



dated April 5, 2002, appellant indicated that her husband died on November 2, 2001 and she had no dependents. In a preliminary determination dated September 19, 2002, the Office found that appellant was overpaid benefits in the amount of \$7,190.73 because health benefit deductions were not deducted from her compensation for the period November 9, 1988 to November 1, 2001. The Office explained that, when appellant left federal employment on November 9, 1988, the employing establishment was to transfer her enrollment code, 452, and the Office would continue to make deductions on appellant's behalf, however, so that no deductions were made for appellant's premiums. An Office note dated July 9, 2002 stated that appellant had been enrolled in the health benefits plan since November 9, 1988 and had not transferred the plan to the Office after she left the federal government.

The Office also found that appellant was overpaid because she received compensation at a three-quarter percent rate instead of a two-third percent rate after her husband died on November 2, 2001. Specifically, the Office found that appellant was overpaid \$2,490.36, the difference between the two-third and three-quarters rate, from November 2, 2001 to July 13, 2002. The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that she could request a telephone conference, request that a final decision be issued based on the written evidence or request a preresumption hearing. The Office also informed appellant that she could submit the appropriate financial information to establish waiver of the overpayment.

By decision dated December 17, 2002, the Office affirmed the preliminary determination, finding that an overpayment of \$9,861.09 was created and that appellant was without fault in the creation of the overpayment. The Office noted that it had not received any financial information from appellant. The Office, however, obtained an itemized statement of earnings from the Social Security Administration, which showed that appellant received approximately \$6,000.00 each year in 2000 and 2001. In the April 5, 2002 EN1032 appellant indicated that she received social security at a rate of \$77.00 a month. By letter from the Office to appellant's mortgage company dated May 22, 2000, the Office indicated that appellant was receiving compensation at a rate of \$1,477.00 every 28 days. A letter from the Office to a different finance company dated July 22, 2002, indicated that appellant was receiving gross compensation benefits of \$1,373.00 as of July 14, 2002. Checks appellant received from the Department of Treasury dated October 1, 3 and 5, 2002, showed that appellant received a survivor's annuity of \$379.00, social security benefits of \$77.00 and a monthly compensation payment of \$1,262.84, respectively.

In the decision, the Office considered that appellant received continuing compensation under a wage-earning capacity decision finalized in 2002 and that appellant was not entitled to waiver of recovery of the overpayment. The Office, therefore, required that appellant make monthly payments of \$95.00 with interest until the overpayment was recovered.

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

The regulation of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits (FEHB) Program, provide guidelines for regulation, enrollment and continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides: "[A]n employee of annuitant is responsible for payment of the employee [or annuitant's] 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” the health benefit withholdings or direct premium payments are not made but during, which the enrollment continues.

In addition, 5 C.F.R. § 890.502(d) 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 deductions and any applicable agency contributions required under section 8906 of title 5 United States Code, OMP for deposit in the Employees’ Health Benefits Fund.”

Under the Federal Employees’ Compensation Act, compensation benefits are payable at two-thirds of the applicable pay rate if there are no eligible dependents and at the augmented three-fourths rate if there were one or more eligible dependents.<sup>1</sup>

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

The Office presented worksheets and computer printouts to support its findings that the health deductions of \$7,190.73 were not made from appellant’s compensation from November 9, 1988 through November 1, 2001 and appellant was overpaid \$2,490.36 from November 2, 2001 to July 13, 2002, when she received compensation based on a three-quarter percent rate instead of a two-third percent rate after her husband died. The July 9, 2002 Office note showed that appellant was enrolled in the OPM health benefit plan during the relevant time period compensation payments were made. In her overpayment recovery questionnaire appellant indicated that her husband died on November 2, 2001 and she had no dependents. Since appellant was enrolled in the health benefits plan from November 1, 1988 through November 1, 2001, health benefits deductions should have been made from her compensation payments during that period. Further, once appellant’s husband died and because she had no dependents, her compensation rate should have been changed from the three-fourths rate to the two-thirds rate. The computer printouts of record support the Office’s calculation of the amount of the overpayment. No evidence of record presents contrary figures to this data. The Office, therefore, properly found that an overpayment of \$9,681.09 (\$7,190.73 + \$2,490.36) was created.

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

Section 8129(a) of the Act<sup>2</sup> provides that where an overpayment of compensation has been made “because of an error of fact or law” adjustments 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 tests set forth as follows in section 8129(b): “Adjustments or recovery

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<sup>1</sup> 5 U.S.C. § 8110(a) and (b); 20 C.F.R. § 10.403(b).

<sup>2</sup> 5 U.S.C. § 8129(a).

by the United States may not be made when incorrect payments 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>3</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>4</sup> The Office must 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,” pursuant to the guidelines provided in sections 10.434-10.437 of the implementing federal regulation.

Section 10.436 of the Office’s regulation<sup>5</sup> provides that recovery of an overpayment would defeat the purpose of the Act if such 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. 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.<sup>6</sup> Further, an individual’s assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all the of the individual’s assets not exempt from recoupment.<sup>7</sup>

Section 10.437<sup>8</sup> states that recovery of an overpayment is also considered to be against good conscience if the 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.

Section 20 C.F.R. § 10.438 states:

“(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 an overpayment would defeat the purpose of the Act or be against equity and good conscience. The information will all be used to determine the repayment schedule, if necessary.

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>5</sup> 20 C.F.R. § 10.436.

<sup>6</sup> *Frederick Arters*, 53 ECAB \_\_\_\_\_ (Docket No. 01-1237, issued February 27, 2002); *see Howard R. Nahikian*, 53 ECAB \_\_\_\_\_ (Docket No. 01-138, issued March 4, 2002).

<sup>7</sup> *Id.*

<sup>8</sup> 20 C.F.R. § 10.437.

“(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.”

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

In this case, the Office determined that an overpayment in the amount of \$9,681.09 was created because proper health deductions were not made from appellant’s compensation from October 9, 1988 to November 1, 2001 and appellant was erroneously paid compensation at a three-quarter percent rate from November 2, 2001 to July 13, 2002. Although appellant was provided with the opportunity, she submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Absent evidence documenting appellant’s financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.<sup>9</sup> Further, appellant has not shown that she relinquished a valuable right or changed her position for the worse in reliance on the excess compensation she received while working. The Office properly determined that appellant was not entitled to a waiver of the overpayment.

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

Section 10.441<sup>10</sup> provides if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>11</sup>

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

Appellant did not submit any financial data as requested by the Office. However, despite appellant’s failure to submit financial data, consistent with section 10.441, the Office considered appellant’s financial circumstances noting that appellant received social security benefits, a survivor’s annuity from OPM for the death of her husband and continuing compensation under the Office’s wage-earning capacity determination issued in 2002.<sup>12</sup> The Office also considered appellant’s advanced age and poor health. The Board finds that the Office properly complied with section 10.441 and the recovery rate of the overpayment at \$95.00 a month is reasonable.

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<sup>9</sup> *Robert B. Hutchin*, 52 ECAB 344 (2001); *Marlon G. Massey*, 49 ECAB 650, 652-53 (1998).

<sup>10</sup> 20 C.F.R. § 10.441.

<sup>11</sup> If appellant has additional evidence to submit to establish that she is entitled to waiver or objects to the amount of \$95.00 with interest being withdrawn from her monthly compensation, she may submit evidence with a request for reconsideration to the Office; *see* 20 C.F.R. §§ 10.606, 10.607.

<sup>12</sup> The data in the record showed that the amount of appellant’s monthly compensation payments were approximately \$1,400.00, her monthly social security benefits were \$77.00 and her survivor’s annuity was approximately \$380.00 a month.

**CONCLUSION**

The Office properly found that an overpayment of \$9,681.09 was created. The Office properly found that appellant was not entitled to waiver of recovery of the overpayment and properly determined that \$95.00 a month should be withheld from appellant's continuing compensation until the overpayment is recovered.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member