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

²³ See *id.*

LEGAL PRECEDENT -- ISSUE 3

The Office's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.²⁴

ANALYSIS -- ISSUE 3

The Board finds that the Office properly directed recovery of both overpayments by deducting a total of \$300.00 every four weeks from appellant's continuing compensation payments.

Appellant did not provide a completed overpayment recovery questionnaire or any detailed information regarding his current financial circumstances. It is his responsibility to provide information about income, expenses and assets.²⁵ Section 10.441(a) of the Office's regulations, as noted, directs the Office 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.²⁶ The Office was disadvantaged by appellant's failure to timely provide financial documentation. Again, it had no evidence to consider to support the amount of deductions. In view of these circumstances, the Office properly considered the appropriate factors in determining the recovery of the two overpayments.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$5,032.67 overpayment of compensation from March 28, 2008 to April 11, 2009 for the underwithholding of health insurance premiums and a \$2,168.57 overpayment from March 14, 2007 to April 11, 2009 for the underwithholding of life insurance premiums. The Board further finds that the Office properly denied waiver and required repayment of both overpayments.

²⁴ 20 C.F.R. § 10.441(a); see *Steven R. Cofrancesco*, *supra* note 17.

²⁵ *Id.* at § 10.438.

²⁶ *Id.* at § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the July 20 and 14, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2010
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