

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

CHARLES E. NOE, Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, Stockton, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-172
Issued: June 4, 2004**

Appearances:
Charles E. Noe, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 22, 2003 appellant filed a timely appeal of the September 29, 2003 decision of the Office of Workers' Compensation Programs, which found that appellant received 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 on appeal are: (1) whether the Office properly determined that appellant received an overpayment of \$5,610.14 from October 12, 1998 to December 28, 2002; (2) whether the Office properly denied waiver of the overpayment; (3) whether the Office properly requested that appellant repay the entire amount in a lump-sum payment; and (4) whether the overpayment was discharged in appellant's bankruptcy proceeding.

FACTUAL HISTORY

On January 2, 1997 appellant, then a 52-year-old meat cutter, filed a claim alleging that on January 2, 1997 he injured his back when lifting a piece of beef. The Office accepted that appellant sustained a lumbar strain and displacement of lumbar intervertebral disc without myelopathy and authorized a lumbar fusion. He stopped work on January 2, 1997 and thereafter retired.

On November 4, 1999 an Office of Personnel Management (OPM) benefit specialist notified the Office that appellant was entitled to continue the Federal Employees' Group Life Insurance (FEGLI) postretirement. The specialist specifically noted that appellant's final base salary, on which FEGLI was based was \$36,877.29 and requested that the Office deduct for Code N, which included Basic, Option A Standard, Option B two times the salary and Option C for the family. The specialist further noted that the commencing date for the postretirement reduction was October 12, 1998 and that the basic and optional coverage premiums began on the commencing date.

In a letter dated November 27, 2002, the OPM benefits specialist notified the Office that premiums for life insurance were not being withheld as requested by appellant.

In a March 12, 2003 overpayment worksheet, the Office calculated that no deduction had been made for appellant's life insurance premiums including Basic, Option A Standard, Option B two times the salary and Option C for the family for the period October 12, 1998 to December 28, 2002, which amounted to an overpayment of \$5,610.14.

On August 19, 2003 the Office informed appellant that it had made a preliminary finding that he had been overpaid benefits in the amount of \$5,610.14. The Office noted that the overpayment occurred because the Office did not deduct basic and optional life insurance premiums from appellant's compensation benefits for the period of October 12, 1998 to December 28, 2002. The Office also determined that appellant was without fault in the matter of the overpayment. The Office notified appellant that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

In a letter dated August 25, 2003, appellant requested waiver of the \$5,610.14 overpayment and indicated that he notified the Office on several occasions that deductions for life insurance were not being withheld from his compensation and had been informed that the premiums were being deducted. Appellant further advised that recovery of the overpayment would be a severe hardship because his wife had sustained a stroke and was unable to work and they had filed bankruptcy in 2001. Appellant attached a copy of a discharge in bankruptcy form dated December 11, 2001 and copies of correspondence with a benefits specialist in the OPM.

By decision dated September 29, 2003, the Office found that appellant received a \$5,610.14 overpayment of compensation from October 12, 1998 to December 28, 2002, for which he was without fault in creating. In an accompanying memorandum, the Office noted appellant's argument in support of waiver and found that recovery of the overpayment would not

defeat the purpose of the Federal Employees' Compensation Act¹ nor would it be against equity and good conscience. Therefore, waiver of overpayment was not granted. The Office advised that the overpayment would be recovered by collecting a lump-sum payment from appellant.

LEGAL PRECEDENT -- ISSUE 1

Under the FEGLI program, most civilian employees of the federal government are eligible to participate in basic life insurance and one or more of the options.² The coverage for basic life is effective unless waived,³ and premiums for basic and optional life coverage are withheld from the employee's pay.⁴

The Act⁵ and its implementing regulation provide that an employee entitled to disability compensation benefits may continue his or her basic life insurance coverage without cost under certain conditions⁶ and may also retain the optional life insurance.⁷ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status.⁸ If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made while the compensation was an employee will be used to withhold premiums from his or her compensation payments.⁹ Thus, while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums.¹⁰

ANALYSIS -- ISSUE 1

The record indicates that deductions for basic and optional life insurance were not made from appellant's compensation for the period of October 12, 1998 to December 28, 2002. Consequently, appellant received an overpayment of this amount.

¹ 5 U.S.C. §§ 8101-8193.

² See *Scherrie L. Stanley*, 53 ECAB ____ (Docket No. 01-495, issued March 8, 2002); *Howard R. Nahikian*, 53 ECAB ____ (Docket No. 01-138, issued March 4, 2002); Part 870 -- Basic Life Insurance, subpart B -- Coverage; see 5 C.F.R. § 870.201.

³ 5 U.S.C. § 870.204(a).

⁴ 5 C.F.R. § 870.401(a).

⁵ *Supra* note 1.

⁶ 5 C.F.R. § 870.701, subpart G.

⁷ 5 C.F.R. §§ 871.201, subpart B; 872.201, subpart B; 873.203, subpart B.

⁸ 5 C.F.R. § 870.501.

⁹ 5 C.F.R. § 872.410, subpart D.

¹⁰ *Glen B. Cox*, 42 ECAB 703 (1991).

When an underholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation to appellant because the Office must pay the full premium to OPM upon discovery of the error.¹¹ In this case, the Office properly determined that, for the period of October 12, 1998 to December 28, 2002, appellant received an overpayment of \$5,610.14. Appellant does not dispute that he received the overpayment in question nor does he dispute the amount of the overpayment. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined the amount of the overpayment that covered the period of October 12, 1998 to December 28, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

“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 this subchapter or would be against equity and good conscience.”¹² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹³

Sections 10.441(a) of Title 20 of the Federal Code of Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides “[a]djustment or recovery by the United States may not be made when incorrect payment had 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.”¹⁴

The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations. Section 10.436(a) provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses¹⁵ and if the individual’s nonexempted assets do not exceed a resource base

¹¹ 5 C.F.R. § 872.401(h); *Calvin W. Scott*, 39 ECAB 1031 (1988).

¹² 5 U.S.C. § 8129(b).

¹³ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁴ *Supra* note 12.

¹⁵ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.

determined by the Office with advice from the Department of Labor's Bureau of Labor and Statistics.¹⁶ An overpaid individual must meet both of these criteria in order to establish financial hardship. Section 10.436 also provides that recovery of an overpayment is considered to be against equity and good conscience if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.¹⁷

Section 10.438 of the regulation¹⁸ provides that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office] ... failure to furnish the information within 30 days of the request shall result in denial of waiver...."

ANALYSIS -- ISSUE 2

In this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire, Form OWCP-20, issued on August 19, 2003 if he wanted to request waiver. In his August 25, 2003 letter to the Office, appellant delineated why recovery of the overpayment would be against equity and good conscience; however, he failed to submit a completed Form OWCP-20 or otherwise submit financial information supporting his assertions. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.¹⁹

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulation provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. Appellant asserts that he notified the Office on several occasions after reviewing his compensation benefits statement that deductions for life insurance were not being withheld from his compensation and he further advised that recovery of the overpayment would be a severe hardship because his wife suffered a stroke and could not work and they filed bankruptcy in 2001. However, appellant did not submit any financial information to show that he would experience severe financial hardship; that he relinquished a valuable right; or showed that his position changed for the worse. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse.

The record indicates that appellant elected basic and optional life insurance code N, which encompassed Basic life insurance, Option A Standard life insurance, Option B life

¹⁶ 20 C.F.R. § 10.436(a).

¹⁷ *Id.* at § 10.437(b).

¹⁸ 20 C.F.R. § 10.438.

¹⁹ *See id.* (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

insurance of two times the salary and Option C life insurance for the family. The evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. As stated previously, appellant failed to submit the financial information required by section 10.438 of the Act²⁰ which was necessary to determine whether appellant detrimentally relied on the overpayments. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office properly denied waiver of recovery of the overpayment. Thus, appellant does not qualify for waiver by reason of financial hardship. Further, appellant did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience because, or that in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse.

LEGAL PRECEDENT -- ISSUE 3

The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.²¹ Section 10.441(a) of the regulation²² provides:

“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. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the [Act] with respect to the individual’s death.”²³

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. When as in this case an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²⁴ The Board finds that the Office did not abuse its discretion in following those guidelines in this case and deducting the entire overpayment at one time.

²⁰ 20 C.F.R. § 10.438.

²¹ *Lorenzo Rodriguez* 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²² 20 C.F.R. § 10.441(a).

²³ *Id.*

²⁴ *Gail M. Roe*, 47 ECAB 268 (1995); *Robin D. Calhoun*, Docket No. 00-1756 (issued May 21, 2001).

LEGAL PRECEDENT -- ISSUE 4

The Office procedure manual²⁵ provides in pertinent part:

“A claimant’s obligation to repay an overpayment is nullified if the bankruptcy court has discharged the debt in a bankruptcy proceeding. 11 USC 521(1) requires that a debtor list all creditors and amounts due when petitioning for bankruptcy. The court will send a ‘Proof of Claim’ to each creditor which must be completed immediately and returned (whether or not due process has been completed). The district office should consult the Regional Solicitor for assistance in filing the Proof of Claim and transmitting it to the U.S. Attorney, if appropriate.

“A debt is not discharged if the claimant knowingly failed to list it in petitioning the court, if the overpayment was not discovered until after discharge, or if the claimant committed fraud to obtain the payment originally. Debts resulting from fraud should be referred to the Regional Solicitor for guidance, with the request that the Solicitor file a timely objection to the discharge. The Solicitor’s advice should be requested on any other case which may represent an exception.”²⁶

ANALYSIS -- ISSUE 4

As noted above, the Office’s procedure manual provides that, if an overpayment was not discovered until after discharge, the overpayment remains an unpaid obligation.²⁷

In the instant case, evidence submitted by the claimant indicates that his bankruptcy was discharged on December 11, 2001. The overpayment was not discovered until September 29, 2003. Therefore, the \$5,610.14 overpayment was not discharged by the bankruptcy proceeding of December 11, 2001²⁸ and, therefore, this overpayment is to be considered separate, distinct and outstanding.

CONCLUSION

The Board finds that appellant received an overpayment of \$5,610.14 in compensation from October 12, 1998 to December 28, 2002. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment. The Board further finds that the

²⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4e(3) (September 1994). This is consistent with 11 U.S.C. § 523, “Exceptions to Discharge,” which does not list a debt such as appellant’s as one that is excepted from being discharged in bankruptcy; *William E. McCarty*, 54 ECAB ___ (Docket No. 03-308, issued April 14, 2003).

²⁶ *Id.*

²⁷ *Supra* note 25.

²⁸ *See William E. McCarty*, *supra* note 25.

Office properly determined to recover the overpayment in a lump sum.²⁹ Finally, the Board finds that the overpayment of compensation was not discharged in appellant's bankruptcy proceeding of December 2001.

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

²⁹ With his appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).