U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY W. HENSON and U.S. POSTAL SERVICE,
POST OFFICE, Ventura, Calif.

Docket No. 95-2493; Submitted on the Record;
Issued November 3, 1998

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of $2,955.45 because health benefit, optional life insurance and basic life insurance premiums were not deducted from June 6, 1992 to May 28, 1994; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

On July 6, 1981 appellant, then a 33-year-old letter carrier, filed a notice of occupational disease alleging that he tore the medial meniscus of his right knee in the course of his federal employment. The Office accepted the claim for a medial meniscus, right knee and appellant received compensation for temporary total disability. The Office subsequently deducted health benefit and life insurance premiums from appellant's compensation.

On August 2, 1982 appellant elected to receive Federal Employees' Compensation Act benefits in preference to benefits under the Civil Service Retirement Act.

On January 10, 1983 the Office informed appellant that he was placed on the periodic rolls for total disability compensation and that it would deduct health and optional insurance benefits. The Office subsequently paid appellant compensation for total disability and deducted premiums for health benefit and life insurance premiums.

On August 16, 1983 the Office wrote to the Office of Personnel Management (OPM) to indicate that since July 25, 1981 it had been responsible for appellant's health benefits deductions. Appellant received a copy of this letter. On August 23, 1983 appellant received notice that his health benefit enrollment had been transferred to the Department of Labor (DOL) effective October 24, 1981.

On September 3, 1983 appellant returned to a limited-duty position working four hours per day with the employing establishment.

The employing establishment subsequently requested that health benefits be transferred back to it. On September 8, 1983 appellant's health benefits enrollment was transferred to the employing establishment.

Appellant subsequently received wage-loss compensation but health benefit and life insurance premiums were not deducted from his compensation benefits.

On a disability worksheet dated September 16, 1983, the Office indicated that due to appellant's return to limited duty an overpayment of $92.97 existed based on appellant's wage-earning capacity and a recovery of health benefits.

A November 4, 1983 Office compensation log printout indicated that appellant received a schedule award of $1,268.00.

By decision dated June 20, 1984, the Office reduced appellant's compensation based on his loss of wage-earning capacity.

By decision dated April 10, 1989, the Office reduced appellant's compensation based on his loss of wage-earning capacity.

An Office compensation log printout dated May 7, 1991 indicated that appellant was entitled to $1,125.71 in compensation for the period of August 28, 1990 through May 4, 1991, but that appellant received $3,519.99 for this period.

By decision dated May 14, 1991, the Office determined that the position of a rehabilitation clerk with wages of $545.65 represented appellant's wage-earning capacity. The Office, therefore, adjusted appellant's compensation based on his loss of wage-earning capacity. In an accompanying memorandum, the Office noted that appellant was not at fault in the creation of the overpayment, which resulted from the change in wage-earning capacity.

On May 14, 1991 the Office made a preliminary determination that an overpayment of $2,394.28 existed because appellant's work hours increased from six to seven hours per day on August 28, 1990, but appellant's compensation was not decreased until May 5, 1991. The Office found that appellant was not at fault in the creation of this overpayment.

By decision dated July 25, 1991, the Office indicated that the position of light-duty distribution clerk fairly and reasonably represented appellant's wage-earning capacity. It, therefore, reduced appellant's compensation based on his loss of wage-earning capacity.

By letter dated August 2, 1991, the Office indicated that it would follow appellant's request and deduct $100.00 from his continuing compensation to liquidate the overpayment.

An August 6, 1993 compensation log printout indicated that appellant received compensation for partial disability from July 25 through August 21, 1993 and that health and insurance premiums were not deducted.

By letter dated May 4, 1994, the employing establishment submitted life and health benefit forms documenting appellant's selection of basic life insurance, optional life insurance

and health insurance coverage. This included forms indicating that health benefits transferred to the employing establishment on September 8, 1983, to OPM on July 16, 1983 and to DOL on November 29, 1983.

A June 11, 1994 compensation log printout indicated that appellant owed health insurance benefits from June 6, 1992 through May 28, 1994 in the amount of $2,523.78 for health benefits and $728.62 for optional life insurance.

On July 8, 1994 a "Notice of Change of Health Benefits Enrollment" indicated that effective June 28, 1993 DOL accepted appellant's health benefits enrollment.

A July 8, 1994 compensation log printout indicated that appellant received compensation for partial disability from June 26 through July 23, 1994 and that health and insurance premiums were deducted. The printout indicated that the four-week deductions were $93.66 for health benefits, $37.70 for optional life insurance and $10.90 for basic life insurance.

In an undated letter, the Office indicated that OPM informed it that additional premiums must be withheld from appellant's compensation retroactive to June 6, 1992. The Office indicated that these premiums were $93.66 for health insurance, $37.70 for optional life insurance and $10.90 for basic life insurance.

On a disability benefit payment worksheet, the Office found that from June 6, 1992 through January 9, 1993, a period of 31 weeks or 15.5 pay periods, appellant's bi-weekly deductions for basic life insurance should have been $6.11. The Office, therefore, determined that appellant owed $94.71 for this period for basic life insurance. In addition, the Office indicated that from January 10, 1993 through May 28, 1994, a period of 36 weeks or 18 pay periods, appellant's bi-weekly deductions for basic life insurance should have been $5.45. The Office, therefore, found that appellant owed $196.20 for this period for basic life insurance. The Office then totaled $94.71 with $196.20 to establish that appellant owed $290.91 for basic life insurance from June 6, 1992 through May 28, 1994. The Office then noted for the period of June 6, 1992 through May 28, 1994 appellant owed $728.62 for optional life insurance. The Office then indicated that for the period of June 6, 1992 through January 9, 1993 appellant owed $662.16 based on bi-weekly deductions for health insurance of $85.44, that for the period of January 10, 1993 through January 8, 1994 appellant owed $1,391.26, based on bi-weekly deductions of $107.02 and that for the period of January 9 through May 28, 1994 appellant owed $468.30 based on bi-weekly deductions of $93.66. The Office totaled these amounts to find that appellant owed $2,521.72 for health insurance benefits, which were not deducted for the period of June 6, 1992 through May 28, 1994. Finally, the Office totaled the amount appellant owed for basic life insurance of $290.91, with the amount appellant owed for optional life insurance, $728.62, with the amount appellant owed for health insurance benefits to find that an overpayment of $3,541.25 existed for the period of June 6, 1992 through May 28, 1994.

By notice dated February 3, 1995, the Office made a preliminary determination that an overpayment occurred in appellant's case in the amount of $3,541.25 because health and life insurance premiums were not deducted from his compensation for the period of June 6, 1992 through May 28, 1994. The Office noted that its preliminary finding was that appellant was at fault because he reasonably knew or should have known that he was responsible for paying such

premiums and because he received at least one statement of earnings which did not include such deductions. Appellant was provided with an overpayment recovery questionnaire.

Appellant subsequently wrote to the Office only to disagree with the amount of the overpayment. Appellant stated that from June 1992 through May 1993 he made payments for his insurance premiums. Appellant submitted three canceled checks payable to the employing establishment dated September 25, 1992, January 1 and March 3, 1993 demonstrating that he paid $53.40 each time for health benefits. Appellant also submitted an earnings statement indicating that appellant made two payments of $93.05 for insurance premiums in 1993 and that an additional $239.50 was deducted from his pay for health benefits. Appellant stated that he wished to repay the overpayment with a $100.00 deduction from his monthly compensation check.

In a disability benefits payment worksheet, the Office deducted $585.50, the amount appellant established that he paid for his insurance premiums with his canceled checks and earning statement to reduce the overpayment amount to $2,955.45.

By decision dated March 30, 1995, the Office found that an overpayment of $2,955.45 occurred because premiums were not deducted from appellant's compensation checks. The Office further found that appellant was at fault because he knew or reasonably should have known that the deductions were not being made. Finally, the Office agreed with appellant's proposal to deduct $100.00 from his monthly compensation checks in order to recover the overpayment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of $2,955.45 because health benefits, basic life insurance and optional life insurance premiums were not deducted from his monthly compensation from June 6, 1992 through May 28, 1994.

In the instant case, appellant does not dispute that an overpayment occurs, but only contests the amount of the overpayment.

The Board has previously recognized that when an underwitholding 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.[1]

There is no evidence of record that appellant canceled his health benefit enrollment[2] or his basic and optional life insurance. Rather, appellant received compensation benefits from June 6, 1992 through May 28, 1994 and continued to maintain his health and life insurance enrollment. OPM noted that from June 6, 1992 through May 28, 1994 appellant's enrollment for health, basic life and optional life insurance rested with DOL. However, the Office indicated on

[1] *See John E. Rowland*, 39 ECAB 1377 (1988).

[2] Cancellation means the act of filing a health benefits registration form terminating enrollment in a health benefits plan and electing not to be enrolled for the future by an enrollee who is eligible to continue enrollment. 5 C.F.R. § 890.101(a); *see also* 5 C.F.R. § 890.304(d).

its disability benefit payment worksheet that appellant did not pay these premiums out of his compensation.

The regulations of OPM, which administers the Federal Employee Health Benefit (FEHB) Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees who are transferred as annuitants of compensation under the Act. The regulations state:

> "An employee or annuitant is responsible for payment of the employee 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 the United States in the amount of the proper employee withholding required for that period."[3]

A compensationer/annuitant must remit his share of the charge for enrollment for every pay period during which the enrollment continues.[4] If not paid, the individual may not reenroll or have health benefits coverage reinstated.[5] In short, to qualify for continued health coverage for himself and his family under the FEHB, premium payments must be made retroactive to June 6, 1992.

The Office properly calculated the amount of the premiums appellant owed during this period by referring to the Office's compensation log printout dated June 11, 1994 and by multiplying the amount of premiums appellant owed on a bi-weekly basis with the number of pay periods, in which the premiums were not deducted. Consequently, the Office found that appellant owed $290.91 for basic life insurance premiums for the period of June 6, 1992 through May 28, 1994 based on 15.5 pay periods with premiums of $6.11 and 18 pay periods with premiums of $5.45. Based on its computer log printout, the Office further determined that appellant's premiums for optional life insurance during this period were $723.62. Finally, the Office determined that appellant owed $2,521.72 for health insurance premiums based on its computer log printout and its determination that for the period of June 6, 1992 through January 9, 1993 appellant owed $662.16, based on bi-weekly deductions for health insurance of $85.44; that for the period of January 10, 1993 through January 8, 1994 appellant owed $1,391.26, based on bi-weekly deductions of $107.02; and that for the period of January 9 through May 28, 1994 appellant owed $468.30, based on bi-weekly deductions of $93.66. The Office then totaled the amount appellant owed for health benefit, basic life and optional life insurance premiums to find that appellant received an overpayment of $3,541.25. However, the Office properly deducted the $585.80 from the overpayment amount because the record established, by appellant's canceled checks and earning statements, that appellant made some premium payments from June 6, 1992 through May 24, 1994. The Office, therefore, properly

[3] 5 C.F.R. § 890.502(b)(1).

[4] 5 C.F.R. § 890.502(f)(4).

[5] *Id.*

found that appellant owed $2,955.45 in an overpayment for insurance premiums which he failed to make.

The Board further finds that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Act[6] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "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."[7] If an employee is not "without fault" the overpayment is not subject to waiver.[8]

Section 8129 necessitates a determination as to whether appellant is at fault in the creation of the overpayment of compensation for the periods June 6, 1992 through May 28, 1994. Concerning whether an individual is with fault in creating an overpayment, the Office's regulations provide in relevant part:

> "In determining whether an individual is with fault the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who:
>
> > (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > (2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[9]

In this case, the Office applied the third standard -- accepted a payment which the individual knew or should have been expected to know was incorrect -- in finding that appellant was at fault in the creation of an overpayment which result from insurance premiums not being deducted from his compensation benefits. As the Office properly noted, appellant received at least one statement of earnings in which the premiums were not deducted. Moreover, appellant had previously received compensation benefits in which such premium deductions were made.

[6] 5 U.S.C. § 8129(a).

[7] 5 U.S.C. § 8129(b).

[8] *Monroe E. Hartzog*, 40 ECAB 322, 331 (1988).

[9] 20 C.F.R. § 10.320(b).

Appellant, therefore, knew such deductions should have been made from his compensation. During the period of June 1992 to May 1993 appellant made direct payment to the employing establishment for premiums. This evidence shows that appellant was generally aware of his compensation payments and of the necessity that premiums be paid. Thus he knew or should have been expected to know of the incorrect payments he accepted. This renders appellant "with fault" in the creation of the overpayment under section 10.320(b)(3). Since appellant is not without fault, the overpayment is not subject to waiver.

The decision of the Office of Workers' Compensation Programs dated March 30, 1995 is affirmed.

Dated, Washington, D.C.
November 3, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member