

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

HARVEY J. DOCTOR, Appellant)	
)	
and)	Docket No. 05-549
)	Issued: August 3, 2005
DEPARTMENT OF THE NAVY,)	
CHARLESTON NAVAL SHIPYARD,)	
Charleston, SC, Employer)	

Appearances:
Harvey J. Doctor, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 29, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 18, 2004, finding an overpayment of compensation and denying waiver of recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$242.92, because health benefit premiums were deducted using an incorrect code for the period June 1 to July 10, 2001; (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 \$35.00 from appellant's continuing compensation each four weeks.

FACTUAL HISTORY

On March 13, 1992 appellant, then a 37-year-old rigger, filed a claim for an injury to his back in the performance of duty. The Office accepted the claim for back strain and spondylolisthesis.¹

The Office paid appellant compensation for temporary total disability and subtracted a premium for health benefits under code 452. On December 10, 2002 he changed his health benefits coverage from code 452 for a family plan to code 451 for single coverage. Effective June 1, 2004 appellant changed his health benefits coverage back to the family plan under code 452. The Office adjusted his periodic rolls payments to reflect his change in health benefits coverage effective July 11, 2004.

By letter dated July 28, 2004, the Office advised appellant of its preliminary determination and that overpayment of \$242.92, occurred in his case because his health benefits premiums for the period June 1 to July 10, 2004 were deducted using an incorrect health benefits code. The Office advised him that he was not at fault in the creation of the overpayment and provided him 30 days to submit additional information. The Office requested that appellant complete an enclosed overpayment recovery questionnaire and submit financial documents to support the income and expenses listed in the questionnaire. A worksheet completed by the Office shows that it deducted \$273.11, for health benefits premiums for the period June 1 through July 10, 2004, under code 451 instead of the \$516.03, it should have deducted under code 452 for that period. The Office subtracted \$273.11 from \$516.03 to find a total overpayment of \$242.92.

Appellant did not submit any additional information.

By decision dated October 18, 2004, the Office finalized its determination that an overpayment occurred in the amount of \$242.92 and further found that appellant was not entitled to waiver of recovery of the overpayment. The Office advised him it would recover the overpayment by deducting \$35.00 from his continuing compensation every four weeks.

LEGAL PRECEDENT

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits program. The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits Program,

¹ By decision dated November 7, 1996, the Office reduced appellant's compensation based on his capacity to earn wages as a hotel clerk trainee. In a decision dated December 16, 2002, the Office denied his request for reconsideration on the grounds that it was untimely filed and did not show clear evidence of error. Appellant appealed to the Board on April 21, 2003. The Board determined that the case record was incomplete and remanded the case for reconstruction of the case record by the Office and the issuance of an appropriate decision. Order Remanding Case, Docket No. 03-1094 (issued November 25, 2003). On January 6, 2004 the Office reissued its December 22, 2002 decision with appeal rights. Appellant has not appealed this decision and, thus, it is not before the Board at this time.

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 to the United States in the amount of the proper employee withholding required for that pay period.”²

In addition, 5 C.F.R. § 890.502(c)(1) provides:

“An agency that withholds less than or none of the proper health benefits contributions for 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 deposit in the Employees Health Benefits Fund.”³

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁴ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁵ The Board has recognized that, when an under withholding 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.⁶

ANALYSIS -- ISSUE 1

The record establishes that, from June 1 to July 10, 2004, the Office deducted health benefits premiums of \$273.11 for single coverage under code 451. The Office should have deducted premiums of \$516.03 during this period using code 452 for family coverage. The Office’s failure to deduct the premiums for health insurance under the family plan coverage from June 1 to July 10, 2004 resulted in an overpayment of \$242.92 or \$273.11, subtracted from \$516.03. The Board has recognized that, when an under withholding 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.⁷ The Board finds that the amount of the overpayment due to the underdeduction of health benefits premiums in this case is \$242.92.

² 5 C.F.R. § 890.502(b)(1).

³ *Id.* at § 890.502(d).

⁴ *Id.* at § 890.502(b)(1).

⁵ *Id.* at § 890.502(d).

⁶ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁷ *Id.*

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.⁸ 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 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.”⁹

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.

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436, provides:

“(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. A higher amount is specified for a beneficiary with one or more dependents.”¹⁰

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.

⁸ *Frederick Arters*, 53 ECAB 397 (2002).

⁹ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁰ 20 C.F.R. § 10.436.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."¹¹

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.¹² The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹³

Section 10.438 provides 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 recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

As appellant was without fault in creating the overpayment, the Office proceeded to determine whether he was entitled to waiver of the overpayment. In this case, he has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The Office advised appellant in its July 28, 2004 letter, that in order to support a request for waiver of the overpayment he needed to submit a completed overpayment recovery questionnaire and provide supporting documents such as copies of income tax returns, bank account statements, bills, canceled checks and any other records to support the income and expenses listed in the questionnaire. However, he failed to provide a completed overpayment recovery questionnaire

¹¹ 20 C.F.R. § 10.437.

¹² *Linda Hilton*, 52 ECAB 476 (2001).

¹³ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹⁴ 20 C.F.R. § 10.438(a).

¹⁵ 20 C.F.R. § 10.438(b).

and supporting documentation of his income and expenses as requested by the Office. Section 10.438 provides that it is appellant's responsibility to submit information supporting waiver of an overpayment.¹⁶ The Office clearly advised him of his responsibility to submit such information. As a result, the Office did not have the necessary financial information to determine whether waiver of recovery of the overpayment would defeat the purpose of the Act. The Office, therefore, properly found that appellant does not qualify for waiver under the "defeat the purpose of the Act" standard.¹⁷

Further, appellant has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse in reliance of the erroneous amount of compensation benefits received in this case. 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.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) provides in pertinent part:

"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."¹⁸

Section 10.438 of the regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].¹⁹ As the regulation indicates, this information is necessary to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.²⁰ Appellant's financial information is also used to determine any necessary repayment schedule.²¹

ANALYSIS -- ISSUE 3

On July 28, 2004 the Office requested that appellant submit an overpayment recovery questionnaire and supporting financial documents. He did not respond to the Office's

¹⁶ 20 C.F.R. § 10.438.

¹⁷ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

¹⁸ 20 C.F.R. § 10.441.

¹⁹ 20 C.F.R. § 10.438.

²⁰ *Id.*

²¹ *Id.*

preliminary overpayment determination. Consequently, the Office did not have any information about appellant's personal finances in determining the method of repayment. If a claimant is being paid compensation and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.²² Based on the circumstances of this case, including appellant's failure to provide the required financial information, the Board finds that the Office did not abuse its discretion in requiring repayment of the \$242.92 overpayment by deducting \$35.00 from his continuing compensation checks.

On appeal, appellant acknowledged that his premiums should have increased in June 2004 because he changed to a family plan coverage. Subsequently, however, he contended that he switched to a less expensive health insurance plan but that his compensation checks did not correspondingly increase. Appellant additionally questioned whether the Office cashed a personal check he sent for \$35.00 and requested information on his current balance. The only issues before the Board, however, are whether he received an overpayment of compensation of \$242.92, from June 1, to July 10, 2004, whether he is entitled to waiver and recovery of the overpayment. Appellant should address his concerns to the Office.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$242.92, because health benefit premiums were deducted based on an incorrect code for the period June 1 to July 10, 2001. The Board further finds that the Office properly denied waiver of the overpayment and properly determined that the overpayment should be recovered by deducting \$35.00 from his continuing compensation each four weeks.

²² See *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2004 is affirmed.

Issued: August 3, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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