

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

C.K., claiming as widow of J.K., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
SHIPYARD, Philadelphia, PA, Employer)

**Docket No. 09-2014
Issued: May 21, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 5, 2009 appellant filed a timely appeal from a July 20, 2009 merit decision of the Office of Workers' Compensation Programs regarding 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 the Office properly found an overpayment of \$992.82 was created from January 1 to May 9, 2009; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$50.00 from continuing compensation payments.

FACTUAL HISTORY

Appellant received compensation following the death of the employee while in the performance of duty in 1984. As of May 10, 2008 she received net compensation of \$1,690.15 every 28 days, with no deductions for health benefit insurance. In a memorandum of telephone

call dated April 29, 2009, the Office noted that appellant reported her health benefits had been involuntarily terminated. A memorandum dated May 7, 2009 indicated that she had selected Keystone Health Plan East in 2000 and remained covered although no deductions were made. Appellant asserted that her coverage had been cancelled as of January 2009. A certificate of group health plan coverage showed coverage had begun October 1, 2001 and ended December 31, 2008.

By letter dated May 21, 2009, the Office advised appellant's congressional representative that health benefit coverage had been reinstated effective January 1, 2009. The record indicates that, as of May 10, 2009, the Office began deducting premiums for health benefits. A May 20, 2009 Office memorandum reported appellant was covered under code plan ED1.

In a letter dated June 5, 2009, the Office advised appellant of a preliminary determination that an overpayment of \$992.92 was created.¹ Its worksheet (Form CA-25) showed \$93.88 in health benefit premiums should have been deducted from January 1 to 17, 2009 and \$829.04 in premiums from January 18 to May 9, 2009. The Office advised appellant that she was found not at fault in creating the overpayment and an overpayment recovery questionnaire was enclosed. Appellant was advised to complete the form and submit supporting financial documentation within 30 days for the Office to consider the waiver issue. She did not respond.

By decision dated July 20, 2009, the Office found an overpayment of \$992.82 was created from January 1 to May 9, 2009. It denied waiver of the overpayment. With respect to repayment, the Office indicated \$50.00 would be deducted from appellant's continuing compensation payments. A memorandum dated July 20, 2009 noted that \$50.00 was less than five percent of appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits (FEHB) Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(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 due to the United States in the amount of the proper employee withholding required for that pay period."

In addition, 5 C.F.R. § 890.502(d) provides: "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 the title, 5 United States Code, to OPM for

¹ The final overpayment decision determined the overpayment was \$992.82, without further explanation.

deposit in the Employees Health Benefits Fund.” When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.²

ANALYSIS -- ISSUE 1

The period of the overpayment in this case was from January 1 to May 9, 2009. Appellant was eligible for coverage under the FEHB as survivor of her federal employee spouse. The record establishes that she selected health benefits from Keystone Health Plan East, under FEHB plan code ED1 for single individuals. Appellant had coverage under this plan since at least 2001.³ In 2009, her coverage temporarily ceased but was reinstated effective January 1, 2009.

As noted, it is appellant’s responsibility for payment of premiums for health benefits. The Office did not make deductions for the health benefit insurance from January 1 to May 9, 2009. Accordingly, an overpayment of compensation was created. As to the amount, the Office calculations indicated that \$992.92 should have been deducted for plan code ED1 during this period. The Board notes that the final decision stated that amount was \$992.82, which may have been an inadvertent error. Since this was a minor adjustment in appellant’s favor, the Board will accept the stated amount of \$992.82.

On appeal, appellant states that she had no coverage for months in 2009 and was being asked to pay “for something I never had.” However, her coverage was reinstated retroactive to January 1, 2009. Since appellant was covered under the health plan from January 1 to May 9, 2009 the Office must properly deduct the appropriate premiums for any period of enrollment.⁴ The evidence clearly establishes an overpayment based on the failure to deduct premiums for health benefit insurance.⁵

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office’s discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of the Federal Employees’ Compensation Act which states: “Adjustment or recovery [of an overpayment] 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

² See *John Skarbek*, 53 ECAB 630 (2002).

³ The certificate of coverage reported an initial date of October 1, 2001, but a memorandum of telephone call dated May 20, 2009 indicated the 2001 date represented only the implementation of a new system and appellant had been covered prior to this date.

⁴ See *John Skarbek*, *supra* note 2; *Leticia C. Taylor*, 47 ECAB 198 (1995); *Marie D. Sinnott*, 40 ECAB 1009 (1989).

⁵ The Board also notes that the declared overpayment represents only a limited period in 2009, even though the record indicated premiums had not been deducted for prior periods.

⁶ *Robert Atchison*, 41 ECAB 83 (1989).

good conscience.”⁷ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁸ provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁹ 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 \$50.00.¹⁰

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 in 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.¹¹

With respect to the submission of evidence regarding waiver, Office regulations provide:

“(a) 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 the 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.

“(b) 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.”¹²

⁷ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁸ 20 C.F.R. § 10.436 (1999).

⁹ An individual’s assets must exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual’s assets not exempt from recoupment; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

¹⁰ *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹¹ 20 C.F.R. § 10.437 (1999).

¹² *Id.* at § 10.438.

ANALYSIS -- ISSUE 2

On the issue of waiver of the overpayment, the Office's June 5, 2009 preliminary determination provided appellant with an overpayment recovery questionnaire and requested that she submit relevant financial information within 30 days. The financial information is necessary for the Office to make a proper determination as to whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. Appellant did not submit the OWCP-20 or any relevant financial information.

Under the regulations noted above, failure to submit the requested information "shall result in denial of waiver" and no further request shall be considered until the information is provided. The Board accordingly finds that the Office properly denied waiver in this case.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of the Office's regulations provide:

"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 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."¹³

ANALYSIS -- ISSUE 3

In this case, the Office determined that the overpayment could be recovered by deducting \$50.00 every 28 days from appellant's continuing compensation payments. As noted it must consider such factors as the extent of future payments, compensation rate and the financial circumstances of the individual to "minimize any hardship." Appellant did not submit any evidence regarding her financial circumstances and the Office can only consider the evidence of record. The Office noted in its July 20, 2009 memorandum that its procedures provide that when a claimant is being paid compensation and does not respond to the preliminary overpayment determination, a final decision must be issued and the overpayment recovered in a timely manner.¹⁴ In addition, the memorandum noted that \$50.00 represented a small percentage of appellant's continuing compensation payments.

Based on the evidence of record, the Board finds that the Office properly considered the relevant factors in attempting to minimize hardship to appellant. The Office's determination that the overpayment should be recovered by deducting \$50.00 from continuing compensation is in accord with the Office regulations regarding recovery of an overpayment.

¹³ *Id.* at § 10.441(a).

¹⁴ Federal (FECA) Procedure Manual *supra* note 9 at Chapter 6.200.4(c)(2) (May 2004).

On appeal, appellant asks that her age, limited income and rising expenses be taken into consideration. As noted it is her responsibility to submit relevant financial information so that the Office can make an appropriate decision. The Office properly denied waiver because appellant did not submit any evidence regarding her income and expenses on which to properly assess the waiver issue. The repayment by deducting \$50.00 from continuing compensation properly minimizes any hardship based on the evidence available.

CONCLUSION

The Board finds an overpayment of \$992.82 was created due to a lack of health benefit insurance deductions. The Office properly denied waiver of the overpayment and properly determined it would be recovered by deducting \$50.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2009 is affirmed.

Issued: May 21, 2010
Washington, DC

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

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

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